AMERICAN COLLEGE OF BANKRUPTCY
2022 INDUCTION EDUCATION SESSIONS

Third-Party Releases: Are We in For a Backlash?

Saturday April 2, 2022

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THIRD-PARTY RELEASES

uncontroversial releases and implementing injunctions:

- release of claims belonging to the estate
  - including claims that individual creditors or shareholders can assert outside bankruptcy
    - e.g., fraudulent transfer claims
    - corporate derivate suits

    See, e.g., Protective Comm. v. Anderson, 390 U.S. 414 (1968);

    Code § 1123(b)(3)(A)

- other *in rem* releases and injunctions
  - insurance injunctions

    See, e.g., In re Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988)
  - successor liability injunctions
  - partnership debtor releases/injunctions for individual partners

uncontroversial releases and implementing injunctions:

- indemnification/contribution bar order for settling defendant

  See, e.g., In re Munford, Inc., 97 F.3d 449 (11th Cir. 1996)

direct claims by creditors or shareholders against non-debtor third party

- e.g., officers, directors, or other principals
- affiliates, insurers, other creditors
- guarantors

- for direct personal liability
  - e.g., fraud, conspiracy, aiding & abetting, joint tortfeasor
- cause of action does not belong to estate
  - so estate rep/s have no standing/authority to prosecute such third-party claims

    See Caplin v. Marine Midland Grace Tr. Co., 406 U.S. 416 (1972)

direct claims by creditors or shareholders against non-debtor third party

- (relatively) uncontroversial releases and injunctions:
  - temporary stay

    See, e.g., *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995); *Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648 (1935)
  - consensual release

    See, e.g., *In re Specialty Equip. Cos.*, 3 F.3d 1043 (7th Cir. 1993)

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual release
  - and permanent “channeling” injunction
- expressly permitted for certain third-party claims in asbestos bankruptcies in 1994 *Manville* legislation
  - *See* Code § 524(g)(4)(A)(ii)-(iii)
  - creates no inferences of permissibility/not in other cases under (uncodified) statutory rule of construction

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual releases
- prominent feature of several recent high-profile cases:
  - *USA Gymnastics*
  - *Boy Scouts*
  - *Purdue Pharma*

    See In re Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y.), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021)

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual release
- Circuit split
  - prohibited by Code § 524(e):
    - Fifth Circuit

      See In re Zale Corp., 62 F.2d 746 (5th Cir. 1995)
    - Ninth Circuit

      See In re Lowenschuss, 67 F.2d 1394 (9th Cir. 1995)
    - Tenth Circuit

      See In re W. Real Estate Fund, 922 F.2d 592 (10th Cir. 1990)

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual release
- Circuit split
  - prohibited by Code § 524(e):

“discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt”

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual release
- Circuit split
  - prohibited by Code § 524(e)
  - exculpation provisions may be treated differently

    See, e.g., *Blixseth v. Credit Suisse*, 961 F.3d 1074 (9th Cir. 2020); *In re Pac. Lumber Co.*, 584 F.3d 229 (5th Cir. 2009); *In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000)

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual release Circuit split
- nonconsensual releases are permissible
  - Fourth Circuit

    See In re A.H. Robins Co., 880 F.2d 694 (4th Cir. 1989)
  - Sixth Circuit

    See In re Dow Corning Corp., 280 F.3d 648 (6th Cir. 2002)
  - Seventh Circuit

    See In re Ingersoll, Inc., 562 F.3d 856 (7th Cir. 2008)
  - Eleventh Circuit

    See In re Seaside Eng'g & Surveying, Inc., 780 F.3d 1070 (11th Cir. 2015)

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual release
- Circuit split
  - not prohibited by Code § 524(e)
  - permitted by Code § 105(a):

"The court may issue any order, process, or judgment that is necessary or appropriate to carry out provisions of this title."

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual release
- Circuit split
  - not prohibited by Code § 524(e)
  - permitted by Code § 1123(a)(5):

“a plan shall . . . provide adequate means for the plan’s implementation”

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual release
- Circuit split
  - not prohibited by Code § 524(e)
  - permitted by Code § 1123(b)(6):

“a plan may . . . include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]”

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual release
- Circuit split
  - Second and Third Circuits have equivocated

    See In re Continental Airlines, Inc., 203 F.3d 203 (3d Cir. 2000); *In re Metromedia Fiber Network, Inc.*, 960 F.3d 136 (2d Cir. 2005)

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual release
- recent legislation introduced to prohibit
    - Nondebtor Release Prohibition Act of 2021

      S. 2497, 117th Cong. (2021); H.R. 4777, 117th Cong. (2021)

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual releases are permissible
- *Master Mortgage/Dow Corning* factors:

  See In re Master Mortgage Inv. Fund, Inc., 168 B.R. 930, 934-35 (Bankr. W.D. Mo. 1994); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002)

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual releases are permissible
- *Master Mortgage/Dow Corning* factors:

(1) There is an identity of interest between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate.

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual releases are permissible
- *Master Mortgage/Dow Corning* factors:

(2) The non-debtor has contributed substantial assets to the reorganization.

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual releases are permissible
- *Master Mortgage/Dow Corning* factors:

(3) The injunction is essential to reorganization. Without it, there is little likelihood of success.

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual releases are permissible
- *Master Mortgage/Dow Corning* factors:

> (4) A substantial majority of the creditors agree to such injunction, specifically, the impacted class, or classes, has "overwhelmingly" voted to accept the proposed plan treatment.

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual releases are permissible
- *Master Mortgage/Dow Corning* factors:

(5) The plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction.

direct claims by creditors or shareholders against non-debtor third party

- nonconsensual release
- must be "related to" bankruptcy jurisdiction over released/enjoined claims
- Does a non-Article III bankruptcy judge have "core" jurisdiction to enter a final order approving a nonconsensual release?
  - YES: *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (3d Cir. 2019)
  - NO: *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021); *Patterson v. Mahwah Bergen Retail Grp., Inc.*, 2022 WL 135398 (E.D. Va. Jan. 13, 2022)

direct claims by creditors or shareholders against non-debtor third party

- consensual release
- What constitutes sufficient consent?
  - vote in favor of plan?

    Compare, e.g., In re Coram Healthcare Corp., 315 B.R. 321 (Bankr. D. Del. 2004) (yes), *with In re Arrowmill Dev. Corp.*, 211 B.R. 497 (Bankr. D.N.J. 1997) (no)
  - use of "death trap" to induce "consent" to release by vote in favor of plan

    See In re Weinstein Co. Holdings LLC, No. 1:18-bk-10601 (D.Del.)

direct claims by creditors or shareholders against non-debtor third party

- consensual release
- What constitutes sufficient consent?
  - failure to opt out of release?

    Compare, e.g., In re Indianapolis Downs, LLC, 486 B.R. 286 (Bankr. D. Del. 2013) (yes), *with Patterson v. Mahwah Bergen Retail Gp, Inc.*, 2022 WL 135398 (E.D. Va. Jan. 13, 2022) (no)
  - What constitutes failure to opt out of release?
    - not signing/checking separate opt-out election

      See, e.g., In re Washington Mutual, Inc., 442 B.R. 314 (Bankr. D. Del. 2011); *In re DBSD N. Am., Inc.*, 419 B.R. 179 (Bankr. S.D.N.Y. 2009); *In re Conseco, Inc.*, 301 B.R. 525 (Bankr. N.D. Ill. 2003)
    - not voting on plan

      See, e.g., In re Emerald Oil, Inc., No. 16-10704 (Bankr. D. Del.)
    - not objecting to plan

      See, e.g., In re Hertz Corp., No. 20-11218 (Bankr. D. Del.)

Feature

By Thomas J. Salerno and Clarissa C. Brady

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In Defense Of Third Party Releases In Chapter 11 Cases (PART ONE): Let's Define The Battlefield![1]

"Nicht das Kind mit dem Bade ausschütten!"

Thomas Murner
NARRENBESCHÖRUNG (1512)[2]

The negotiation and confirmation of financial restructuring deals, even in cases of modest size, are very much like sausage making. With apologies to our vegetarian colleagues, most people can agree they want a good bratwurst, but watching one being made is neither pretty nor recommended. Chapter 11 is judicially supervised negotiation at its core. Financial restructurings involve the creation of sometimes tenuous alliances, then trying to keep them together while

[1] This article is a compilation of a three-part series of articles by the authors which were published as: (a) "In Defense Of Third Party Releases In Chapter 11 Cases (PART ONE): Let's Define The Battlefield!", *ABI Journal* at 32 (March 2022); (b) "In Defense Of Third Party Releases In Chapter 11 Cases (PART II): Show Me The Money, And What's Wrong With the "God Clause"?", *ABI Journal* at XX (XXX 2022); and (c) "XXX", *ABI Journal* at XX (XXX 2022). Footnotes have been renumbered to be sequential for purposes of the consolidation of the three articles.

[2] "Don't throw the baby out with the bathwater!" *Appeal To Fools* (1512).

recalcitrant constituencies snipe for tactical purposes as the case slogs its way through the arduous process that is chapter 11. Not surprisingly, the odds are not with the troubled business trying to navigate the rocky shores of chapter 11.[3] The path from the filing (oftentimes under emergency circumstances) to the closing dinner and exchange of the Lucite deal cubes belie the sometimes tense and contentious events leading up to the confirmation of a plan that memorializes the numerous deals made to get there. That is, at least in the authors' humble opinions, what also makes chapter 11 so exciting. In the immortal words of John "Hannibal" Smith, "I love it when a plan comes together!"[4]

Which brings us to the topic of this article. Reminiscent of a scene from a Mary Shelley novel, villagers wielding torches and pitchforks lay siege to the castle of a miscreant and call for the death of "the monster.” The metaphorical death sought in this case is the definitive end (once and for all) of the use of third party releases in restructuring cases. The "monster" in this analogy is played by the Sackler family, controlling interest holders in *Purdue Pharma,* who undeniably made billions in profits from the opioid scourge.[5] Purdue sought chapter 11 protection based on primarily over 3000 personal injury/product liability lawsuits filed against it and its various subsidiaries and affiliates. To avoid this "veritable tsunami of litigation”[6] Purdue sought to trade a release of civil liability against the Sackler family for a payment by the Sacklers (and their various entities) of about $4.3 billion into a trust fund to pay victims of the opioid scourge that ravaged the U.S.[7] starting in the early 1990s, as part of its proposed chapter 11 plan of reorganization.

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[3] The "success rate," always a somewhat murky concept when applied to a process as diverse as chapter 11 given the myriad of potential outcomes being sought, is somewhere between 10-33%, depending on whose statistical analysis you use. *Cf*. "Chapter 11 Bankruptcy,” Financial Management (September 7, 2020), available at: https://efinancemanagement.com/financial-leverage/chapter-11-bankruptcy (estimating an "abysmally low" success rate of "around 10% or so"), *with* Warren & Westbrook, "The Success Of Chapter 11: A Challenge To The Critics," 107 MICH. L.REV. 603 (2009) (using statistical analysis gauging success in chapter 11 cases of between 17-33%). Part of the difficulty is caused by one's definition of "success" in chapter 11. A sale of all assets within the first thirty days of the case, even with very little return to general unsecured creditors, with a plan confirmed distributing proceeds might be a "successful" chapter 11 in one sense, even if not economically.

[4] George Peppard as J. "Hannibal" Smith in *The A Team* (1983-87). Of course, that same show gave us "I pity the fool!" which might be applied to those about to embark on the financial restructuring process. But we digress.

[5] *In re Purdue Pharma, LP* and subsidiaries and affiliates, Case No. 7:19-bk-23649 (US Bankruptcy court, SD NY) ("**Purdue Pharma**") and *In re Purdue Pharma, L.P.,* 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021) ("**SDNY Opinion**"). Purdue Pharma sought chapter 11 protection based on primarily over 3000 personal injury/product liability lawsuits filed against it and its various subsidiaries and affiliates (characterized by the SDNY Opinion as "a veritable tsunami of litigation.").

[6] SDNY Opinion at 2.

[7] The opioid scourge has been called a "uniquely American problem" because the abundance of private health insurance in the U.S. favors prescribing drugs for pain management over alternative, more expensive therapies. *See* Shipton EA, Shipton EE, Shipton AJ, "A Review of the Opioid Epidemic: What Do We Do About It?" *Pain and Therapy* at 7 (1): 23–36 (June 2018), available at: https://link.springer.com/article/10.1007/s40122-018-0096-7. Pills are less expensive and a quick fix for what ails you . . . until the "cure" creates other problems, of course.

The bankruptcy court confirmed the plan with its proposed release over the objection of nine attorneys general [8] (the "**Objecting States**") and about 2,700 individual plaintiffs in personal injury lawsuits against *Purdue Pharma*, which confirmation order was reversed by Judge Colleen McMahon of the Southern District of New York on December 16, 2021.[9] The district court granted the motion seeking leave to appeal to the Second Circuit (over the Objecting States' objection).[10] Meanwhile, Bankruptcy Judge Drain extended the temporary litigation stay for the Sacklers until February 1, 2022, and then again through March 23, 2022.[11] and ordered the case to mediation. Upon the request of Purdue, the Second Circuit granted leave to file the appeal and also put the appeal on a very fast track with oral arguments scheduled for April 25, 2022.[12] As a result of a mediator-brokered settlement, and regardless of how the Second Circuit disposes of this pending appeal[13], it is a possibility that there is still a review by the Supreme Court.

The SDNY Opinion, with its unequivocal rationale that there is no subject matter jurisdictional authority under any circumstances for non-debtor releases in bankruptcy cases, has

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[8] Attorneys general for California, Connecticut, District of Columbia, Delaware, Maryland, New Hampshire, Oregon, Rhode Island and Washington objected to plan confirmation, and ultimately appealed the confirmation order. The US Trustee also objected and joined in the appeal.

[9] *See* SDNY Opinion; Paul R. Hage, "'The Great Unsettled Question': Nonconsensual Third-Party Releases Deemed Impermissible in *Purdue*," XLI *ABI Journal* 2, 12-13, 43-45, February 2022, *available at* abi.org/abi-journal (a thorough overview of the SDNY Opinion).

[10] *See Order Conditionally Granting Debtors' And Allied Parties' Motion For A Certificate Of Appealability* dated January 7, 2022 (Docket 117) ("**Appeal Certification Order**"). The "condition" is that the appealing parties seek expedited consideration of the appeal (which seems superfluous as an expeditious resolution of this issue seems to certainly be in the debtors' best interest in these cases). California, Maryland and the District of Columbia filed oppositions to the request for leave to file the interlocutory appeal. *See* "States Oppose Purdue's 2nd Circuit Appeal Try In Ch. 11 Case," *Law360* (January 7, 2022).

[11] Bankruptcy Judge Drain extended the injunction protections for the Sacklers through February 1, and then again through February 17, 2022 to allow the parties to continue negotiations notwithstanding the pendency of an appeal to see if a deal can be reached. *See* Chutchian, "Purdue Bankruptcy Judge Extends Temporary Litigation Shield For Sacklers," *Reuters* (December 28, 2021); "Purdue Pharma Judge Extends Sacklers' U.S. Litigation Shield To Feb 17", *Reuters* (February 1, 2022). *See also* note 3, *infra*.

[12] *See* "Purdue's Appeal On Ch. 11 Releases Fast-Tracked By 2nd Circ.", *Law360* (January 28, 2022). Indeed, this has been put on the "rocket docket", with opening briefs due February 11, 2022, and responsive briefs due March 11, 2022.

[13] On March 10, 2022, the bankruptcy court approved a mediator-brokered settlement which resulted in at least another $1 billion being contributed by the Sacklers with the possibility of another half billion from future sales of Sackler related assets (bringing the total to about $6 billion). *See* Sullivan, "Purdue Gets Approval For New $5.5 Billion Ch. 11 Sackler Deal", Law360 (March 10, 2022). The Objecting States have agreed not to file their opposition briefs in the pending Second Circuit appeal, leaving essentially only the Purdue Pharma briefs before the Second Circuit. *See* notes 31 and 33, *infra.*

been characterized as a "seismic shift" in the development of the law.[14] To put this into context, the plan (with the releases for the Sackler families) had the support of approximately 120,000 opioid-related claim creditors (representing approximately 95% of that group) as well as 97% of nearly 4800 local and state governments (including tribal authorities) in addition to forty state attorneys general.[15] The plan, however controversial, was undeniably a highly negotiated resolution of very thorny mass tort issues which garnered overwhelming support among creditor constituencies. In most other chapter 11 cases, the accepting votes would have been a crowning success story.

But of course, *Purdue Pharma* is not a typical chapter 11 case. The opioid scourge has rightfully been declared a "public health emergency" in the United States.[16] It is estimated that in the U.S. between 1990 and 2020, there were over 841,000 deaths by drug overdose, with prescription and illicit opioids accounting for over 500,000 of those through 2019.[17] In just the twelve month period ending April 2021, this was an average of 275 drug overdose deaths a day.[18] Beyond the tragic deaths, there are the ripple effects on society resulting from addiction such as torn families, increased crime and strains on social and medical services that follow in the wake of opioid addiction.

The "pushers" behind the opioid crisis are not unkempt characters dealing heroin in dimly lit back alleys. Far from it! The current opioid scourge in the U.S. was facilitated in high rise board rooms by professionals in designer clothes with dazzling PowerPoint presentations on how to "turbocharge" the sales of brand name opioids[19] with a distribution network of highly paid consultants,[20] pharmaceutical company sales reps and doctor's offices throughout the country

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[14] *See* Vince Sullivan, "Seismic Purdue Ruling May Finally Get High Court's Attention," *Law360* (December 17, 2021).

[15] *See* Paul Scott, "Purdue Pharma Settlement Plan Approved By 95% Of Creditors, But CT Still Opposed," *Stamford Advocate* (July 27, 2021), available at: https://www.stamfordadvocate.com/business/article/Purdue-Pharma-settlement-plan-approved-by-95-of-16343595.php. In addition to the foregoing, creditor support from non-opioid related claimants in other classes ranged from 88% to 100% depending on the class.

[16] *See 2016 National Survey on Drug Use and Health*, available at: https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2016/NSDUH-DetTabs-2016.pdf.

[17] *See* CDC, "Understanding the Epidemic" (March 19, 2020), available at: https://www.cdc.gov/opioids/basics/epidemic.html.

[18] Refer to the "Data Table for Figure 1a. 12 Month-ending Provisional Counts of Drug Overdose Deaths." CDC, "Vital Statistics Rapid Release Provisional Drug Overdose Death Counts" (last reviewed December 15, 2021), available at: https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm.

[19] Familiar names such as OxyContin, Percocet, Vicodin and Norco, all drugs related to opioids.

[20] Such as, for example, consulting powerhouse McKinsey & Company. *See* "McKinsey Settles For Nearly $600 Million Over Role in Opioid Crisis," *New York Times* (February 3, 2021) (McKinsey settled with attorneys general in 47 states for its role in "turbocharging" opioid sales in those states).

as some of the most prevalent and addictive of the opioids were (and are) medications prescribed by doctors for pain management. Simply put, doctors had a "pill for what ails you." Purdue Pharma's actions were not "allegedly" improper—there were numerous criminal and civil settlements related to its conduct in continuing to aggressively market these drugs even in the face of internal evidence that highlighted the powerfully addictive nature of these pharmaceuticals.[21]

Which brings us back to the *Purdue Pharma* plan and proposed Sackler family release. With the frenzy surrounding the ultimate legality of third party releases in the form of the Sackler family, they have become the unlikely poster children for an important and (used appropriately) essential tool in the restructuring toolbox. The Sacklers are undeniably unsympathetic characters, with evidence showing that between 2008 and 2017 (when it was apparent there would be liability from damages resulting from the manufacture and sale of its opioid products), *Purdue Pharma* managed to "upstream" north of $10.4 billion of wealth (for the benefit of other Sackler controlled entities, including offshore entities), much of it from the enormous profits from Purdue Pharma and its premier product OxyContin.[22] This differentiates *Purdue Pharma* from other product liability type cases (such as *Johns-Manville*, *.A.H Robins* and *Dow Corning*, for example) that put out products that turned out to be very harmful, but the extent of the harm may not have been known at the time the product was put into the marketplace. This puts *Purdue Pharma* in its own hybrid category. It is conceptually both a product liability case and an abuse case (like the Catholic dioceses, *USA Gymnastics* and *Boy Scouts of America* cases) rolled into one. Bad folks intentionally pushing a bad product to make money. The beneficiaries of the releases are not only insurance companies but also individuals who profited handsomely from the misdeeds. Not a good category to be in without a doubt. That notwithstanding, there is a real risk that the proverbial baby (in the form of useful third party releases) is tossed aside with the bathwater in the battle for the unequivocal rejection of third party releases in chapter 11 cases.

While in no way coming to the defense of the Sackler family for what they perpetrated upon the country (all while reaping enormous profits from the resulting carnage), we undertake a spirited defense of the legality and propriety of the use of third party releases in chapter 11 restructurings. Finally, the authors propose some straightforward legislative fixes to this issue based on amendments to existing Bankruptcy and Judicial Code provisions. Although the consensus is that the *Perdue Pharma* case presents egregious facts, including the fact that the Sacklers are responsible for creating the opioid epidemic, the “bad facts” do not justify the creation of bad law.

Let the games begin!

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[21] *See* SDNY Opinion at p. 2 regarding pre-bankruptcy criminal plea agreements on various federal criminal charges.

[22] *See* SDNY Opinion at 4; *see also* "Moral Bankruptcy Doesn't Count In Sackler Family Protection Deal," *St. Louis Post-Dispatch* (December 22, 2021).

DEFINING THE BATTLEFIELD

"Precision of communication is important, more important than ever, in our area of hair trigger balances, when a false or misunderstood word may create as much disaster as a sudden thoughtless act."

James Thurber
Lanterns and Lances (1961)

To avoid confusing different concepts because of imprecise language, it is important to define terms and concepts as they are often conflated in the heat of the debate. There should be at least four (4) things that all parties should be able to agree on:

(a) A "***discharge***" in the sense of 11 U.S.C. §§ 524 and 1141(d) only applies to a debtor in bankruptcy. The Bankruptcy Code is clear in this respect.

(b) The concept of ***non-debtor releases and exculpations***, backed by plan injunctions, for actions related to the bankruptcy proceeding are acceptable in most courts (call these "**Post-Bankruptcy Conduct Releases**"). These usually cover officers, directors, estate counsels, Committee members and other professionals in the case, and always exclude from the scope of such a release fraud and other bad acts. [23] The rationale for allowance of Post-Bankruptcy Conduct Releases is straightforward—barring fraud by the participants in the proceeding, any material actions taken in relation to the proceeding itself (such as negotiations, asset sales, and all the other myriad activities that make up a bankruptcy proceeding) are done after notice and court approval. Hence, to allow parties to sue outside of the bankruptcy process, for example, the directors of a now-reorganized debtor for negotiating, proposing and obtaining confirmation of a plan would subject parties to all sorts of collateral attacks on actions the bankruptcy court already approved (again, excepting out fraud by the participants). If a recalcitrant party has an issue with a course of action in a bankruptcy proceeding, they must avail themselves of the bankruptcy process (objections, appeals from orders and the like). It is a necessary "speak now or forever hold your peace" rationale. To permit otherwise would create chaos in the lack of finality.

(c) In ***asbestos related mass tort liability circumstances***, injunctions protecting non-debtors (usually insurance companies, but applies to others as well) are permitted assuming the legal requirements of 11 U.S.C. § 524(g)(2)(B) are met. Congress added 11 U.S.C. § 524(g) to the Code as part of the Bankruptcy Amendments Act of 1994 (S.540) to provide explicit statutory authority for a bankruptcy court to order the channeling of asbestos related claims against a debtor's insurers (or indeed, any other third party liable with a debtor), and an injunction

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[23] *See, e.g. Blixseth v. Credit Suisse*, 961 F.3d 1074 (9th Cir. 2020). *But see Memorandum Decision, Patterson v. Mahwah Bergen Retail Group, Inc.,* Case No. 3:21cv167 (DJN), United States District Court, Eastern District of Virginia (January 13, 2022) (finding even Post-Bankruptcy Conduct Releases impermissible.).

protecting those third parties from claims if the mechanism was part of a confirmed chapter 11 plan. This enabled debtors facing immense liability due to asbestos claims to have a means to obtain contributions from such third parties (who would in turn be protected by an injunction) and thereby deal with both their past and future liabilities to asbestos claimants. In effect, Congress codified the process and ultimate ruling in the *Johns-Manville* case filed in 1982. In that case, Johns-Manville confirmed its plan in 1986 that created a trust, funded in part by over $850 million from numerous insurance companies (all of whom were given a release backed up by an injunction) to deal with billions in asbestos related personal injury claims. Claims were "channeled" to the trust for allowance and ultimate payment. That plan release and injunction was ultimately upheld by the Second Circuit.[24]

(d) Finally, if releases are given in a plan to which all creditors vote to accept, that release (presumably backed up by an injunction for enforcement) would be permissible, much like a creditor can agree to modification of its rights as part of plan treatment. We will call this the "**Fully Consensual Release.**" Similarly, the failure of a claimant with adequate notice of a proposed claim that will be precluded from objecting to the approval of a plan containing the release if the objection is not timely raised.[25] In smaller cases, however, that is frequently how such objections are dealt with. There are both Supreme Court and Circuit Court decisions , however, that hold that failure to object to a plan with release provisions, providing there was adequate and proper notice of the provisions effectuating the release, may not be collaterally attacked on appeal by a creditor who did not object.[26] Of course, the authors recognize that legal purists would take issue with the Fully Consensual Release insofar as there are other, non-traditional creditors (such as the EPA, or SEC, and of course the US Trustee) which would have standing to object on legal grounds under 11 U.S.C. § 1109. The basic premise of any such objection would be that if the ability of a bankruptcy court to approve any third party release (other than the *Johns-Manville* provision releases for asbestos related claims under Section 524(g)) is one of subject matter jurisdiction, parties may not confer upon a court subject matter

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[24] *See MacArthur Co. v. Johns-Manville Corp.,* 837 F2d 89 (2nd Cir. 1988) ("***Johns-Manville***"). Hence, Section 524(g) (which applies only to asbestos related claims) has often been called the "Johns-Manville provision." This was a very innovative solution to a very difficult problem and is discussed in more detail in Part II of this article.

[25] *See infra* note 26. Notwithstanding case law prohibiting these types of releases (discussed *infra*), pragmatic bankruptcy judges such as the Hon. James Marlar (Bankruptcy Judge, District of Arizona, retired) had their own methods of dealing with one or two recalcitrant creditors who were objecting to releases that otherwise had widespread support. Judge Marlar would rule that the releases would "carve out" the objecting creditor(s) only, and then confirm the plan. The Judge recognized that the objections were often interposed for tactical reasons and not because the objector really intended to spend the resources to pursue the claims. By so ruling the legal standing of the objector was removed (as they would not be injured economically). Of course that would not have been a solution in *Purdue Pharma* (and other more complex cases) given the numerous state and other agencies objecting (the carving out of which claims would present an economic hurdle and willingness, presumably, of the beneficiary of the release to do the deal).

[26] *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 145–46 (2009) (notwithstanding issue of jurisdiction to issue third party releases, failure to object if given notice precludes appeal under *res judicata* principles); *In re Le Centre On Fourth, LLC*, 17 F.4th 1326 (11th Cir. 2021).

jurisdiction which it does not have. Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.[27]

The contentious releases (such as being advocated for in *Purdue Pharma* and the subject of scores of chapter 11 cases over the last nearly 40 years) is of course the non-consensual release for pre-bankruptcy conduct benefiting third parties. That is where the rubber truly meets the road in this debate, and that is the subject of Part II, coming in a future issue of the *ABI Journal*.

In Defense Of Third Party Releases In Chapter 11 Cases (PART TWO): Show Me The Money, And What's Wrong With the "God Clause"?

WHERE THE RUBBER MEETS THE ROAD….

"Desperate times offered a certain flexibility in the rules of absolution."

Dan Brown
Origin (2017)

In Part I of this series the authors discussed the *Purdue Pharma* case as it relates to the non-consensual[28] releases of the Sackler family for payment of approximately $4.3 billion in contributions to be earmarked for payment of opioid addiction and its aftermath.[29] The order confirming the Purdue Pharma plan was reversed by the District Court for the Southern District of New York. The SDNY Opinion, with its unequivocal rationale that there is no subject matter jurisdictional authority under any circumstances for non-debtor releases in bankruptcy cases, has

[27] *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

[28] Or at least fully non-consensual as there was widespread creditor and state regulatory support for the {Purdue Pharma plan and releases. *See* In Defense of Third Party Releases (Part I): Let's Define the Battlefield*, ABI Journal* at 32. ("**Part I Article**")

[29] *Id.* The bankruptcy court confirmed the plan with its proposed release over the objection of nine attorneys general[29] (the "**Objecting States**") and about 2,700 individual plaintiffs in personal injury lawsuits against Purdue Pharma, which confirmation order was reversed by Judge Colleen McMahon of the Southern District of New York on December 16, 2021 (the "**SDNY Opinion**"), which reversal is on appeal to the Second Circuit Court of Appeals.

been characterized as a "seismic shift" in the development of the law.[30] Despite a settlement, [31] the pending "rocket docket" appeal to the Second Circuit[32] will ensure a decision sometime this summer, with a possible (however unlikely) appeal to the U.S. Supreme Court following in its wake. Even with the settlement that will involve an uncontested appeal before the Second Circuit[33] appeal, one is left to wonder what is to be done with the SDNY Opinion, which unequivocally holds there is no subject matter jurisdiction to grant third party releases. How, precisely, do the parties "unring that bell"? Perhaps by asking the District Court to vacate its prior decision (void it *ab initio*, as it were)? With the SDNY Opinion on the record (and no longer the subject of the pending appeal should the parties drop it), party consent or not, how does the bankruptcy court approve a plan with third party releases that the District Court said it legally cannot do based on a jurisdictional limitation?[34] Perhaps entertain a motion for reconsideration where the parties, hand in hand, can ask the District court to allow the third party releases under the "unique" facts and circumstances of that particular case? It also should be noted that even this "grand bargain" is not without its critics.[35]

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30 *See* Vince Sullivan, "Seismic Purdue Ruling May Finally Get High Court's Attention," *Law360* (December 17, 2021).

31 On March 10, 2022, the bankruptcy court approved a mediator-brokered settlement which resulted in at least another $1 billion being contributed by the Sacklers with the possibility of another half billion from future sales of Sackler related assets (bringing the total to about $6 billion). *See* Sullivan, "Purdue Gets Approval For New $5.5 Billion Ch. 11 Sackler Deal", Law360 (March 10, 2022); *see also* Sullivan, "Purdue Reaches Final Terms On New $5.5 Billion Ch. 11 Settlement", *Law360* (March 3, 2022) ("**Sullivan**"). The non-monetary terms of the settlement are also noteworthy. They include public expressions of "regret" by the Sacklers, renaming Purdue Pharma as Knoa Pharma, and switching to manufacture of medications to treat addictions by 2024, the disassociation and removal of the Sackler family name from buildings, programs facilities and scholarships (as long as any announcement does not "disparage" the Sacklers), and the immunity does not shield the Sacklers from future criminal prosecution. *See* Hoffman, "Sacklers Strike New Deal To Settle Opioid Suits", *New York Times*, page A1 (March 4, 2022). This settlement is the equivalent of burning the Purdue Pharma house (with the Sackler name inside it) to the ground, and then salting the earth on which it stood so nothing can grow there in the future. The bankruptcy court had extended the injunction protecting the Sacklers from lawsuits to March 23 to allow this new deal to get brought before the bankruptcy court.

32 The Second Circuit not only granted leave to file the appeal, but set briefing deadlines that will occur by March, with oral argument set for mid-April, 2022. *See* Part I Article at 33.

33 The Objecting States have agreed not to file their opposition briefs in the pending Second Circuit appeal, leaving essentially only the Purdue Pharma briefs before the Second Circuit. Presumably it is hoped that the Second Circuit will consider this one of the "narrow circumstances" in which third party releases are permissible consistent with its prior precedent. *See* note 44, *infra*.

34 Put another way, can parties create subject matter jurisdiction by agreement? Not likely. Perhaps the idea is for all parties to urge the Second Circuit to find authority exists under the specific facts and circumstances of this case. It would be consistent with existing Second Circuit precedent. *See* note 43, *infra.*

35 *See, e.g.* Sullivan (Florida, who voted to accept the initial plan, has concerns that the earmarking of the increased Sackler contribution should go to all states pursuant to existing sharing agreements, not just to the settling objectors as contemplated); Schreiber, "OxyContin Victims Fight for Their Share In Purdue Bankruptcy Case", (February 27, 2022) (with victims' advocates complaining that the portion of the deal that is attributable to actual victims equates to about $5,000 per victim, with t the rest allocated to states for rehabilitative and other purposes.)

This article explores the specifics of the oft-maligned (but frequently attempted, with varying degrees of success) the most controversial of the third party releases--where a plan attempts (as it did in *Purdue Pharma* and scores of other plans across the land) to give a release, backed up by an injunction, for pre-bankruptcy acts by a non-debtor third party ("**Third Party**") for not only presently existing claims, but also future claims to the extent they are directly tied to the pre-bankruptcy conduct.[36] We call this the "**Pre-Bankruptcy Conduct Release**."

Depending upon which side of the issue you find yourself on, there is no doubt this issue has created more debate than almost any other issue in the Bankruptcy Code. It is one which academia loves to wax philosophical espousing their righteous indignation in scholarly writings bemoaning the demise of civilization as we know it.[37] Like moths to a flame, politicians are never far behind to advocate their own solutions.[38] Those solutions, perhaps not surprisingly, are to simply prohibit all Pre-Bankruptcy Conduct Releases for Third Parties. Problem solved. While making for good sound bites, the law of unintended consequences certainly is in play here in that companies that might otherwise survive based on funding from third parties die on the vine. The beauty of academia and politics is that these issues are always someone else's problems later on. On to the next election/news cycle/semester!

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[36] Pre-bankruptcy conduct can and often does involve claims that may manifest themselves post-bankruptcy based on conduct which occurred pre-bankruptcy. Environmental contamination and product liability mass tort claims frequently may not be fully manifested at the time of a bankruptcy filing—indeed, some injured people are not even aware they have been injured because physical symptoms do not appear until a date after the filing or there is still an open statute of limitations for filing claims.

[37] *See, e.g*., Prof. Lindsey Simon, "Bankruptcy Grifters", *Yale L. J.* (Winter 2022) (Likening beneficiaries of third party releases to "grifters" who " take advantage of situations, latching on to others for benefits they do not deserve." No judgments there…); Prof. LoPucki's forthcoming article "Chapter 11's Descent Into Lawlessness," 96 *American Bankruptcy L.J.* (June 2022). Not one to feign neutrality, Prof. LoPucki decries "lawlessness" in, *inter alia*, "illegal or abusive practices" such as venue choices, examiners to avoid trustees, the concept of the debtor in possession (over what he would suggest, which is creditor chosen management to run bankruptcy cases), sales outside of the plan process, any sort of retention bonuses for management, rejection of contracts, critical vendor orders, and of course third party releases. *See also* Adam J. Levitin, "The Boy Scouts Are Abusing The Bankruptcy System" (November 17, 2021), available at: https://news.bloomberglaw.com/bankruptcy-law/the-boy-scouts-are-abusing-the-bankruptcy-system (despite a plan that provides over $2.3 billion in third party funding plus profits from the Boy Scouts of America, and about 73% approval by abuse claimants, Prof. Levitin breathlessly asserts that "the bankruptcy system runs roughshod over victims' rights in alleged sexual abuse cases. . .).

[38] *See Nondebtor Release Prohibition Act of 2021* ("**NRPA**") introduced by Senators Elizabeth Warren (D-Mass.), Dick Durbin (D-Ill.) and Richard Blumenthal (D-Conn.), and Representatives Jerrold Nadler (D-N.Y.) and Carolyn B. Maloney (D-N.Y.), aimed at limiting, if not prohibiting entirely, the use of third-party releases in such cases. While the legislative process for the NRPA remains in its early stage, investors and practitioners must be focused on the extent to which the NRPA proceeds through Congress in its present form.. *See also* Garner Vance, "Sackler Immunity: Problems Surrounding Nondebtor Releases in Chapter 11 Bankruptcy" *SSRN* (December 17, 2021), available at: https://ssrn.com/abstract=4002743 or http://dx.doi.org/10.2139/ssrn.4002743.

Again, in an effort to limit the battlefield, there are at least three (3) things we hope can be agreed on: (a) First, there can never be, nor should there ever be, any attempt to release anyone (debtor or Third Party) from potential criminal liability. Even the authors acknowledge that is the proverbial "bridge too far"[39]; (b) Second, there should never be releases for future acts (hence, releases can never be a "get out of jail free" card for acts that may be committed in the future); and (c) Finally, there must be adequate and clear notice of any proposed Pre-Bankruptcy Conduct Releases to those to be effected by such releases. Due process demands are paramount and clearly must be adhered to.

So, given the caveats above, let's look at Pre-Bankruptcy Conduct Releases. The concept (like so-called "critical vendor" payment motions) was the brainchild of innovative professionals in an effort to create and preserve going concern values in real time in a mass tort context. Mass tort liability cases create their own challenges—from identifying and providing notice to potential victims/claimants, to trying to ensure some process whereby assets (such as insurance policies and other Third Party funding sources) are preserved for ratable distribution to what is often a huge and disparate class of creditors, all of whom are deserving of timely compensation for their injuries.

The first major use of this concept was the *Johns-Manville* case in 1986 (actually filed in 1982, while the ink on the Bankruptcy Code was still drying). Since then, it has been used in one form or another in scores of large mass tort liability cases, from product liability (as in *Dow Corning* in 1995, *A.H. Robins* in 1988, with *Johnson & Johnson* trying to accomplish this same thing in its 2021 filing), to personal injury from abuse cases (essentially every Catholic diocese case filed and *USA Gymnastics*), and including the pending *Boy Scouts of America* case (for which the *Purdue Pharma* case, albeit in a different jurisdiction, will have potentially devastating impact).[40]

The case law on this issue gets messy. As the SDNY Opinion recognized, “This issue has hovered over bankruptcy law for thirty-five years – ever since Congress added Section 524(g) and (h) to the Bankruptcy Code. It must be put to rest sometime; at least in this Circuit, it should be put to rest now. . . . the lower courts desperately need a clear answer.”[41] The Circuits are split in both the ultimate allowance of, and rationale for and against allowance of, Pre-Bankruptcy Conduct Releases for Third Parties.

The cases can be divided into three (3) broad categories:[42]

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[39] Even the landmark pending Sackler settlement did not try to cross that bridge. *See* note 31, *supra*.

[40] *See* "Boy Scouts Bankruptcy Plan Hinges On Releases Deemed Illegal In Purdue Case" *ABI Rochelle Daily Wire* (December 22, 2021).

[41] SDNY Opinion at *4 (discussing the lack of uniformity for third-party releases and the need for clarity).

[42] These are categorized for ease of reference, but the authors acknowledge that reasonable minds could create more nuanced categories. Moreover, even within a Circuit there may be differing categories. *See, e.g.* note 16, *infra.* The SDNY Opinion did a masterful job of assembling the cases on this complex issue.

(a) Not Legally Permissible: The Fifth, Ninth, and Tenth Circuits have concluded that the bankruptcy court may not authorize Pre-Bankruptcy Conduct Releases for Third Parties (which they conflate with "discharges") outside of the asbestos context under Section 524(g).[43]

(b) Permissible With Restrictions: The Second,[44] Sixth and Seventh Circuits have concluded that Section 105(a) and 1123(b)(6) provide bankruptcy judges with some "residual authority" to allow for third party releases under certain circumstances (separating the concepts of discharge and third party releases).[45]

(c) Legally Permissible: The Third, Fourth and Eleventh Circuits have concluded that either Section 105(a) authorizes Pre-Bankruptcy conduct Releases for Third Parties or that there are factors to evaluate in deciding when it is appropriate to impose such a release.[46] In at least Delaware, non-consensual Third Party Pre-Bankruptcy Conduct Releases specifically concerning opioid claimants have been upheld as recently as February 3, 2022. *See In re Mallinckrodt, PLC,* Case No. 20-12522-JTD (Bankr. D. Del., February 3, 2022) (Docket No. 6347) (approved releases for Third Parties with opt out rights in plan, but also approved non-consensual Third Party Pre-Bankruptcy Conduct Releases as to opioid claimants based on necessity.).[47]

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[43] *See, e.g. Blixseth v. Credit Suisse*, 961 F.3d 1074, 1082 (9th Cir. 2020), *cert. denied,* 141 S. Ct. 1394, 209 L. Ed. 2d 132 (2021); *Bank of New York Tr. Co., NA v. Off. Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009); *In re W. Real Estate Fund*, 922 F.2d 592, 600 (10th Cir. 1990).

[44] Obviously the Second Circuit may redefine what it finds appropriate or not should the SDNY Opinion go through the appellate process. The Second Circuit had previously held that non-consensual third party-releases against non-debtors could be approved in narrow circumstances. *Deutsche Bank A.G. v. Metromedia Fiber Network, Inc., (In re Metromedia Fiber Network, Inc.)*, 416 F. 3d 136, 141 (2d Cir. 2005).

[45] *See, e.g In re Airadigm Communications, Inc.*, 519 F. 3d 640, 657 (7th Cir. 2008); *In re Dow Corning Corp.*, 280 F.3d 648, 663 (6th Cir. 2002).

[46] *See, e.g In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078–81 (11th Cir. 2015); *Behrmann v. Nat'l Heritage Found., Inc.*, 663 F.3d 704, 712 (4th Cir. 2011); *Gillman v. Cont'l Airlines (In re Cont'l Airlines)*, 203 F.3d 203, 212–213 (3d Cir.2000).

[47] *See* "*In re Mallinckrodt PLC*: Delaware Bankruptcy Court Approves Non-Consensual Third Party Releases In Contrast To *Purdue* and *Ascena*", *V&E Restructuring & Reorganization Update* (February 14, 2022). Interestingly, another bankruptcy judge in Delaware denied confirmation of a plan with Third Party Pre-Bankruptcy Conduct Releases on the basis there was no showing the releases were necessary or there was any contribution by the Third Parties getting the releases. *See* Archer, "Judge Rejects 3rd-Party Releases In Cannabis Co. Ch. 11 Plan", *Law360* (February 15, 2022). The authors speculate that while the Third Parties were disappointed in not getting their releases, they were just too mellow to care all that much.

ECONOMIC ANALYSIS: SHOW ME THE MONEY!

"It has been more profitable for us to bind together in the wrong direction than to be alone in the right direction."

Nassim N. Taleb
The Black Swan (2010)

Bankruptcy, chapter 11 in particular, has as its hallmark the preservation and maximization of finite resources for the benefit of constituencies (be they creditors in an insolvent estate, or creditors and equity in a solvent estate).[48] While lawyers can (and often do) argue incessantly over legal principles, the timely economic returns to constituents should be paramount.[49] Moreover, the time value of money cannot be disregarded—hence present value concepts abound in the Bankruptcy Code. Those opposed to Pre-Bankruptcy Conduct Releases in bankruptcy cases to facilitate the collection of money as part of plan confirmation have often posited that despite optimistic projections, the actual claimants themselves rarely see any meaningful recovery. The money is absorbed (like water to a dry sponge) by administrative costs and related expenses. But in the final analysis, the economic return to the claimants (those with "skin in the game") is where the focus should be.

A Pre-Bankruptcy Conduct Release, when applied to actors that have done bad acts (as compared to, for example, insurers who simply insured bad acts), is the bankruptcy equivalent of prosecutors cutting an immunity deal for one bad actor to catch another (ostensibly worse) bad actor. It is not condoning what the immunized actor did, but rather is a real world recognzition that sometimes you let one bad actor off the hook to acheive an imperfect but greater purpose (in the criminal analogy, catching an even worse criminal). In the bankruptcy world, a timely economic return with certainty of sources of funds to pay claims to creditors is the greater purpose to be achieved. "Punishing" a bad actor oftentimes delays or can reduce that ultimate economic recovery.[50]

Looking at the returns to creditors in bankruptcy cases could conceptually be compared to those in other mass claim types of circumstances outside of bankruptcy. Consumer related class actions are firmly entrenched in the legal landscape and, while not without its critics, recognized as a mechanism to provide legal redress to large consumer groups. Hence,

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48 Put another way, bankruptcy is a "zero sum game" in that once the asset pool is defined, what you give to one comes from another's share of the pot.

49 Hence a common criticism of chapter 11 is that it is too lengthy and expensive. While perhaps true, in complex dynamics such as those brought by mass tort issues, it is also perhaps an imperfect but necessary evil.

50 In releases of insurance companies, even if the insurance company is not contributing 100% of policy limits, the timeliness of the economic return from the contribution, plus the recognition that there may be diminution in the policy from costs of defense of the bad actors, would still be a greater good.

conceptually the concept of Pre-Bankruptcy Conduct Releases is not all that dissimilar from settlements of class actions in other contexts (with the concept of opt out rights dealt with below). In this context, what is the recovery to claimants in class action cases?

There exist some admittedly limited empirical studies in such matters endorsed by such groups as the U.S. Chamber of Commerce (usually supported by positon papers by various law firms and others).[51] As the settlements reached in class actions are usually not public, gathering empirical data can be challenging—hence, these studies are not without controversy.[52] The foregoing notwithstanding, the US Chamber Study concluded that in the class action settlements examined, the average class member's recovery was between 0.000006-12% of the claims, or an average of a mere $32.35 per claimant.[53] The lawyers for the class, by contrast, recovered nearly $424,500 in fees.[54] The US Chamber Study further concluded that the vast majority of cases produced no benefit to most members of the putative class, and indeed approximately 35% of the class actions were dismissed voluntarilly by the plaintiffs after the plaintiff reached a private (*i.e.* non-class) settlement with the defendant.[55] The foregoing notwithstanding, class actions (and class action settlements) are here to stay.

It may be instructive to compare that return with the recovery to one well-known example of Pre-Bankruptcy Conduct Release cases—the seminal case of *Johns-Manville*.[56] In the 33 years since its creation, the Manville Trust has processed about one million claims seeking in excess of $5 billion in total claims.[57] The Manville Trust contains assets currently in excess of $2 billion, and is currently still paying claimants approximately 5.1% of requested claim amounts to

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[51] *See, e.g.,* "Do Class Actions Benefit Class Members?" *U.S. Chamber Of Commerce* (September 2013), which is based on a position paper by the law firm of Mayer Brown LLP entitled "Do Class Actions Benefit Class Members?: An Empirical Analysis of Class Actions" (September 2013) ("**US Chamber Study**").

[52] *See* Corporate Counsel, "Do Class Actions Benefit Class Members?" US Chamber Report (December 13, 2013) ("In an effort to sway the opinion of federal regulators about the value of arbitration over class action law suits, the U.S. Chamber Institute for Legal Reform (ILR) this week released the results of a study showing that the vast majority of class action cases produce no benefits for most members of the class.").

[53] *Id. See also* "FTC Study: Class Action Settlement Notices Have Room To Improve," *Ballard Spahr Legal Alert* (October 2, 2019).

[54] *Id.* at 2.

[55] *Id.* at 3-4.

[56] At the time the *Johns Manville* plan (with its Pre-Bankruptcy Conduct Releases) was confirmed, Bankruptcy Code §524(g) was not in the Code.

[57] *See* Matt Mauney, "Johns Manville" (August 23, 2021) available at: https://www.asbestos.com/companies/johns-manville/.

maintain liquidity.[58] So by comparison to a traditional class action settlement, this is one tangible example where a a Pre-Bankruptcy Conduct Release for the benefit of Third Parties has returned a larger percenatge to claimants than any traditional class action settlement. To put it another way, it certainly is not worse than the recoveries to class action settlement claimants and (unlike private class action settlements that can involve dismissals after side deals are cut) has the added benefit that the entire claims distribution process is transparent.

WHAT'S WRONG WITH THE "GOD CLAUSE"?

"E pur si muove."

Galileo Galilei
(1633)[59]

Opponents of the Pre-Bankruptcy Conduct Releases are quick to point out that there is no express statutory authorization in the Code for these releases (asbestos claims excepted), and that bankruptcy courts are left to rely on the equitable powers granted to bankruptcy courts under the amorphous provisions of Section 105. In the words of one commentator, "Section 105(a), [is] sometimes referred to as the 'God clause', which allows judges to exercise their equitable powers to issue any orders necessary or appropriate to carry out a bankruptcy plan."[60] Of course, there is also no express prohibition in the Code or jurisdictional statutes either. To paraphrase the immortal words of John F. Kennedy, ask not what the Bankruptcy Code allows, but rather what it does not specifically prohibit. The only express prohibition posited by some is the prohibition found in Bankruptcy Code §524(e) which conflates a discharge with a release and injunction. They are distinct legal issues and not tied together. The Pre-Bankruptcy Conduct Release is not a "discharge" of a Third Party (which is expressly prohibited), nor does the Pre-Bankruptcy Conduct Release flow from the discharge of the debtor. It may have the same ultimate preclusive legal effect, but it is an injunction prohibiting actions against the Third Party based on that parties own liability.

The complexities of financial restructurings are such that having some leeway in implementing creative solutions should be encouraged, not discouraged. In the words of one experienced and respected bankruptcy judge, chapter 11 is unique in the law in that it deals with what can be, not exclusively on what happened in the past (like traditional litigation).[61] So while

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[58] *See CRMC Announcements* (February 18, 2021), available at: https://www.claimsres.com/2021/02/18/manville-mv-trust-pro-rata-increase/ (*Pro rata* Trust distributions are adjusted periodically).

[59] "Albeit it does move." Galileo purportedly muttered this phrase after Inquisition torturers forced him to recant his theory—deemed heresy by the church—that the earth orbits the sun.

[60] Sullivan, *supra* note 37, at 2.

[61] Hon. Redfield T. Baum (Bankruptcy Court, District of Arizona).

admittedly amorphous in its scope and language, rather than attempt to make the Code another version of the Internal Revenue Code with its patchwork of stopgaps and other byzantine provisions which were inserted to deal with specific problems (always in hindsight and making the law unfathomable to most mortals), keeping flexibility for bankruptcy courts allows those courts to deal with real time, real world exigencies is critically important to the ultimate success of the chapter 11 process.

Case in point—so-called "critical vendor" motions which are, for the most part, standard in operating company chapter 11 cases. These motions provide for the post-bankruptcy payment of pre-bankruptcy unsecured claims based on the need to maintain trade credit and otherwise avoid irreparable harm to the debtor's nascent restructuring proceedings. The problem is, payment of pre-bankruptcy unsecured claims in a chapter 11 is authorized in the Code itself to be done only pursuant to a confirmed chapter 11 plan (with its attendant classification and other protections). The legal basis for "critical vendor" motions? The "doctrine of necessity" under the Railroad Reorganization Act of 1933[62] and—wait for it—Section 105.

In the *K Mart* chapter 11, a scorned non-critical vendor objected to a first day procedure to pay critical vendors taking the appeal all the way to the Seventh Circuit in 2004.[63] The Circuit Court affirmed the district court's reversal of the bankruptcy court approval of the critical vendor motion on the basis of, *inter alia*, lack of statutory authority.[64] True enough, yet critical vendor motions are still commonplace in most jurisdictions (including within the Seventh Circuit).[65] Another case in point—the so-called "new cash exception/corollary" to the absolute priority rule. Like the "doctrine of necessity" for critical vendor motions, there is no statutory support in the Code at all under Section 1129(b)(2)B)(ii) (indeed, it is violative of the express provisions of the

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62 *See* Max Lowenthal, "The Railroad Reorganization Act," 47 HARV. L. REV. 18 (November 1933).

63 *See In re K Mart Corp.,* 359 F.3d 866 (7th Cir. 2004) ("A "doctrine of necessity" is just a fancy name for a power to depart from the Code. . . every circuit that has considered the question has held that this statute does not allow a bankruptcy judge to authorize full payment of any unsecured debt, unless all unsecured creditors in the class are paid in full. . . . The fact that a [bankruptcy] proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be.") (citations omitted).

64 *Id.* (finding no specified basis in the record regarding the critical need to pay the critical vendors, and lack of statutory authority); *See also* Thomas Salerno, "The Mouse That Roared: Or, Hell Hath No Fury Like a Critical Vendor Scorned," ABI Journal 28 (June 2003).

65 Albeit with perhaps more evidentiary backup than was used in K Mart! *See e.g. In re Concepts Am., Inc.*, 625 B.R. 881, 893 (Bankr. N.D. Ill. 2021) (noting that statutory authority still exists for chapter 11 debtors to pay their critical vendors despite noting the "overhaul of 'critical vendor' payments in the Seventh Circuit" prior to *Kmart*). Seventh Circuit precedent notwithstanding, the 2015 mega-case of Caesars Entertainment Corporation (initially filed in Delaware as an involuntary bankruptcy but then moved to Chicago) had critical vendor and other first day types of motions granted allowing it to pay pre-bankruptcy unsecured claims. *See, e.g. In re Caesars Entertainment Operating Company, Inc. et al*., No. 15-01145 (ABG) (numerous first day motions, including critical vendors and honoring prepetition chip liabilities, all approved). *See* Docket No. 36, 49, 54, 55, 57, 58, 91, 618, 620, 621 and 622.

Bankruptcy Code) and is the product of *dicta* in a pre-Code case from the 1930s.[66] The Supreme Court has had two opportunities to rule on this very issue, and managed to simply punt on it both times[67]. And yet it is commonly used in chapter 11 cases all the time. The statutory basis? None whatsoever, rather the Supreme Court determined that there was an "ambiguity" in the Code provision to suggest it might have survived.[68]

WHY ARE SOME PRE-BANKRUPTCY CONDUCT RELEASES LESS OBJECTIONABLE THAN OTHERS?

"All animals are equal, but some animals are more equal than others."
George Orwell
Animal Farm (1945)

Are those Third Parties who may have liability for asbestos related injuries along with the debtor (and legally able to obtain a Pre-Bankruptcy Conduct Release) somehow more deserving of relief than those related to mass tort damages that are not asbestos related? Was Section 524(g) just the result of a powerful asbestos-related insurance industry lobbying effort? Is there anything unique about mass tort situations in asbestos cases as compared with other product liability or mass tort cases? It is unclear, but also undeniable that the Code as currently existing creates two distinct groups of third party beneficiaries when it comes to the availability of Pre-Bankruptcy Conduct Release availability.

Put another way, let's look at this from the perspective of the victims of mass tort cases. It must be presumed that Congress believed in 1994 that there was societal and economic benefit in amending Section 524(g) to provide for a specific and detailed mechanism to get Pre-Bankruptcy Conduct Releases in the asbestos context to non-debtor Third Parties in exchange for contribution to funding trusts for payment of these claims.[69] Presumably such amendment to the

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[66] *See Case v. Los Angeles Lumber*, 308 U.S. 106 (1939); *Cf. In re Ambanc La Mesa Ltd. Partnership*, 115 F.3d 650 (9th Cir. 1997) and *In re Bonner Mall Partnership,* 2 F.3d 899 (9th Cir. 1993) (recognizing continued viability of new cash exception) with *In re Coltex Loop Central 3 Partners, LP,* 138 F.3d 39 (2nd Cir. 1998) and *In re Bryson Properties, XVIII,* 961 F.2d 496 (4th Cir. 1992) (holding the new cash exception did not survive the enactment of the Bankruptcy Code).

[67] *See Bank of America v. 203 North LaSalle Partnership*, 526 US 434 (1999) ("**203 North LaSalle**") and *Norwest Bank Worthington v Ahlers*, 45 U.S. 197 (1988); Salerno & Kroop, "Urgent Message To The Supreme Court: 'Just Do It!'", 34 *B.C.D.* 1 1999).

[68] 203 North LaSalle at 435 ("The drafting history is equivocal, but does nothing to disparage the possibility apparent in the statutory text, that §1129(b)(2)(B)(ii) may carry such a corollary. Although there is no literal reference to "new value" in the phrase "on account of such junior claim," the phrase could arguably carry such an implication in modifying the prohibition against receipt by junior claimants of any interest under a plan while a senior class of unconsenting creditors goes less than fully paid.")

[69] *Id.* Congress amended the Bankruptcy Code to add Section 524(g) in 1994 to "provide a restructuring model for asbestos-related bankruptcies Susan Power Johnston & Katherine Porter, "Extension of Section 524(g) of the

law was based on anticipated quicker, ratable payments to a deserving group of victims, and incentivized third parties to "fund" trusts to administer such funds (the "carrot" being the Pre-Bankruptcy Conduct Release). It is hard to argue against this change in the law.

Real time case in point--Johnson & Johnson is currently facing about 38,000 personal injury lawsuits, with new "ovarian cancer and mesothelioma lawsuits being filed at the rate of one per hour all day, very day in 2020."[70] In another opioid producer's case defense costs were estimated at as much as $1 million per week.[71] The tort adjudication system in the U.S. has been characterized as "lottery-like" by Johnson & Johnson.[72] While J&J was characterizing this system from the perspective of astronomical jury verdicts in favor of plaintiffs (and against the company) taking years to come to judgment[73], the flip side is also true. Those claimants that get judgments first ("lottery-like" or not) stand a better chance of getting paid, but also ultimately reduce the "pot" available for later victims. Avoiding a rush to the courthouse may in practical effect benefit not just the company, but also the later victims (some of whom may not even know they have injury). Bottom line—chapter 11 should be about equitable and ratable return and not just about payment to the first that get judgments. ***The authors respectfully submit that the debate and litigation should center not on the legal issue about whether the Third Party Pre-Bankruptcy Conduct Release is legally permissible, but rather the economic issue of how much it should cost the Third Party. That is what is critical to those with "skin in the game"—certainty, timing and sources of payment and efficiency of the process.*** This is certainly where *Johnson & Johnson* is

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Bankruptcy Code to Nondebtor Parents, Affiliates, and Transaction Parties," American Bar Association, The Business Lawyer, Vol. 59, No. 2, pp. 510-511 (February 2004), available at: https://www.jstor.org/stable/40688207. Section 524(g) provides for a specific and detailed procedure for the issuance of an injunction pursuant to a plan of reorganization to cover, among others, a Third Party (such as an insurance company or any other party who is alleged to be "directly or indirectly liable" with the debtor on asbestos related claims.

[70] Johnson & Johnson's subsidiary recently defeated a motion to dismiss its chapter 11 filing on bad faith grounds, with the bankruptcy court finding that chapter 11 is uniquely positioned to create a forum for the ratable distribution of assets for victims. *See* Sullivan, "J&J Talc Unit's Ch. 11 Case Allowed To Go Forward", *Law360* (February 25, 2022).

[71] In opioid producer Mallinckrodt PLC's chapter 11 in Delaware, the litigation costs were estimated at $1 million per week. *See* Rochelle, "Horizontal 'Gifting' Approved in Mallinkrodt's Confirmed Chapter 11 Plan", *Rochelle's Daily Wire* (February 9, 2022).

[72] *Id.* (discussing how Johnson & Johnson was "already subject to 38,000 talc suits, with more accumulating every hour," and the numbers clearly evidenced the company "could not bear the costs—let alone the lottery-like verdicts—of adjudicating the pending and expected claims.").

[73] *See* "Talc Claimants Argue Bad Faith In J&J Ch. 11 Trial", *Law360* (February 14, 2022) (49 talc claims had been tried at the time Johnson & Johnson set up its new "Texas two-step" company to ring fence liabilities, which cases took 8 years to adjudicate with one jury verdict of $4.7 billion, reduced to $2 billion on appeal, in favor of 22 plaintiffs).

attempting to steer the debate in its pending proceedings.[74] It is also clearly the focus of the ongoing *Purdue Pharma* settlement discussions.

So why precisely are victims of personal injury (mental and/or physical) resulting from sexual abuse, or victims of product liability for faulty medical devices or talcum powder, or victims of environmental contamination, or any other mass tort less worthy of the same avenue for a more expeditious resolution of their claims and a source of payment for those claims in one forum?[75] The only difference between a personal injury claim resulting from exposure to asbestos and one resulting from physical or sexual abuse or one from the use of a faulty contraceptive device or baby powder is the root cause of the injury. The injury is real in all cases. The disparity in the law has never been satisfactorily explained.[76] *See* "ABI Panelists, US Chamber Support Ch. 11 3rd Party Releases", *Law360* (February 25, 2022). The focus of the naysayers have been on the perceived benefit to the Third Parties of the Pre-Bankruptcy Conduct Release when the real focus should be on the potential benefits to the victims of the mass tort.[77] Presumably this is where congress' focus was when it enacted Bankruptcy Code §524(g) in 1994. The allowance of Pre-Bankruptcy Conduct Third Party Releases resulting from *Johns-Manville* (who pioneered the concept before the Code expressly allowed it) was viewed as visionary enough that Congress formally adopted it for asbestos cases. The same concept is now being characterized as abusive.

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[74] *See* "J&J Could Increase $2 Billion Talc Settlement Offer, Lawyer Says", *ABI Headlines* (February 17, 2022)(quoting from testimony in the dismissal proceedings wherein Johnson & Johnson's bankrupt subsidiary stated the $2 billion being contemplated for settlement of the claims is only "a start", subject to further negotiations.)

[75] The mirror side of this proposition, of course, is why are asbestos manufacturers more worthy of chapter 11 protection than, for example, makers of talcum powder? Based on the perceived abuses of the so-called "Texas Two Step" divisive merger mechanism as a precursor to chapter 11, there is no shortage of outcry over whether Johnson & Johnson should even be allowed to be in chapter 11, much less be able to use what unquestionably will be the fulcrum of its restructuring efforts (the claims estimation process, bar date for filing of claims, creation of a trust for payment of those claims, and of course a Third Party Pre-Bankruptcy Conduct Release). *See, e.g.* Chappell, Friedman & Parr, "J&J Can't Be Allowed To Dodge Civil Justice With Bankruptcy", *Law360* (February 10, 2022). Indeed, there are currently ongoing congressional hearings on this issue. *See, e.g.* Written Testimony Of Hon. Judith Klaswick Fitzgerald (Ret.) before the Senate Committee On The Judiciary, Subcommittee On Federal Courts, Oversight, Agency Action and Federal Rights, entitled "Abusing Chapter 11: Corporate Efforts To Side-Step Accountability Through Bankruptcy" (February 8, 2022).

[76] The authors recognize the lobbying efforts of the personal injury bar and insurance industries in the passage of Section 514(g). That perhaps is the only difference in the circumstances, albeit a distinction that is neither fair nor equitable from an overall policy perspective.

[77] The historic uses of chapter 11 to attempt to ring-fence liabilities (using a divisive merger or otherwise), obtain discharges for debtors and Third Party Pre-Bankruptcy Conduct Releases have been the "abuses" of bankruptcy laws decried by numerous critics discussed above. While making for expedient sound bites, it is also (in the authors' opinions) somewhat myopic. One can argue about changing the law, but at a minimum the full economic repercussions should be analyzed. If you increase taxes to companies and they move operations offshore, these same critics will complain about the loss of American jobs. In economics, as in physics, every action has a reaction. It can be good, or not so good.

It is time for Congress to address this disparity decisively. To that end, the authors humbly suggest four (4) potential amendments to the Bankruptcy Code (Title 11) and Judicial Code (Title 28) that would create certainty in this uncertain jurisprudential morass.

Stay tuned for ***Part III: Four Proposed Legislative Fixes For The Third Party Release Mess!***

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AN INCIPIENT BACKLASH AGAINST NONDEBTOR RELEASES? (PART I): THE "NECESSARY TO REORGANIZATION" FALLACY

By Ralph Brubaker

The last few months have seen some rather startling developments in the case law regarding so-called nondebtor (or third-party) "releases" and "channeling" injunctions. Such releases have always been controversial,[1] particularly nonconsensual "releases" (a bit of an oxymoron), which permanently extinguish creditors' or shareholders' direct claims of liability against a third-party nondebtor, without the consent (and even over the objection) of those "releasing" creditors and shareholders. Such nonconsensual releases, which typically appear in a Chapter 11 debtor's plan of reorganization, discharge the obligations of a nondebtor in precisely the same manner that confirmation of the plan discharges the debts of the debtor.[2] Indeed, in confirming a plan containing nondebtor release provisions, the court will typically enter a so-called "channeling" injunction permanently barring any assertion of the "released" claims against the "released" nondebtor, in the same manner that the § 524(a) statutory discharge injunction bars asserting discharged claims against the reorganized debtor.

Four recent decisions regarding nondebtor releases could well represent both (1) the high point in judicial permissiveness, followed almost immediately by (2) a stark and severe backlash, which may well portend a growing and more general judicial skepticism (and even open hostility) toward nondebtor releases. The recent high-water marks of judicial permissiveness came from the Eleventh Circuit's decision in *In re Centro Group, LLC*,[3] and the bankruptcy court's confirmation of Purdue Pharma's plan of reorganization,[4] which released the Sackler family from all potential civil liability in conjunction with Purdue's opioid OxyContin.

The potential harbingers of nondebtor releases' decline (or even demise) came with the Southern District of New York

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district court's dramatic reversal of the *Purdue Pharma* confirmation order,[5] holding (inter alia) that the Bankruptcy Code simply does not authorize nonconsensual nondebtor releases. That decision knocked the legs out from under a multi-billion-dollar deal. And then only a few weeks later, the district court for the Eastern District of Virginia vacated confirmation of a plan containing what purported to be *consensual* nondebtor releases, on multiple grounds, including its conclusion that those releases "offended the most fundamental precepts of due process."[6]

This Part I will analyze the *Centro Group* decision and what it tells us about the supposedly stringent requirement that a nonconsensual nondebtor release purportedly "should be reserved for those unusual cases in which such an order is necessary for the success of the reorganization."[7] In a subsequent issue of *Bankruptcy Law Letter*, I will then look at the sudden, startling, and sensational judicial recoil against releases and analyze what those decisions tell us about the continuing viability of nondebtor releases.

IN RE CENTRO GROUP, LLC

The *Centro Group* case involved a settlement of litigation claims belonging to debtors' Chapter 11 estates and nonconsensual nondebtor releases approved in conjunction therewith.

Centro provided payroll and human resource management services to businesses, including payroll processing. In April of 2018, Centro merged with another payroll and human resource management firm, ProHCM Holdings, Inc., and after the merger Centro became the operating entity for the combined businesses, as a wholly-owned subsidiary of ProHCM.

As part of its payroll processing services, Centro would withdraw money from clients' bank accounts for disbursement to client employees and payroll tax authorities. In conjunction with the merger, Centro represented to ProHCM that it was a profitable company with minimal liability. After the merger, though, ProHCM discovered that Centro evidently had misappropriated money from customer escrow accounts containing funds for payment of customers' payroll taxes. Consequently, Centro had over $1.7 million in liability for the shortfall, an amount in excess of the post-merger companies' capacity to pay, so both companies filed Chapter 11 in October 2018.

"[N]either ProHCM nor Centro sought to reorganize and continue operations" through Chapter 11.[8] Thus, the principal function of the Chapter 11 proceedings was to allocate the as-

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sets remaining in the estates as between HCM and Centro and to purse causes of action belonging to the estates against former Centro officers and directors allegedly responsible in various ways for the misappropriation of customers' escrowed payroll tax funds and for misleading ProHCM regarding that misappropriation. Accordingly, Centro filed an adversary proceeding against Centro's former CEO asserting multiple causes of action.

Based upon their investigation, the Debtors and the Creditors' Committee believed that the estates also had viable claims against several other former officers or directors. No lawsuit against these others was ever filed, however, because the parties negotiated a settlement funded by Giraldo Leyva, Jr., one of the potential defendants. Mr. Leyva and his companies (the "Leyva Parties") agreed to pay the debtors' estates $2.6 million, which was an amount sufficient to fully repay the debtors' creditors, including all of the Centro customers whose escrowed payroll tax funds had been misappropriated. In exchange, the debtors' estates would (1) assign to the Leyva Parties their claims against Centro's former CEO and (2) release all potential claims against all of the other potential Centro officer/director defendants, including Mr. Leyva. In addition, the Leyva Parties insisted that the bankruptcy court, in approving the settlement, grant the Leyva parties a nonconsensual release of *all* potential claims against them, *by anyone*, "directly or indirectly relating in any way to . . . any of the claims released by the Debtors" on behalf of their bankruptcy estates.[9]

Initially, it is worth noting that no one doubts the ability of the bankruptcy estate, with court approval under Bankruptcy Rule 9019(a), to settle and release any claim or cause of action belonging to the estate. Indeed, Code § 1123(b)(3)(A) explicitly provides that a Chapter 11 plan of reorganization can "provide for the settlement or adjustment of any claim . . . belonging to . . . the estate."[10]

The only controversial aspect of the settlement in *Centro Group*, therefore, was the nonconsensual nondebtor release whereby the bankruptcy court was asked to extinguish all potential claims that *other* parties (*not* the debtors' bankruptcy estates) might have against the Leyva parties in conjunction with Centro's alleged misappropriation of customer funds and alleged deception of ProHCM. And in that regard, ProHCM's largest preferred shareholder, Joseph Markland, who was the ProHCM CEO before the merger and the CEO of both ProHCM and Centro after the merger, objected to the nonconsensual nondebtor release. Markland claimed "that before the merger, his ProHCM[] shares had a value of $2.8 million, which was 'wiped out' and reduced to 'a few hundred dollars' due to the misappropriation,"[11] yet the proposed release would prevent HCM shareholders from pursing any claims they might have against the Leyva Parties.

The bankruptcy court, though, overruled Markland's objection and approved the proposed settlement, including the nonconsensual nondebtor release provision, finding that the release "was essential to the compromise" in that "Mr. Leyva would not have agreed to the settlement without it."[12] And on appeal, both the district court and the Eleventh Circuit, in an unpublished per curiam opinion, affirmed.

Both the district court and the Eleventh Circuit panel affirmed the nonconsensual nondebtor release at issue in *Centro Group* on the authority of the Eleventh Circuit's 1996 decision of *In re Munford, Inc.*[13] However, *Centro Group* represents a vast and pernicious expansion of the kinds of releases authorized by *Munford*. The *Centro Group* decision also (and likely unwittingly) lays bare the emptiness of the supposedly rigorous and exacting "necessary to reorganization" standard for approval of nonconsensual nondebtor releases.

IN RE MUNFORD, INC.: BARRING CO-DEFENDANT CONTRIBUTION AND INDEMNITY CLAIMS AGAINST A SETTLING DEFENDANT

Munford involved an adversary proceeding

against multiple defendants challenging a pre-bankruptcy leveraged buy-out of the debtor corporation, Munford, that allegedly forced it into Chapter 11. The debtor was seeking "money damages in excess of $68 million," and the defendants in that suit included the "debtor's former officers and directors, certain former shareholders and former employees who received monetary benefits from the LBO, and certain financial advisors and consultants who provided services in connection with the LBO."[14] One of the defendants, Valuation Research Corporation ("VRC"), had provided a solvency opinion in connection with the LBO, and the debtor proposed to settle all of the estate's claims against VRC for $350,000.

That proposed settlement with VRC was "conditioned upon the court's entry of an order protecting VRC by permanently barring *joint tortfeasors*," i.e., VRC's *nonsettling co-defendants* in the debtor's lawsuit, "from pursuing *contribution or indemnification claims* against VRC," the settling defendant.[15] The debtor and VRC so requested in seeking the bankruptcy court's approval of the proposed settlement under Bankruptcy Rule 9019(a), and in approving the proposed settlement, the bankruptcy court (over the objection of the nonsettling co-defendants) issued "an order permanently enjoining the *nonsettling defendants* from asserting *contribution and indemnification claims* against VRC."[16] Both the district court and the Eleventh Circuit affirmed that settlement bar order, which was (again) by its terms limited in effect to barring *only* claims of *contribution or indemnity* by nonsettling co-defendants against the settling defendant.[17]

The significance of that limitation, *only* barring contribution or indemnification claims, cannot be overstated. Such a bar is a routine, accepted feature of even nonbankruptcy partial settlements (with less than all defendants). Indeed, the basic nature of common-law contribution and indemnity is such that an order barring contribution or indemnity claims by nonsettling co-defendants against a settling defendant simply gives full effect to the legal consequences of a plaintiff's partial settlement (i.e., with less than all defendants) even in the absence of the bar order.

1. THE NATURE OF CONTRIBUTION AND INDEMNITY LIABILITY

The co-defendants in *Munford* objected to the settlement bar order because it would "eliminate[] any cross claims they ha[d] against VRC for contribution or indemnity under" Georgia state law, "leaving them without recourse."[18] It is generally the case, though, under applicable state law of contribution and indemnity, that a plaintiff's separate settlement with and release of one (but not all) co-defendants immunizes the settling co-defendant from claims of contribution or indemnity by the nonsettling co-defendants. That result follows from the very nature of contribution and indemnity liability.

"An entitlement to indemnity or contribution can potentially arise in any setting in which two parties [A and B] are jointly and severally liable to a third."[19] And the right of contribution or indemnity arises from the benefit conferred by one of those co-liable parties (e.g., A) upon the other (B) by paying more than its relative share of that joint obligation, giving rise to a right of restitution for unjust enrichment.[20]

> The consequence is that A has to that extent performed B's obligation; unless A intended to make a gift to B, such a transaction gives A a prima facie claim in restitution to the extent of B's unjust enrichment. The claim is called indemnity when the liability in question, as between the parties, is altogether the responsibility of B; it is called contribution when A has paid more than A's share of a common liability that is allocated in some proportion between them. The logic and the rationale of the claim in restitution are precisely the same in either case.[21]

The unjust enrichment logic of that restitution claim (for either contribution or indemnification) is as follows: "If [A] renders to a third person a performance for which [A] and [B] are jointly and severally liable," B is unjustly enriched (and thus A is entitled to restitution from B) "to the extent that the effect of [A's performance] is to

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reduce an enforceable obligation of [B], and as between [A] and [B], the obligation discharged (or the part thereof for which [A] seeks restitution) was primarily the responsibility of [B]."[22]

2. THE COMMON-LAW BAR ON CO-DEFENDANT CONTRIBUTION AND INDEMNITY CLAIMS AGAINST A SETTLING DEFENDANT

No court order or injunction, therefore, is required to bar contribution or indemnity claims by nonsettling co-defendants against a settling defendant. The plaintiff's release of the settling defendant's liability to the plaintiff (in conjunction with the settlement) extinguishes any potential contribution or indemnity claim that nonsettling co-defendants might have had. To understand why, consider the following textbook example:

> In the paradigm case, plaintiff alleges that defendants A and B are jointly liable for damages in the amount of $100,000. Plaintiff eventually reaches a settlement with [B], who pays $25,000 in exchange for an unconditional release of plaintiff's claims against him. [A] refuses to settle and goes to trial. The jury determines that (i) plaintiff's damages are $80,000, and (ii) A and B are jointly responsible on a 50/50 basis.[23]

Question: If A must pay plaintiff more than $40,000 (A's 50% share of plaintiff's damages), will A have a valid contribution claim against B for the amount paid in excess of $40,000?

Answer: No, because the only basis for claiming that A's payment to the plaintiff unjustly enriched B would be that in doing so, A satisfied an obligation of B to the plaintiff. At the time of A's payment, however, B had no more obligation to the plaintiff because the plaintiff had fully released B in conjunction with their settlement agreement; whatever obligation B had to the plaintiff was fully discharged by their settlement. Consequently, "[i]t is the universal rule that a defendant who settles with the plaintiff cannot thereafter be liable in contribution or indemnity to a nonsettling codefendant."[24]

CENTRO GROUP: THE TRANSMOGRIFICATION OF *MUNFORD* SETTLEMENT BAR ORDERS

The order in *Munford* barring the defendants' contribution and indemnity claims against VRC in conjunction with the plaintiff-debtor-estate's release of all claims against VRC was likely nothing more than a declaration and effectuation of the legal effect of approving the release of the estate's claims against VRC, which (as discussed above) the bankruptcy court clearly has the authority to do.[25] Indeed, and as the bankruptcy court in *Munford* pointed out, the *only* contentious issue raised by a separate settlement with some but not all defendants is *not* whether the settling defendants are thereby immunized against subsequent contribution and indemnity claims by nonsettling co-defendants. Rather, "[t]he real issue" is "the judgment reduction method to be used" for nonsettling defendants subsequently adjudicated to be liable to the plaintiff, to take into account the amount the plaintiff already recovered in its prior settlement.[26]

For example, in the hypothetical textbook case posited above, should judgment against A be entered in the amount of $55,000?: plaintiff's total damages of $80,000 minus the $25,000 B paid to the plaintiff in settlement, which is a so-called "pro tanto" (dollar-for-dollar) credit. Or, alternatively, should judgment be entered in the amount of only $40,000?: plaintiff's total damages of $80,000 reduced by B's 50% comparative share, which is a so-called "comparative share" credit.

Choosing the appropriate judgment-credit system for the plaintiff's claims against nonsettling defendants raises a host of difficult policy and administrability issues,[27] and that choice (ultimately, of a pro-tanto credit in *Munford*) was the most consequential aspect of the *Munford* settlement bar order.[28] That is not to say that there are no grounds to object to the legitimacy of the bar on contribution and indemnity claims

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by nonsettling co-defendants against VRC in *Munford*.[29] But, again, to the extent that the bar order is merely co-extensive with the extinguishment of contribution and indemnity claims that occurs as a matter of law—simply from the estate's release of its claims against a settling defendant and the bankruptcy court's approval thereof—the bar order is relatively benign. Indeed, the proposed Nondebtor Release Prohibition Act, introduced in both the House and Senate in July 2021, which would generally prohibit nonconsensual nondebtor releases, contains an express carveout for such a bar order.[30]

It is widely recognized that the rule barring subsequent contribution and indemnity claims by nonsettling co-defendants against a settling defendant helps facilitate pretrial partial settlements (with less than all of the defendants).[31] Indeed, the Eleventh Circuit emphasized that settlement-facilitation benefit in affirming the *Munford* bar order:

> This is because "[d]efendants buy little peace through settlement unless they are assured that they will be protected against codefendants' efforts to shift their losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation." But for the bankruptcy court's bar order in this case, for example, VRC would not have entered into the settlement agreement with Munford, Inc. For these reasons, we hold that section 105(a) . . . authorize[s] bankruptcy courts to enter bar orders where such orders are integral to settlement in an adversary proceeding.[32]

That was, however, a rather loose statement of the holding. The strict holding of the court was likely limited to only that which was before the court: "the bankruptcy court ha[d] legal authority to enter the order barring the nonsettling defendants from asserting claims of contribution and indemnity against VRC."[33] This has led to uncertainty over whether a *Munford* settlement bar order can bar *other* claims against a settling defendant—claims other than contribution and indemnity claims *and* claims by parties other than nonsettling co-defendants—as long as barring such claims is "integral to the settlement" (in the sense mentioned by the *Munford* court) in that the defendant will not enter into the settlement agreement without the bar order.

Before the recent *Centro Group* decision, "the Eleventh Circuit ha[d] found only cross-claims for indemnity and contribution among co-defendants or similar claims to be" appropriate for a settlement bar order.[34] Thus, some lower courts have limited *Munford* to its strict holding authorizing bar of "cross-claims for indemnity and contribution among co-defendants."[35] Others, however, have permitted bar of any and *all claims*, *by anyone* against the settling defendant (*or others*), as long as they arose out of the same nucleus of operative fact as the settled claims.[36] That latter approach was followed by both the bankruptcy court and the district court in approving the settlement order barring claims against the Leyva Parties in *Centro Group*.

The Eleventh Circuit affirmed in an unpublished, nonprecedential, per curiam opinion that nicely illustrates why nonconsensual nondebtor releases, more generally, have become such a ubiquitous feature of the bankruptcy landscape.

THE SETTLEMENT-FACILITATION (NON)STANDARD FOR APPROVAL OF SETTLEMENT BAR ORDERS

If settlement bar orders can extinguish *any* claims by *anyone* against a settling defendant (*or others*), as long as they have some factual relationship to the estate's claims against the defendant that are being released, then settlement bar orders are functionally indistinguishable from nonconsensual nondebtor releases approved in Chapter 11 cases.[37] The essential requisite for approval of these broader nondebtor releases, though, is that the release "is necessary for the success of the reorganization"—the standard the Eleventh Circuit adopted in its 2015 *Seaside Engineering* decision.[38] "The more relaxed *Munford* standard,"[39] by contrast, is that the bar order is "essential" or "integral to reaching a settlement agreement between the parties" because "the parties would not have entered into a settlement agreement without it."[40]

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The nonconsensual release at issue in *Centro Group* went beyond barring the kind of co-defendant cross-claims for indemnity and contribution at issue in *Munford*. Arguably, then, the broader *Centro Group* release could only be approved under "the more stringent *Seaside* standard"[41] of being necessary to a successful reorganization, by "prevent[ing] claims against nondebtors that would undermine the operations of, and doom the possibility of success for, the reorganized entity."[42] Yet, the Eleventh Circuit acknowledged that the *Centro Group* settlement bar order would *not* and could "*not* . . . ensure success for a reorganized entity," "because neither ProHCM nor Centro sought to reorganize and continue operations."[43]

The Eleventh Circuit reconciled that disconnect by simply expanding the permissible scope of *Munford* settlement bar orders—to go beyond co-defendant cross-claims for settlement and indemnity against a settling defendant—but without explicitly acknowledging (or perhaps even understanding) that it was doing so. Under *Centro Group*, the settlement-facilitation tail of *Munford* wags the bar-order dog, and settlement facilitation justifies barring *any* claim within the court's subject-matter jurisdiction (because it arises from the same core of operative facts as the estate claim being released). Thus, the Eleventh Circuit reasoned as follows:

> Such a bar order is appropriate where the parties would not have entered into a settlement agreement without it, and thus it is "integral" to the settlement. The *Seaside* factors apply to bar orders that are specifically within the reorganization context [in] "unusual cases in which such an order is necessary for the success of the reorganization." . . .
>
> . . . [T]his case is more like *Munford* than *Seaside* because the Bar Order under review was integral to settlement. . . . [T]he purpose of the Bar Order differs from the factual context under *Seaside* because neither ProHCM nor Centro sought to reorganize and continue operations. As such, the purpose of the Bar Order is not to ensure success for a reorganized entity by eliminating liability against third parties but is instead to facilitate a settlement agreement[, so] *Munford* controls . . . .[44]

That reasoning is extremely troubling, on several levels.

Initially, settlement facilitation as a requisite for approval of a settlement bar order provides no limitations whatsoever on approval of nonconsensual release of claims. Nondebtor defendants themselves can manufacture the "evidence" necessary for approving a nonconsensual release/extinguishment of claims against them, because the operative legal rule is simply a self-interested party's negotiation position.

> Therefore, the negotiation position of the nondebtor[-defendant] is preordained by the operative legal rule. The nondebtor[-defendant] will absolutely insist upon receiving a nonconsensual nondebtor release as an inviolable deal-breaker condition of making any . . . settlement . . . , and when the resulting release is presented to the bankruptcy court for approval, will enthusiastically testify accordingly. And truthfully so, since the operative legal rule itself turns on a negotiating position. Even the most obvious bluff, on the stand and under oath, does not risk punishable perjury, because the nondebtor is not so much testifying about objectively verifiable past facts as the nondebtor is testifying about its negotiating position: "I will not . . . settle[] without a nonconsensual nondebtor release."[45]

Moreover, the estate representative/s negotiating the settlement on behalf of the estate will readily compromise the released third-party nondebtor claims against the nondebtor defendant because those claims *do not* belong to the bankruptcy estate. Consequently, the bankruptcy estate and its fiduciary representatives have no authority whatsoever to prosecute those claims,[46] but under *Centro Group* they evidently *do* have the authority to extinguish those claims by agreeing to a settlement that will bring funds into the estate. If the estate can give away someone else's property in order to get a benefit for the estate, obviously the estate will eagerly do so.

Centro Group's authorization of sweeping nonconsensual extinguishment of claims simply because "the parties would not have entered into a settlement agreement without it,"[47] therefore,

is a robbing of Peter to pay Paul that obviously "strike[s] at the heart of . . . foundational [due process] rights."[48] What's more, the Eleventh Circuit's posited distinction between "settlements" and "reorganization" is impossible to coherently operationalize, because there is no clean, clear distinction between settlement and reorganization.

THE FALSE DICHOTOMY BETWEEN SETTLEMENTS AND REORGANIZATION

The *Centro Group* decision is predicated on its postulated distinction between (1) nonconsensual nondebtor releases entered "to facilitate a settlement agreement,"[49] which should be governed by "[t]he more relaxed *Munford* [non]standard"[50] just discussed, that "the parties would not have entered into a settlement without it, and thus it is 'integral' to the settlement,"[51] as contrasted with (2) those nonconsensual nondebtor releases approved "within the reorganization context,"[52] which should be governed by "the more stringent *Seaside* standard"[53] that the releases are "necessary for the reorganized entity to succeed."[54]

That, however, is a false dichotomy. Indeed, one of the principle justifications for nonconsensual nondebtor releases in the "reorganization" context, from their very inception, has been the "objective of encouraging negotiated settlement of disputes."[55]

> A confirmed plan of reorganization, to which all of the debtor's creditors and shareholders are parties for purposes of res judicata, is a very powerful means by which to accomplish settlement of the triangular claims implicated by non-debtor actions. In fact, the desire to foster such compromises has been the impetus for consensual nondebtor plan releases. In recognition of the force of the settlement policy in complex reorganizations, courts approving compulsory nondebtor releases clothe their decisions with the rhetoric of compromise and settlement, often emphasizing contributions the non-debtor has agreed to make to the debtor's estate that will enhance the recoveries of all creditors, such as cash payments to or continued services for the debtor.[56]

Particularly in mass tort reorganizations, facilitating settlement is *the* overriding rationale, über alles, for approval of nonconsensual nondebtor releases. Consider, for example, the *Purdue Pharma* case. The bankruptcy court approved nonconsensual nondebtor releases for the Sacklers because the debtor's entire plan of reorganization was predicated on payment by the Sacklers of $4.325 billion (over a period of years) "that settles [1] the estates' claims" against the Sacklers,[57] e.g., for alleged fraudulent transfers and breach of fiduciary duty,[58] as well as [2] "certain third-party claims against the Sacklers related to those claims [by the estate] and the third-party's claims against the Debtors,"[59] and what's more, "the plan contains several other settlements interrelated to those settlements that would not be achievable if either of the settlements with the Sacklers fell away."[60] Thus, the nonconsensual nondebtor release provisions were "necessary" to the "reorganization" because "the plan's third-party release provisions . . . are an essential quid pro quo to the [Sacklers]' settlement,"[61] in that "[u]nderstandably the [Sacklers] are not going to agree to provide the consideration under the settlement without receiving the . . . releases in return."[62]

The nonconsensual nondebtor releases in *Purdue*, therefore, were approved *not* on the basis of a supposedly "more stringent"[63] standard applicable "specifically within the reorganization context."[64] The Sacklers' nonconsensual nondebtor releases were approved under "the more relaxed *Munford* [non]standard"[65] that "the parties would not have entered into a settlement without it, and thus it is 'integral' to the settlement."[66] The *Centro Group* decision, therefore, in its attempt to devise a nonexistent distinction between "settlement" and "reorganization," unwittingly exposes the utter emptiness of the purportedly "stringent" standard[67] that nonconsensual nondebtor releases "should be reserved for those unusual cases in which such an order is necessary for the success of the reorganization."[68]

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THE "NECESSARY" TO SUCCESSFUL REORGANIZATION FICTION

The truth about nonconsensual nondebtor releases is that the courts have never required that they be "necessary to successful reorganization" in the sense of saving an operating business from destruction. That is apparent from the many instances, such as *Centro Group*, in which nonconsensual nondebtor releases are approved in "reorganizations" that *liquidate* a defunct business's assets.[69] As applied by the courts, then, necessary to successful reorganization means necessary to do the deal embodied in the plan of reorganization—whether or not those whose third-party claims will be "released" have agreed to the deal—simply because those who negotiated the deal (including the "released" nondebtors) *say* that nonconsensual nondebtor releases are necessary to the deal.

Understandably, then, and despite the admonitions of courts of appeals that nonconsensual nondebtor releases are to be granted cautiously and infrequently, in only rare, unusual, and exceptional circumstances,[70] that has not been the case. As Judge McMahon has insightfully pointed out:

> Anyone can devise a plan that involves contributions from non-debtors who (not surprisingly) would condition their participation on being shielded from *their* creditors. And . . . every . . . corporate bankruptcy [debtor] can come up with some aspect of its situation that seems to it, and to its creditors, to be "unique." So it would be all too easy to . . . make a plan facet that is supposed to be an exception swallow the rule against non-debtor releases.[71]

Thus, there is an inevitable "transformation of relief circuit courts describe as 'extraordinary' into a routine part of nearly every chapter 11 case."[72] Judge Holt has aptly described this as "an example of the Lake Wobegon effect whereby many ordinary and average things are postured as extraordinary, causing the very concept of extraordinariness to lose meaning."[73]

> Permitting the practice of approving nonconsensual nondebtor releases that are "necessary to successful reorganization," while "preach[ing] caution" (as Courts of Appeals have done) is simply extreme naivete—especially if the hope is that this approach will exert any principled restraint on the practice. "Necessary to successful reorganization" is a negotiating position proffered by a nondebtor who will directly benefit from that which it insists is essential to any settlement deal. By positively inviting the nondebtor to manufacture the "evidence" necessary for approval, through its negotiating behavior, this standard virtually guarantees that approval will not and cannot be limited to "rare" and "unusual" cases, which the growing prevalence of the bankruptcy grifter phenomenon vividly illustrates.[74]

Indeed, Jutice Breyer's opinion in *Czyzewski v. Jevic Holding Corp.* made a similar observation in striking down an extra-statutory priority deviation approved using a similar "necessity" fiction. Such a standard "will lead to similar claims being made in many, not just a few, cases," which "threatens to turn a 'rare case' exception into a more general rule."[75] "[O]nce the floodgates are opened, [the negotiating parties] can be expected to make every case that 'rare case.' "[76] And as Judge McMahon put it, in vacating the Sacklers' releases in the *Purdue Pharma* case, "[w]hen every case is unique, none is unique."[77]

ENDNOTES:

[1]See generally Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. Ill. L. Rev. 959.

[2]See 11 U.S.C.A. § 1141(d)(1)(A).

[3]In re Centro Group, LLC, 71 Bankr. Ct. Dec. (CRR) 1, 2021 WL 5158001 (11th Cir. 2021), aff'g sub nom. Markland v. Centro Group, LLC, 2021 WL 1705754 (S.D. Fla. 2021).

[4]In re Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D. N.Y. 2021)

[5]In re Purdue Pharma, L.P., 2021 WL 5979108 (S.D. N.Y. 2021).

[6]Patterson v. Mahwah Bergen Retail Group, Inc., 2022 WL 135398, at *3 (E.D. Va. 2022).

[7]In re Seaside Engineering & Surveying, Inc., 780 F.3d 1070, 1078, 60 Bankr. Ct. Dec. (CRR) 212, 73 Collier Bankr. Cas. 2d (MB) 605, Bankr. L. Rep. (CCH) P 82783 (11th Cir. 2015).

[8]Centro Group, 2021 WL 5158001, at *3.

[9]Markland v. Centro Group, 2021 WL 1705754, at *2.

[10]See Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968).

[11]Markland v. Centro Group, 2021 WL 1705754, at *2.

[12]Id.

[13]Matter of Munford, Inc., 97 F.3d 449, 29 Bankr. Ct. Dec. (CRR) 1087, 36 Collier Bankr. Cas. 2d (MB) 1604, 35 Fed. R. Serv. 3d 1538 (11th Cir. 1996), aff'g 172 B.R. 404 (Bankr. N.D. Ga. 1993).

[14]Munford, 172 B.R. at 408.

[15]Id. (emphasis added).

[16]Munford, 97 F.3d at 452 (emphasis added).

[17]The bankruptcy court's settlement bar order provided:

> **FURTHER ORDERED** that [each of the defendants in the suit other than VRC, listed individually by name] ("*nonsettling defendants*") are *permanently barred*, restrained, and enjoined *from asserting*, commencing or continuing any and all *claims against Valuation Research Corporation for* partial, comparative equitable or total *indemnity or contribution*, however denominated, *for* or on account of *any claim alleged by debtor* in its complaint, as amended, in said adversary proceeding. As a result of this bar order, any and all such claims by said nonsettling defendants, against Valuation Research Corporation are barred, extinguished, satisfied, discharged, and/or otherwise unenforceable.

Munford, 172 B.R. at 414-15 (emphasis added).

[18]Id. at 409.

[19]Restatement (Third) of Restitution and Unjust Enrichment § 23 cmt. a, at 329 (2011) [hereinafter R3RUE]. "Important examples include claims between surety and principal obligor; between co-sureties; between joint promisors on contracts generally; between joint tortfeasors; between principal and agent; between general contractor and subcontractor; between co-fiduciaries; and between partners." Id.

[20]See 1 Palmer, The Law of Restitution § 1.5(d) (1978); see, e.g., Restatement (Second) of Torts: Apportionment of Liability § 22 reporter's note to cmt. b, at 277 (2000) [hereinafter R2TAL] (noting that the rationale for a noncontractual indemnity obligation is "that the indemnitee provided a benefit to the indemnitor, so the indemnitee [i]s entitled to restitution"); R3RUE § 23 cmt. a, at 331 ("Recurring instances of indemnity and contribution in particular contexts [include] indemnity and contribution between joint tortfeasors.").

[21]R3RUE § 23 cmt. a, at 328.

[22]Id. § 23. A similar restitution claim for equitable subrogation arises when A's performance of B's obligation is motivated by the reasonable possibility (but not certainty) that A may also be liable therefor. See id. § 24 & cmt. d.

[23]Andrew Kull & Ward Farnsworth, Restitution and Unjust Enrichment: Cases and Notes 146 (2018).

[24]Id.; see R3RUE § 23 cmt. e, illus. 13 (contribution) & cmt. f, illus. 15 (indemnity); *id.* reporter's note to cmt. e, at 342 (discussing "the rule that contribution between tortfeasors is unavailable against a settling co-defendant"); R2TAL § 23(a) (providing that "[w]hen two or more persons are or may be liable for the same harm and one of them discharges the liability of another by settlement or discharge of judgment, the person discharging the liability is entitled to recover contribution from the other, *unless the other previously had a valid settlement and release from the plaintiff*" (emphasis added)); *id.* cmt. i, at 288 & reporter's note to cmt. i, at 297. A settling defendant's immunity from subsequent noncontractual *indemnity* claims by nonsettling defendants also flows from the rule, frequently applicable, that a "plaintiff's settlement with either party to a relationship supporting indemnity releases the other party to that relationship from liability to the plaintiff." R2TAL § 22 cmt. c, at 273; *id.* § 16 cmt. d, at 136-37 & reporter's note to cmt. d, at 144-45; cf. Restatement (Third) of Suretyship and Guaranty §§ 39-44 & intro. note, at 167 (1996) (setting forth common-law suretyship rules that discharge a surety's obligations upon release of the primary obligor by the obligee).

[25]See *supra* note 10 and accompanying text.

[26]Munford, 172 B.R. at 410.

[27]See generally 2 Dan B. Dobbs, The Law of Torts § 388, at 1084-85 (2001); Richard A. Espstein, Torts § 9.7, at 232-34 (1999); R2TAL cmts. & reporter's note, at 133-47.

[28]The operative provision of the bankruptcy court's bar order, quoted *supra* note 17, therefore, added:

> Provided, however, that to protect the nonsettling defendants from the consequences of this bar order, the court directs that any judgment recovered by plaintiff debtor in said adversary proceeding against nonsettling defendants shall be reduced by the amount of $350,000 paid by Valuation

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Research Corporation in connection with the settlement of claims in this litigation.

Munford, 172 B.R. at 415.

[29]Most significantly, neither the bankruptcy court nor the Eleventh Circuit referenced the applicable Georgia law of indemnity and contribution, in support of the bar order, or the appropriate corresponding judgment-credit for the nonsettling co-defendants. Rather, those courts relied instead upon Code § 105(a). See Munford, 172 B.R. at 414, *aff'd*, 97 F.3d at 454-55. All of the estate's claims at issue, however, apparently were Georgia state-law claims. Thus, those courts' creation of a substantive federal common law of indemnity, contribution, and corresponding judgment credits for nonsettling joint tortfeasors was unconstitutional under Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938). See generally Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J.F. 960 (2022), https://ssrn.com/abstract=3960117.

Additionally, the bar order made no distinction between contractual indemnity rights and noncontractual, common-law indemnity rights. A plaintiff's separate settlement with a defendant cannot extinguish any contractual indemnity obligations the settling defendant has to nonsettling co-defendants. See R2TAL § 22 cmt. f, at 275 ("contractual indemnity is determined by the terms of the contract"); R3RUE § 23 cmt. f, illus. 15 (recognizing that even in the absence of a restitutionary indemnity claim, indemnitee may have contractual indemnity claim against indemnitor who previously settled and obtained release of plaintiff's claims against indemnitor). Apparently, none of the co-defendants in *Munford* claimed any contractual indemnity rights against VRC. To the extent that settlement bar orders entered on the authority of *Munford* do extinguish nonsettling co-defendants' otherwise-enforceable contractual indemnity rights against a settling defendant, that is also an unconstitutional creation of substantive federal common law under *Erie*.

[30]Each of those bills, in the proposed addition of § 113 to the Bankruptcy Code, provides in § 113(b)(3) that "[n]othing in subsection (a) of this section [prohibiting nonconsensual nondebtor releases and injunctions] shall affect any power the court might have . . . to bar a claim or cause of action for indemnity, reimbursement, contribution, or subrogation against an entity that the estate has released from a claim or cause of action for which the holder of the barred claim or cause of action also is or may be liable or has or may have secured." S. 2497, 117th Cong. § 2(a) (2021) (proposing 11 U.S.C.A. § 113); H.R. 4777, 117th Cong. § 2(a) (2021) (same).

[31]See, e.g., R2TAL § 16 reporter's note to cmt. c ("In order to effectuate partial settlements, the settling tortfeasor must be assured that the settlement agreement finally determines the settling tortfeasor's liability.").

[32]Munford, 97 F.3d at 455 (quoting In re U.S. Oil and Gas Litigation, 967 F.2d 489, 494, Fed. Sec. L. Rep. (CCH) P 96957 (11th Cir. 1992)).

[33]Munford, 97 F.3d at 454.

[34]Brophy v. Salkin, 550 B.R. 595, 600 (S.D. Fla. 2015).

[35]In re Fontainebleau Las Vegas Holdings, LLC, No. 09-21481-BKC-AJC, 2014 Bankr. LEXIS 3505 (Bankr. S.D. Fla. July 11, 2014).

[36]See, e.g., United States v. Hartog, 597 B.R. 673, 680-81 (S.D. Fla. 2019); Brophy, 550 B.R. at 600; In re Land Resource, LLC, 505 B.R. 571, 584 (M.D. Fla. 2014).

[37]Indeed, as discussed *infra*, that was precisely the context and justification for the bankruptcy court's approval of nonconsensual nondebtor releases for the Sacklers in the *Purdue Pharma* case—without those releases, the Sacklers purportedly would not have settled the estate's claims against them (e.g., for fraudulent conveyances and breach of fiduciary duty). See Purdue Pharma, 633 B.R. at 71, 83-84, 91-93, 107 (stating that "the plan's third-party release provisions . . . are an essential quid pro quo to the shareholder released parties' settlement" because "[u]nderstandably the shareholder released parties are not going to agree to provide the consideration under the settlement without receiving the shareholder releases in return").

[38]In re Seaside Engineering & Surveying, Inc., 780 F.3d 1070, 1078, 60 Bankr. Ct. Dec. (CRR) 212, 73 Collier Bankr. Cas. 2d (MB) 605, Bankr. L. Rep. (CCH) P 82783 (11th Cir. 2015).

[39]Markland v. Centro Group, 2021 WL 1705754, at *9.

[40]Centro Group, 2021 WL 5158001, at *2-*3.

[41]Markland v. Centro Group, 2021 WL 1705754, at *10.

[42]Seaside, 780 F.3d at 1077. That was the reasoning of the court in the *Fontainebleu* decision, 2014 Bankr. LEXIS 3505, at *13-*14 & n.6.

[43]Centro Group, 2021 WL 5158001, at *3 (emphasis added).

[44]Id.

[45]Brubaker, 131 Yale L.J.F. at 988-89. The legal standard for approval of the settlement bar order "is a negotiating position proffered by a

nondebtor[-defendant] who will directly benefit from that which it insists is essential to any settlement deal." Id. at 989.

[46]See Caplin v. Marine Midland Grace Trust Co. of New York, 406 U.S. 416, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972); Brubaker, 131 Yale L.J.F. at 984 & n.105.

[47]Centro Group, 2021 WL 5158001, at *3.

[48]Patterson, 2022 WL 135398, at *1.

[49]Centro Group, 2021 WL 5158001, at *3.

[50]Markland v. Centro Group, 2021 WL 1705754, at *9.

[51]Centro Group, 2021 WL 5158001, at *3.

[52]Id.

[53]Markland v. Centro Group, 2021 WL 1705754, at *10.

[54]Centro Group, 2021 WL 5158001, at *3.

[55]Brubaker, 1997 U. Ill. L. Rev. at 973.

[56]Id. at 974 (footnotes omitted).

[57]Purdue Pharma, 633 B.R. at 83.

[58]See id. at 91-93.

[59]Id. at 83.

[60]Id.

[61]Id. at 71.

[62]Id. at 107.

[63]Markland v. Centro Group, 2021 WL 1705754, at *10.

[64]Centro Group, 2021 WL 5158001, at *3.

[65]Markland v. Centro Group, 2021 WL 1705754, at *3.

[66]Centro Group, 2021 WL 5158001, at *3.

[67]Markland v. Centro Group, 2021 WL 1705754, at *10.

[68]Seaside, 780 F.3d at 1078.

[69]See Brubaker, 131 Yale L.J.F. at 988 & n.118.

[70]See Patterson, 2022 WL 135398, at *2 ("The Fourth Circuit has made clear that the use of third-party releases is disfavored, saying that such releases should be 'granted cautiously and infrequently,' " and "[o]ther circuits that permit their use likewise reserve their utilization for the rare or exceptional case." (quoting Behrmann v. National Heritage Foundation, 663 F.3d 704, 712, 55 Bankr. Ct. Dec. (CRR) 221, 66 Collier Bankr. Cas. 2d (MB) 1282, Bankr. L. Rep. (CCH) P 82124 (4th Cir. 2011)).

[71]In re Karta Corp., 342 B.R. 45, 55 (S.D. N.Y. 2006).

[72]In re Astria Health, 623 B.R. 793, 801 n.25, 69 Bankr. Ct. Dec. (CRR) 195 (Bankr. E.D. Wash. 2021); see In re Aegean Marine Petroleum Network Inc., 599 B.R. 717, 726 (Bankr. S.D. N.Y. 2019) ("Almost every proposed Chapter 11 Plan that I receive includes proposed releases."); Patterson, 2022 WL 135398, at *2 (noting that despite court-of-appeals directives that nonconsensual nondebtor releases are to be granted in only rare and exceptional cases, "the Bankruptcy Court for the Richmond Division of this district regularly approves third-party releases").

[73]Astria Health, 623 B.R. at 801 n.25.

[74]Brubaker, 131 Yale L.J.F. at 989 (footnotes omitted and quoting In re Ingersoll, Inc., 562 F.3d 856, 864, 51 Bankr. Ct. Dec. (CRR) 133, 61 Collier Bankr. Cas. 2d (MB) 1202, Bankr. L. Rep. (CCH) P 81469 (7th Cir. 2009)).

[75]Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 986, 197 L. Ed. 2d 398, 63 Bankr. Ct. Dec. (CRR) 242, 77 Collier Bankr. Cas. 2d (MB) 596, 41 I.E.R. Cas. (BNA) 1613, Bankr. L. Rep. (CCH) P 83082 (2017).

[76]Id. (quoting Frederick F. Rudzik, *A Priority Is a Priority Is a Priority—Except When It Isn't*, 34 Am. Bankr. Inst. J., Sept. 2015, at 16, 79).

[77]Purdue Pharma, 2021 WL 5979108, at *3; see also Patterson, 2022 WL 135398, at *2 (stating that the "ubiquity" and "prevalence" of releases "undermines assertions that they are integral to the success of this particular reorganization").

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MANDATORY AGGREGATION OF MASS TORT LITIGATION IN BANKRUPTCY

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This response to Professor Lindsey Simon's *Bankruptcy Grifters* article challenges the controversial practice at the epicenter of the bankruptcy grifter phenomenon that Simon critiques: so-called nonconsensual nondebtor (or third-party) "releases" and "channeling" injunctions that discharge the mass tort obligations of solvent nondebtor entities who have not themselves filed bankruptcy. These nondebtor releases are an illegitimate and unconstitutional exercise of substantive lawmaking powers by the federal courts that contravenes the separation-of-powers limitations embedded in both the Bankruptcy Clause and *Erie*'s constitutional holding. The federal courts have manufactured out of whole cloth the unique, extraordinary power to impose mandatory non-opt-out settlement of a nondebtor's mass tort liability on unconsenting tort victims through the bankruptcy proceedings of a codefendant. The bankruptcy "necessity" that supposedly justifies this astounding and unique settlement power—to mandate nonconsensual non-opt-out "settlements" that are otherwise impermissible and unconstitutional—is (at best) naive credulity or (at worst) specious sophistry.

Nonconsensual nondebtor releases are not "necessary" for the bankruptcy process to facilitate efficient aggregate settlements of the mass tort liability of both bankruptcy debtors and nondebtor codefendants. The bankruptcy jurisdiction, removal, and venue provisions of the Judicial Code already contain the essential architecture for mandatory, universal consolidation of tort victims' claims against *both* bankruptcy debtors *and* nondebtor codefendants. Bankruptcy can be an extremely powerful aggregation process that facilitates efficient (and fair) settlements of the mass tort liability of nondebtors, even (and especially) without nonconsensual nondebtor releases, particularly if the Supreme Court elucidates the full expanse of federal bankruptcy jurisdiction. Nondebtor releases are an illicit and unconstitutional means of forcing mandatory settlement of unconsenting tort victims' claims against solvent nondebtors, and the Supreme Court should finally resolve the longstanding circuit split over the permissibility of nonconsensual nondebtor releases by categorically renouncing them.

Keywords: nondebtor releases, third-party releases, channeling injunctions, nondebtor discharge, the *Erie* doctrine, the Bankruptcy Power, the Bankruptcy Clause, federalism, separation of powers, Chapter 11 bankruptcy reorganizations, mass tort bankruptcies, mandatory settlement, non-opt-out settlement, multidistrict litigation, MDL consolidations, class actions, nonclass aggregation, mandatory consolidation, mandatory aggregation

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MANDATORY AGGREGATION OF MASS TORT LITIGATION IN BANKRUPTCY

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Mandatory Aggregation of Mass Tort Litigation in Bankruptcy

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ABSTRACT. This Response to *Bankruptcy Grifters* by Lindsey Simon shares her concerns about the inequities of a solvent entity, which has not filed bankruptcy, discharging its mass tort liability in the bankruptcy proceedings of a codefendant. Such a nondebtor discharge, effectuated through a so-called nondebtor release and channeling injunction, imposes upon tort victims a mandatory non-opt-out settlement of the released nondebtor's mass tort liability. Simon's proposed reforms of nondebtor-release practice do not go far enough. Nondebtor releases are an illegitimate and unconstitutional exercise of substantive lawmaking powers by the federal courts. Moreover, the bankruptcy "necessity" proffered as justifying a mandatory settlement of nondebtors' mass tort liability—a mandatory settlement that is otherwise impermissible and unconstitutional—is nothing more than pretext. The Supreme Court should resolve the circuit split over the permissibility of nondebtor releases by flatly repudiating them. Bankruptcy can serve as a powerful aggregation process for efficient (and fair) resolution of the mass tort liability of *both* debtors *and* nondebtor codefendants even (and especially) without nondebtor releases, particularly if the Supreme Court also clarifies the full expanse of federal bankruptcy jurisdiction.

INTRODUCTION

Professor Lindsey Simon's fascinating and revealing article, *Bankruptcy Grifters*,[1] comes in the midst of a collective epiphany regarding the astonishing means by which federal bankruptcy courts impose mandatory settlements of mass tort liabilities. Of course, with respect to an insolvent debtor's liability, such a power has always been incident to collective insolvency proceedings, even before the

1. Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154 (2022).

enactment of the current Bankruptcy Code.[2] What is remarkable (and profoundly disturbing) about the bankruptcy grifter phenomenon Simon documents, however, is that bankruptcy courts have, entirely at their own behest, invented the immense, extraordinary power to impose mandatory non-opt-out settlements of mass tort victims' claims against eminently solvent *non*debtors, who have *not* filed bankruptcy themselves.

I wholeheartedly share Simon's concerns regarding the inequities the bankruptcy grifter phenomenon has wrought. Indeed, I predicted as much twenty-five years ago,[3] in the wake of the first big bankruptcy grift involving the Dalkon Shield contraceptive device manufactured by A.H. Robins. Those who succeeded in discharging their liability exposure in the Robins bankruptcy case included a long list of alleged joint tortfeasors: Robins's insurer (Aetna), members of the Robins family, and other officers, directors, employees, and attorneys for Robins. Personal injury claimants asserted that Robins and Aetna affirmatively concealed from the public the dangers of the Dalkon Shield and that individual actors personally participated in defrauding the public through the marketing of the Dalkon Shield.[4]

The pending Purdue Pharma bankruptcy, implicating the Sackler family's personal responsibility for the ravages of the opioid OxyContin,[5] initially unfolded as essentially a replay of the A.H. Robins case. But the Robins bankruptcy grift went largely unnoticed, except in the insulated community of bankruptcy professionals, who aggressively exploited the precedent, fueling the proliferating and rapidly accelerating system of bankruptcy grifting.[6] The prospect of liability releases for the Sacklers in the Purdue Pharma case, however, finally awakened

2. *See generally* Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. TORT L. 59 (2012) (recounting the resolution of the litigation spawned by the 1944 Ringling Brothers circus fire through a state-court equitable receivership proceeding).

3. Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959.

4. *See id.* at 963; *In re* A.H. Robins Co., 88 B.R. 742, 751-55 (E.D. Va. 1988) (confirming plan of reorganization), *aff'd*, 880 F.2d 694, 700-02 (4th Cir. 1989); *In re* A.H. Robins Co., 131 B.R. 292, 294-96 (E.D. Va. 1991) (quoting plan of reorganization's nondebtor release and injunction provisions), *rev'd*, 972 F.2d 77 (4th Cir. 1992).

5. *See* Samir D. Parikh, *The New Mass Torts Bargain*, 90 FORDHAM L. REV. (forthcoming 2022), https://ssrn.com/abstract=3649611 [https://perma.cc/49VW-TWJ5].

6. *See* Ralph Brubaker, *A Case Study in Federal Bankruptcy Jurisdiction: Core Jurisdiction (or Not) to Approve Non-Debtor "Releases" and Permanent Injunctions in Chapter 11*, 38 BANKR. L. LETTER, no. 2, Feb. 2018, at 1, 6 (noting that "until the Fourth Circuit's 1989 decision in the A.H. Robins reorganization, it was virtually unthinkable . . . that a bankruptcy court could enter an order discharging the *in personam* liability of a nondebtor party to a debtor's creditors").

a wider realization, even and perhaps particularly among the general public,[7] with all of the shock, disbelief, and outrage that bankruptcy grifting should have elicited from its infancy.[8]

While I agree with Simon that bankruptcy grifting is a momentous, pressing problem, I disagree with her regarding the appropriate response. Simon seems resigned to the inevitability of the highly controversial practice that makes bankruptcy grifting possible: so-called nonconsensual nondebtor (or third-party) "releases," which extinguish creditors' claims against a nondebtor without the

7. *See, e.g.*, Patrick Radden Keefe, *The Sackler Family's Plan to Keep Its Billions*, NEW YORKER (Oct. 4, 2020), https://www.newyorker.com/news/news-desk/the-sackler-familys-plan-to-keep-its-billions [https://perma.cc/98TA-FT4B]; Libby Lewis, *The Sackler Family's Bankruptcy Scheme*, AM. PROSPECT (Mar. 31, 2021), https://prospect.org/justice/sackler-familys-bankruptcy-scheme [https://perma.cc/V9WG-JP56]; Gerald Posner & Ralph Brubaker, Opinion, *The Sacklers Could Get Away With It*, N.Y. TIMES (July 22, 2020), https://www.nytimes.com/2020/07/22/opinion/sacklers-opioid-epidemic.html [https://perma.cc/9Y6E-5KFZ]; Jonathan Randles, *Congressional Democrats Target Legal Releases for Purdue Pharma Owners*, WALL ST. J. (Mar. 19, 2021), https://www.wsj.com/articles/congressional-democrats-target-legal-releases-for-purdue-pharma-owners-11616185184 [https://perma.cc/7CQK-67AR]; Last Week Tonight with John Oliver, *Opioids III: The Sacklers*, YOUTUBE (Aug. 8, 2021), https://www.youtube.com/watch?v=uaCaIhfETsM [https://perma.cc/7P72-2LYD]; *How Asbestos Saved the Sackler Family from Bankruptcy*, ECONOMIST (Sept. 9, 2021), https://www.economist.com/united-states/2021/09/09/how-asbestos-saved-the-sackler-family-from-bankruptcy [https://perma.cc/CP33-SFFZ].

8. The bankruptcy court approved liability releases for the Sacklers in September of 2021. *In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y. 2021). In a dramatic development in December of 2021, while this Response was in the final stages of production, the district court vacated the bankruptcy court's decision, holding that nonconsensual nondebtor releases are not authorized by the Bankruptcy Code and thus are impermissible. *In re* Purdue Pharma, L.P., No. 21 cv 7532, 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021); *see Third-Party, Non-Consensual Releases Nixed in the Purdue "Opioid" Reorganization*, ROCHELLE'S DAILY WIRE (Dec. 20, 2021), https://www.abi.org/newsroom/daily-wire/third-party-non-consensual-releases-nixed-in-the-purdue-%E2%80%98opioid%E2%80%99-reorganization [https://perma.cc/JHR9-P3GB] (describing the district court's decision as "remarkable" and "one of the most consequential decisions for the chapter 11 system that's ever been handed down"); Vince Sullivan, *Seismic Purdue Ruling May Finally Get the High Court's Attention*, LAW360 (Dec. 17, 2021), https://www.law360.com/articles/1449858/seismic-purdue-ruling-may-finally-get-high-court-s-attention [https://perma.cc/VAS2-6PLU]. The Second Circuit granted leave for an expedited, interlocutory appeal of that decision, and as of this writing, that appeal is pending. Purdue Pharma, L.P. v. Washington, No. 22-85 (2d Cir. Jan. 27, 2022) (order granting expedited, interlocutory appeal).

consent (and even over the objection) of creditors[9] in the same way that a bankruptcy discharge extinguishes a bankruptcy debtor's debts.[10] Such nondebtor-release provisions most frequently appear in the terms of a Chapter 11 debtor's plan of reorganization. And in confirming a plan containing such a nondebtor-release provision, the court will typically enter an order permanently enjoining assertion of the released claims (now commonly known as a "channeling" injunction[11]), replicating the effect of the Bankruptcy Code's statutory discharge

9. This Response addresses only nonconsensual nondebtor releases. Many courts will approve releases that are binding upon only those creditors who consent to release of their claims against a nondebtor. *See, e.g.*, *In re* Specialty Equip. Cos., 3 F.3d 1043, 1045-47 (7th Cir. 1993). All references herein to nondebtor releases are solely to nonconsensual nondebtor releases.

10. The bankruptcy court's confirmation of a plan of reorganization in a Chapter 11 case "discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(1)(A) (2018).

11. The "channeling" terminology, in reference to injunctions effectuating nondebtor releases, has its origins in a beguiling effort to portray nondebtor releases as consistent with bankruptcy courts' longstanding, traditional *in rem* injunctive powers. In reality, though, nondebtor releases are a perversion of bankruptcy courts' conventional *in rem* injunctive powers. *See* Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten* Callaway v. Benton *Case*, 72 AM. BANKR. L.J. 1, 14-22 (1998) [hereinafter Brubaker, *Nondebtor Release Jurisdiction*]; Lewis, *supra* note 7 ("In the guise of something designed to protect property, a liability release for [a nondebtor] does something radical. It forcibly converts the *rights* of victims to seek redress for *personal* misconduct by the [nondebtor] into a kind of *property* of [the debtor]. Property that [the debtor] can dispose of any way it wants as part of its bankruptcy . . . ."). Nonetheless, the "channeling" terminology is now widely employed to describe injunctions that effectuate a discharge of personal liability (of either a debtor or a nondebtor) that leaves specified property as the only source of recovery for those whose claims have been discharged – that is, their claims are "channeled" away from the discharged person and toward and against that property (and only that property).

"Channeling" can also connote a more limited, purely procedural, forum-consolidating and centralizing injunction, known as an anti-suit injunction amongst complex litigation scholars, that prevents assertion of a claim in any court other than the one issuing the anti-suit "channeling" injunction. *See* JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION AND ITS ALTERNATIVES 101 (2d ed. 2018). With respect to creditors' claims against a bankruptcy debtor, including the disputed claims of tort victims, bankruptcy's statutory automatic stay functions as a channeling injunction in both senses. By enjoining creditors from asserting their claims against the debtor personally, the automatic stay has the indirect effect of forcing creditors to file their claims (if at all, given the prospect of a bankruptcy discharge of the debtor's personal liability) in the bankruptcy court as claims against the debtor's bankruptcy estate (i.e., the debtor's property). *See* Ralph Brubaker, *Money Judgments in Governmental Regulatory Actions: A Lesson in the Multiple Functions of Bankruptcy's Automatic Stay*, 36 BANKR. L. LETTER, no. 10, Oct. 2016, at 1 (noting that "the stay serves a *channeling function* that promotes judicial economy and efficiency in administration of bankruptcy estates – channeling all claims against the debtor's estate into one forum, the federal bankruptcy court, for efficient, centralized resolution, rather than allowing piecemeal adjudications in various state and fed-

injunction (which is, of course, applicable to only *the debtor's* discharged debts).[12]

Unlike Simon, I do not believe that we should simply abandon what she recognizes as an "obvious solution"[13] to the bankruptcy grifter problem: prohibiting nonconsensual nondebtor releases.[14] As Simon points out, the ever-larger waves of bankruptcy grifting and the degree to which grifting disadvantages claimants is a significant and urgent problem, one that I believe warrants the attention of the Supreme Court. Indeed, there is a prominent, longstanding circuit split over the propriety of nondebtor releases that begs for resolution.[15]

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eral courts"); Stern v. Marshall, 564 U.S. 462, 493 (2011) (observing that a creditor "had nowhere else to go if he wished to recover from [the debtor]'s estate"); Ralph Brubaker, *The* Erie *Doctrine, Code Common Law, and Choice of Law Rules in Bankruptcy (Part II)*, 32 BANKR. L. LETTER, no. 6, June 2012, at 1, 7, 4 (explaining how "the automatic stay of all nonbankruptcy suits against the debtor operates in conjunction with the requirement that a creditor (in order to receive a distribution from the debtor's bankruptcy estate) must file a proof of claim with the 'home' bankruptcy court in the district in which the debtor's bankruptcy case is pending," and "the combined effect of the automatic stay and the discharge injunction typically means that a creditor's only recourse with respect to [a] claim against the debtor, once the debtor files bankruptcy, is to assert that claim against the debtor's bankruptcy estate"); *infra* Section III.A.

12. 11 U.S.C. § 524(a) (2018).

13. Simon, *supra* note 1, at 1205.

14. And the sensational recent decision of the district court in the *Purdue Pharma* case, discussed *supra* note 8, gives me renewed hope that pressing for outright prohibition may not be a futile endeavor, even in the face of the "long-established practice in Chapter 11 and general acceptance . . . by the bench and bar." Simon, *supra* note 1, at 1205; *see also* Patterson v. Mahwah Bergen Retail Grp., No. 21cv167, 2022 WL 135398 (E.D. Va. Jan. 13, 2022) (invalidating nonconsensual nondebtor releases approved by a bankruptcy court, on multiple grounds, including violation of the claimants' due-process rights).

15. The Fifth, Ninth, and Tenth Circuits prohibit nonconsensual nondebtor releases. *See In re* Zale Corp., 62 F.2d 746, 759-62 (5th Cir. 1995); *In re* Lowenschuss, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re* W. Real Estate Fund, Inc., 922 F.2d 592, 600-02 (10th Cir. 1990), *modified on other grounds sub nom.* Abel v. West, 932 F.2d 898 (10th Cir. 1991); *cf.* Blixseth v. Credit Suisse, 961 F.3d 1074, 1081-85, 1082 (9th Cir. 2020) (approving a narrow exception to its ban on nondebtor releases for claims "focused on actions of various participants in the Plan approval process and relating only to that process"); *In re* Pac. Lumber Co., 584 F.3d 229, 251-53 (5th Cir. 2009) (approving nondebtor releases for members of the official committee of unsecured creditors that did "not insulate them from willfulness and gross negligence," consistent with their "qualified immunity for actions within the scope of their duties"). The Fourth, Sixth, Seventh, and Eleventh Circuits permit nonconsensual nondebtor releases. *See In re* A.H. Robins Co., 880 F.2d 694, 700-02 (4th Cir. 1989); Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 656-58 (6th Cir. 2002); *In re* Ingersoll, Inc., 562 F.3d 856, 864-65 (7th Cir. 2008); *In re* Seaside Eng'g & Surveying, Inc., 780 F.3d 1070, 1078-79 (11th Cir. 2015). The Third Circuit—important because of the large number of big Chapter 11 cases filed in the District of Delaware—has expressly equivocated. *See In re* Cont'l

Moreover, nondebtor releases pose much larger questions than the typical statutory-interpretation disputes that comprise the bulk of the Supreme Court's bankruptcy jurisprudence. As I explain in Part I of this Response, the fundamental illegitimacy of nondebtor releases is of a constitutional magnitude, implicating constraints imposed by the separation-of-powers dimensions of both the Bankruptcy Clause and *Erie*'s constitutional holding.

Moreover, the process by which bankruptcy courts approve nondebtor releases departs dramatically from the baseline requirements for resolving disputed nonbankruptcy claims and causes of action, in ways that raise serious due-process concerns. Giving bankruptcy courts the unique power to impose mandatory non-opt-out settlements of tort victims' claims against nondebtors—settlements that are otherwise impermissible and unconstitutional—requires an explanation of why this extraordinary settlement power with respect to claims against a solvent *nondebtor* should exist *only* when a codefendant happens to be a bankruptcy debtor. But as I discuss in Part II, the only proffered justification is nothing more than empty, false rhetoric—what I dub bankruptcy's "necessity" fiction. Nondebtor releases do not advance any legitimate bankruptcy policy; they simply provide a contrived means for solvent nondebtors to impose extraordinary mandatory settlements of their mass tort liabilities upon nonconsenting victims.

Efficient (and fair) joint settlements of both debtors' and nondebtors' mass tort liability will still be possible, even (and particularly) if nonconsensual nondebtor releases are prohibited. As Part III demonstrates, the essential architecture for facilitating powerful aggregation and corresponding settlement of tort victims' claims against nondebtors already exists in the bankruptcy jurisdiction, removal, and venue provisions of the Judicial Code. And a much-needed rationalization of the scope of federal bankruptcy jurisdiction would unleash bankruptcy's full aggregation potential.

As a practical and institutional matter, the Supreme Court is the one body that can (relatively quickly and within the confines of existing law) both end the disturbing bankruptcy grifting we are now witnessing and preserve bankruptcy

Airlines, Inc., 203 F.3d 203, 213-14 (3d Cir. 2000). The also-important Second Circuit, which encompasses another popular destination for large Chapter 11 cases, the Southern District of New York, has sent mixed signals regarding their permissibility. *See In re* Metromedia Fiber Network, Inc., 960 F.3d 136, 142-43 (2d Cir. 2005); *In re* Johns-Manville Corp., 517 F.3d 52, 66 (2d Cir. 2008), *rev'd on other grounds sub nom.* Travelers Indem. Co. v. Bailey, 557 U.S. 137, 155 (2009); Ralph Brubaker, *Supreme Court Validates "Clarified"* Manville *Insurance Injunction: Channeling . . . and So Much More!*, 29 BANKR. L. LETTER, no. 8, Aug. 2009, at 1, 5; *In re* Purdue Pharma, L.P., No. 21 cv 7532, 2021 WL 5979108, at *53-60 (S.D.N.Y. Dec. 16, 2021) (reviewing Second Circuit case law).

as a viable forum for comprehensive, efficient, and fair resolutions of nondebtors' mass tort liability. Accordingly, my response to the troubling rise in bankruptcy grifting, in Part IV, is a plea for action by the Supreme Court.

I. THE ILLEGITIMACY AND UNCONSTITUTIONALITY OF NONDEBTOR RELEASES

One of the principal justifications courts rely upon to approve a nonconsensual nondebtor release – one of the so-called *Master Mortgage*[16] or *Dow Corning* factors[17] – is that the released "non-debtor has contributed substantial assets to the reorganization."[18] Nothing in the Bankruptcy Code expressly authorizes a "release" or discharge of a nondebtor's liability on this basis (or any other).[19] Nonetheless, such power purportedly flows from bankruptcy courts' general equitable powers under § 105(a) of the Bankruptcy Code.[20] But such a judicially designed discharge of debt is an unconstitutional judicial usurpation of a quintessential legislative function, as revealed by both *Erie*'s constitutional holding and the Bankruptcy Clause itself.

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16. *See In re* Master Mortg. Inv. Fund, Inc., 168 B.R. 930, 934-35 (Bankr. W.D. Mo. 1994).

17. *See Dow Corning*, 280 F.3d at 658.

18. *Id.* The *Master Mortgage* factors are the following:

> (1) There is an identity of interest between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate.
> (2) The non-debtor has contributed substantial assets to the reorganization.
> (3) The injunction is essential to reorganization. Without the [sic] it, there is little likelihood of success.
> (4) A substantial majority of the creditors agree to such injunction, specifically, the impacted class, or classes, has "overwhelmingly" voted to accept the proposed plan treatment.
> (5) The plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction.

Master Mortg., 168 B.R. at 934-35 (footnotes omitted).

19. This is with the exception of certain third-party releases expressly authorized in asbestos bankruptcies. *See* 11 U.S.C. § 524(g)(4)(A)(ii)-(iii) (2018). *See generally* Joshua M. Silverstein, *Overlooking Tort Claimants' Best Interests: Non-Debtor Releases in Asbestos Bankruptcies*, 78 UMKC L. REV. 1 (2009) (discussing nondebtor releases authorized by § 524(g)).

20. 11 U.S.C. § 105(a) (2018) (providing that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title"). Through this provision, Congress sought to give federal bankruptcy courts the same equitable powers granted to all federal courts in the All Writs Act to "issue all writs necessary or appropriate in aid of their respective jurisdiction," 28 U.S.C. § 1651(a) (2018), as well as "any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute," H.R. REP. NO. 95-595, at 317 (1977).

Since Congress does have the power to explicitly provide for discharge of the obligations of a nondebtor, it is common to analyze the legality of nonconsensual nondebtor releases strictly as a matter of statutory interpretation, setting aside any consideration of constitutional issues.[21] However, that approach is incomplete, even as a matter of statutory interpretation, because fundamental principles of constitutional structure guide and inform the appropriate construction of the Bankruptcy Code. The separation-of-powers implications of *Erie* and the Bankruptcy Clause provide substantive constitutional canons of statutory interpretation that cogently elucidate why nothing in the Bankruptcy Code can plausibly be read to authorize nonconsensual nondebtor releases.

A. Erie*'s Constitutional Imperative*

A revealing manner of framing *Erie*'s relevance to nondebtor releases is to consider practice before enactment of the Bankruptcy Code in 1978. The Supreme Court has repeatedly emphasized that it "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."[22]

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21. *See, e.g.*, *In re* Purdue Pharma, L.P., No. 21 cv 7532, 2021 WL 5979108, at *4 (S.D.N.Y. Dec. 16, 2021) ("Because I conclude that the Bankruptcy Court lacked statutory authority to impose the [nonconsensual nondebtor] Release, I need not and do not reach the constitutional questions that have been raised by the parties."); Brubaker, *supra* note 3, at 996 n.130 (acknowledging that "non-debtor releases raise serious constitutional concerns," but suggesting "that an appropriate construction of the Bankruptcy Code, which denies courts the power to approve non-debtor releases, properly avoids any constitutional infirmity").

22. Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990); *see* RONALD J. MANN, BANKRUPTCY AND THE U.S. SUPREME COURT 145 (2017) ("The strength of that principle is apparent from the pattern of its use."). If a departure from pre-Code law is not clear from the text of the statute itself, the Court looks for at least some "indication of intent to do so in the legislative history," because "it is most improbable" "that a major change in the existing rules" "would have been made without even any mention in the legislative history." United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 380 (1988). This is bankruptcy's version of "the dog that did not bark" (or Sherlock Holmes) canon of statutory interpretation. *See* WILLIAM N. ESKRIDGE, JR., JAMES J. BRUDNEY & JOSH CHAFETZ, LEGISLATION AND STATUTORY INTERPRETATION 284 (3d ed. 2022); Anita Krishnakumar, *The Sherlock Holmes Canon*, 84 GEO. WASH. L. REV. 1 (2016); SIR ARTHUR CONAN DOYLE, *Silver Blaze*, *in* SHERLOCK HOLMES: THE COMPLETE NOVELS AND STORIES 521, 540 (2003) (when Holmes refers to "the curious incident of the dog in the night-time" and Detective Gregory quizzically responds that "[t]he dog did nothing in the night-time," Holmes replies, "[t]hat was the curious incident").

The predecessor Bankruptcy Act of 1898[23] contained a provision virtually identical to Code § 105(a),[24] and the 1898 Act cases uniformly held that this provision did not authorize nonconsensual nondebtor discharge provisions.[25] Likewise, the Supreme Court held that bankruptcy courts' equitable injunctive powers did not authorize a nonconsensual nondebtor release via permanent injunction in *Callaway v. Benton*.[26] The 1898 Act gave the courts no such substantive discharge power. Moreover, there is nothing in the current Bankruptcy Code or its legislative history to indicate any intention of overturning the 1898 Act practice prohibiting nondebtor discharges and permanent nondebtor injunctions.

The only remotely relevant statutory change in 1978, with enactment of the Bankruptcy Code, was an enlargement of federal bankruptcy jurisdiction to reach all proceedings "related to" a debtor's bankruptcy case.[27] That provision, quite purposefully, expanded the reach of federal bankruptcy jurisdiction to encompass a broad range of *third-party* claims and causes of action—that is, claims that are asserted neither by nor against the debtor's bankruptcy estate, but that are nonetheless sufficiently "related to" the debtor's bankruptcy case.[28] That grant of third-party "related to" jurisdiction is what convinced bankruptcy courts

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23. Act of July 1, 1898, ch. 541, 30 Stat. 544 (amended variously from 1903-1976 and repealed in 1978).

24. *Id.* § 2a(15), *as reprinted in* 1 COLLIER ON BANKRUPTCY 134 (James Wm. Moore et al. eds., 14th ed. 1974) (authorizing bankruptcy courts to "[m]ake such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act").

25. *See, e.g.*, Com. Wholesalers, Inc. v. Invs. Com. Corp., 172 F.2d 800, 801 (9th Cir. 1949); Weber v. Diversey Bldg. Corp. (*In re* Diversey Bldg. Corp.), 86 F.2d 456, 457-58 (7th Cir. 1936); *In re* Nine N. Church St., 82 F.2d 186, 188-89 (2d Cir. 1936). *See generally* Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 29-33 (discussing nondebtor discharge under the 1898 Act).

26. 336 U.S. 132, 136-41 (1949). *See generally* Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 54-59 (discussing *Callaway v. Benton*).

27. That grant now resides in 28 U.S.C. § 1334(b) (2018).

28. *See* Celotex Corp. v. Edwards, 514 U.S. 300, 307 n.5 (1995); Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 777-800 (2000) ("[T]here was explicit recognition in the legislative process that 'related to' bankruptcy jurisdiction went beyond claims by and against the estate and would embrace disputes between third parties having some relationship to the bankruptcy case.").

that they now have the power (that did not exist before 1978) to enjoin the assertion of creditors' claims against a nondebtor.[29] In fact, in approving nondebtor releases, most courts simply collapse the "related to" jurisdictional inquiry into their analyses regarding whether a release should be approved because "[t]here is an identity of interest between the debtor and the third party . . . such that a suit against the non-debtor is, in essence, a suit against the debtor"[30] or—according to the most crucial of the *Master Mortgage* or *Dow Corning* factors—the release is "necessary" or "essential" to the debtor's reorganization.[31]

As the Supreme Court recognized in *Callaway v. Benton*,[32] though, a bankruptcy jurisdiction statute, in and of itself, cannot supply grounds for substantive discharge relief.[33] The right to such substantive relief must exist independent of the jurisdictional grant via the express terms of the bankruptcy statute. To derive the substantive power to discharge debts (which are usually obligations grounded in state law) from the "related to" jurisdictional grant runs afoul of *Erie*.[34] Indeed, *Erie* is a pervasive presence in bankruptcy, where it typically travels incognito under the rubric of the *Butner* doctrine,[35] pursuant to which "state law governs the substance" of parties' rights and obligations in bankruptcy proceedings.[36]

The *Erie* decision—in its constitutional holding, construction of the Rules of Decision Act, and broader policy penumbra—is not limited to diversity cases.[37]

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29. *See* Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 31-35, 59. For example, the bankruptcy court in *Purdue Pharma* disregarded *Callaway v. Benton* because "[t]hat decision . . . preceded 28 U.S.C. § 1334(b)'s jurisdictional grant, which . . . significantly broadened the jurisdictional scheme that existed before the Bankruptcy Code's enactment." *In re* Purdue Pharma L.P., 633 B.R. 53, 98 (Bankr. S.D.N.Y.), *vacated*, No. 21 cv 7532, 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021).

30. Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 658 (6th Cir. 2002); *see, e.g.*, *Purdue Pharma*, 633 B.R. at 95-98, 103-05; *see also* Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate Over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 EMORY BANKR. DEV. J. 13, 72 (2006) (stating that the identity-of-interest factor overlaps with requisite subject-matter jurisdiction).

31. *Dow Corning*, 280 F.3d at 658; *see* Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 48-49. I have more to say about the vacuity of this supposedly stringent requirement in Part II, *infra*.

32. 336 U.S. 132, 136-41 (1949).

33. *See* Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 57-59.

34. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

35. So-named for the case of *Butner v. United States*, 440 U.S. 48 (1979).

36. Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000) (citing *Butner*, 440 U.S. at 57).

37. *See generally* Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980) (discussing the applicability of *Erie* in nondiversity cases).

While the suggestion to the contrary is an "oft-encountered heresy,"[38] "the *Erie* doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law."[39] Consequently, *Erie* is particularly important in federal bankruptcy proceedings.[40]

Indeed, by its very nature, bankruptcy "law" is more procedural than substantive.[41] As I have noted before,

> [B]ankruptcy 'law,' for the most part, functions not to create distinct federal grounds for recovery or relief, but to create an alternative means for enforcing existing substantive rights, most of which are grounded in state law. . . . Thus, . . . congressional power to enact uniform national bankruptcy 'laws' necessarily, and even primarily, envisions the power to place adjudication of all disputes incident to administering bankruptcy estates in federal court.[42]

The Supreme Court's famous reasoning in the bankruptcy case *Butner v. United States*, therefore, was simply an unattributed expression of the *Erie* doctrine:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from

38. Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 n.122 (1964).

39. Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 541 n.1 (2d Cir. 1956) (typeface altered).

40. *See* Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1033 (1953) (stating that, as regards the applicability of *Erie* in nondiversity cases, "[n]owhere is this more true than in bankruptcy"); Thomas E. Plank, *The* Erie *Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 650 (2004).

41. *See* Ralph Brubaker, *Explaining* Katz*'s New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 AM. BANKR. INST. L. REV. 95, 127 (2007).

42. Brubaker, *supra* note 28, at 807-08; *see also* Ralph Brubaker, *The Regulatory Authority of Administrative Agencies Versus the Bankruptcy Code (and Bankruptcy Court Jurisdiction)*, 23 BANKR. L. LETTER, no. 23, May 2003, at 1, 10 (noting that "to a very large extent, it is impossible to separate bankruptcy 'laws' from their administration by the federal bankruptcy courts").

> receiving "a windfall merely by reason of the happenstance of bankruptcy."[43]

Moreover, the *Butner* Court made clear that those "justifications for application of state law" in bankruptcy proceedings "are not limited to ownership interests."[44] And those justifications precisely replicate "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws" in the sense "that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in federal court."[45]

Erie is grounded in two synergistic principles of constitutional structure: federalism and separation of powers. Likewise, *Butner*'s instantiation of *Erie* in bankruptcy also fortifies those same two cornerstones of our constitutional system, which illuminate the unconstitutionality of nondebtor releases.

1. Federalism

The twin aims of *Erie* flow from "the policy that underlies *Erie*," which is vitally "important to our federalism."[46] Indeed, it seems that an implicit premise of *Erie*'s policy reasoning was the federalism impetus that "federal courts . . . must respect the definition of state-created rights and obligations."[47] The *Erie/Butner* doctrine in bankruptcy—that all parties' rights and obligations must be governed by state law in the absence of countervailing federal bankruptcy law—is likewise animated by overt federalism sensitivities.[48] And wholesale extinguishment of creditors' state-law rights against nondebtors via nonconsensual liability releases is obviously troubling from a federalism

43. Butner v. United States, 440 U.S. 48, 55 (1979) (quoting Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609 (1961)); *see* Plank, *supra* note 40, at 650; Lawrence Ponoroff, *Neither 'Twixt Nor 'Tween: Emerging Property Interests in Bankruptcy*, 61 ARIZ. L. REV. 101, 135-36 (2019).

44. *Butner*, 440 U.S. at 55. Thus, for example, "[w]hat claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed, is a question which, in the absence of overruling [nonbankruptcy] federal law, is to be determined by reference to state law." Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946).

45. Hanna v. Plumer, 380 U.S. 460, 467-68 (1965).

46. Guar. Tr. Co. v. York, 326 U.S. 99, 109-10 (1945); *see also Hanna*, 380 U.S. at 474 (Harlan, J., concurring) ("I have always regarded that decision as one of the modern cornerstones of our federalism . . . .").

47. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 535 (1958).

48. *See In re* Village Props., Ltd., 723 F.2d 441, 446 (5th Cir. 1984) (noting the "federalism concerns that underpin the *Butner* decision"); CHARLES J. TABB & RALPH BRUBAKER, TEACHER'S MANUAL FOR BANKRUPTCY LAW: PRINCIPLES, POLICIES, AND PRACTICE 219-20 (4th ed. 2015).

perspective.[49] But those federalism concerns play only a subsidiary, supporting role in pinpointing the unconstitutionality of nondebtor releases under *Erie*.

Erie's constitutional holding is multifaceted and the full extent of its applicability in bankruptcy is uncertain.[50] Nonetheless, it unquestionably does have significance for the third-party claims discharged via nondebtor release. The federal courts' "related to" bankruptcy jurisdiction over third-party claims (such as those discharged via nondebtor releases) is a species of supplemental jurisdiction,[51] and claims before a federal court through supplemental jurisdiction are a classic example of a nondiversity context in which *Erie*'s constitutional holding compels that "state law must govern because there can be no other law."[52] As the Supreme Court has acknowledged, then, for a state-law claim within the federal courts' "related to" bankruptcy jurisdiction, "[i]t is clear, under *Erie R. Co. v. Tompkins*, that [state] law governs the substantive elements of [the] claim."[53]

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49. And those federalism instincts also align with one of the most influential normative theories of bankruptcy law, creditors' bargain theory. *See* Brubaker, *supra* note 3, at 1012-13.

50. For example, as applied to creditors' claims against the debtor's bankruptcy estate, discussed *supra* note 44, the applicability of state law appears to be a matter of *Erie* policy, which (ironically enough) is a federal common-law principle. *See* Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000) ("The 'basic *federal* rule' in bankruptcy is that state law governs the substance of [creditors'] claims . . . ." (emphasis added) (quoting Butner v. United States, 440 U.S. 48, 57 (1979))); Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 986 (2013) (noting that to the extent it is compelled by neither the Constitution nor the Rules of Decision Act, "the *Erie* doctrine might best be characterized as what modern lawyers call 'federal common law'").

51. *See* Ralph Brubaker, *Supplemental Bankruptcy Jurisdiction*, 27 BANKR. L. LETTER, no. 3, Mar. 2007, at 1. Supplemental jurisdiction is attributable to the concept, first recognized in Chief Justice Marshall's opinion in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), that federal "[j]urisdiction attaches to the entire case, including federal claims (that ground the court's jurisdiction) and accompanying questions of general or state law." JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION 157 (3d ed. 2017).

52. Hanna v. Plumer, 380 U.S. 460, 471-72 (1965); *see* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (stating that federal courts are "bound to apply state law to" supplemental claims, citing *Erie*). There are, of course, instances in which a "related to" claim is asserted under nonbankruptcy *federal* law, in which case bankruptcy jurisdiction simply provides another basis for federal jurisdiction and may also provide both a different venue for that claim and reference of the claim to a non-Article III bankruptcy judge. *See* 28 U.S.C. §§ 157, 1408-1409 (2018).

53. Marshall v. Marshall, 547 U.S. 293, 313 (2006) (citation omitted). *Stern v. Marshall*, 564 U.S. 462 (2011), was a subsequent decision in the same litigation as *Marshall v. Marshall* and involved the litigants' constitutional right to final judgment from an Article III judge. The *Stern v. Marshall* Court made a cryptic suggestion that there is a link between that constitutional right and *Butner* (and hence, also *Erie*). *See id.* at 495; CHARLES J. TABB & RALPH BRUBAKER, BANKRUPTCY LAW: PRINCIPLES, POLICIES, AND PRACTICE 873 (5th ed. 2021). The most plausible connection is that if a state-law claim within federal bankruptcy jurisdiction is one for

That focus on identifying the "*substantive* rules . . . applicable in a [s]tate"[54] for the claim at issue is the standard doctrinal formulation of that which must govern the rights and obligations of the parties in federal court under *Erie*'s constitutional holding. Wholly extinguishing parties' state-law rights and obligations via nondebtor release would certainly seem to qualify as "'substantive' in every traditional sense."[55] Indeed, in the largely procedural process that comprises bankruptcy, the principal and clearest example of a right to substantive relief afforded by federal bankruptcy law is the right to receive a discharge of one's obligations. But that "substantive" characterization does not explicate the constitutional provisions and principles at stake in *Erie* and, in particular, its implications for nondebtor releases.

In its purest constitutional-federalism aspect, *Erie* "recognized that the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard."[56] Presumably, though, it is within Congress's discharge power under the Bankruptcy Clause to expressly authorize discharge of the obligations of even a nondebtor,[57] such as Congress has done in § 524(g) of the Bankruptcy Code for certain asbestos claims.[58] Moreover, by virtue of implicit field preemption, the states have *no* debt discharge

which the parties have a constitutional right to final judgment from an Article III judge (i.e., the claim is within non-core "related to" bankruptcy jurisdiction, *see* 28 U.S.C. § 157(c) (2018); Brubaker, *supra* note 6, at 7-8), then *Erie*'s constitutional holding also requires that substantive state law must govern resolution of that non-core "related to" claim. *Stern* made clear that there is a similar linkage between the Article III right in bankruptcy proceedings and a Seventh Amendment right to a jury trial. *See* 564 U.S. at 487, 492-93, 495-99; Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern v. Marshall, 86 AM. BANKR. L.J. 121, 150-51 (2012) [hereinafter Brubaker, *"Summary" Theory*]. That, of course, points up the fact that nonconsensual nondebtor releases, by extinguishing damages (i.e., legal, as opposed to equitable) claims on which creditors have *both* a right to final judgment from an Article III judge *and* a Seventh Amendment right to a jury trial, contravene creditors' constitutional jury-trial rights.

54. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (emphasis added).

55. *Hanna*, 380 U.S. at 472; *see* Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 60-61.

56. *Hanna*, 380 U.S. at 474-75 (Harlan, J., concurring).

57. *But cf.* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 567-70 (1996) (suggesting that enjoining a creditor's action against a nondebtor might exceed Congress's Bankruptcy Power under certain circumstances, particularly if the nondebtor is solvent).

58. 11 U.S.C. § 524(g)(4)(A)(ii)-(iii) (2018); *see supra* note 19.

power.[59] Nondebtor releases, therefore, do not exceed the limits of federal lawmaking authority vis-à-vis that of the states.

2. Separation of Powers

The constitutional infirmity of nondebtor releases is most directly attributable to *Erie*'s constitutional separation-of-powers implications.[60] In the bankruptcy context in particular, the *Erie*/*Butner* doctrine (in both its policy and constitutional manifestations) is grounded in separation-of-powers principles. The *Butner* Court itself stated:

> The constitutional authority of Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States" would clearly encompass a federal statute defining the [extent of parties' rights to] property in a bankrupt estate. But Congress has not chosen to exercise its power to fashion any such rule. . . . Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.[61]

The corollary of the *Erie*/*Butner* separation-of-powers principle is the constraint that it imposes on federal bankruptcy courts' authority to create substantive federal common law. Indeed, in its recent *Rodriguez v. FDIC* opinion,[62] the Court invoked both *Erie* and *Butner* "to underscore the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking," which hazards "the mistake of moving too quickly past important threshold questions at the heart of our separation of powers."[63] And, of course, separation-

59. *See* CHARLES JORDAN TABB, LAW OF BANKRUPTCY § 1.10.d, at 59-60 (5th ed. 2020); Ralph Brubaker, *The Preemptive Effect of the Bankruptcy Code for Preference Avoidance Under State-Law Assignments for the Benefit of Creditors*, 25 BANKR. L. LETTER, no. 4, Apr. 2005, at 1, 3-9. The Contracts Clause also prohibits states from enacting legislation that would retroactively discharge preexisting contractual obligations, even in the absence of any preemptive federal bankruptcy legislation. *See* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 266-68, 303-04 (1827); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 199 (1819).

60. As Professor Ernest A. Young points out, even "*Erie*'s critics have generally acknowledged that the most plausible constitutional rationale incorporates not only federalism but also separation of powers." *See* Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J.L. ECON. & POL'Y 17, 76 (2013).

61. Butner v. United States, 440 U.S. 48, 54 (1979) (footnotes omitted); *see also* Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 21 (2000) ("Congress of course may do what it likes with entitlements in bankruptcy . . . .").

62. 140 S. Ct. 713, 717-18 (2020).

63. *Id.* at 718.

of-powers restrictions on federal lawmaking indirectly preserve states' lawmaking authority (i.e., federalism values).[64] Thus, *Erie*/*Butner* "is completely consistent with notions of *judicial* federalism—that is, limits on the lawmaking power of *courts* that impose no parallel limits on the power of Congress."[65]

Moreover, that *Erie*/*Butner* limitation on bankruptcy courts' creation of substantive federal common law is directly incorporated into the Supreme Court's jurisprudence restraining bankruptcy courts' equitable powers, as the *Butner* decision itself made clear: "The equity powers of the bankruptcy court play an important part in the administration of bankrupt estates in countless situations," but "undefined considerations of equity provide no basis for adoption of a . . . federal rule" giving a party substantive "rights that are not his as a matter of state law,"[66] such as the right to a discharge of his debts without filing bankruptcy. Thus, the same constitutional constraint that restricts federal bankruptcy courts' power to create substantive federal common law for such third-party "related to" claims under *Erie* and *Butner*—and in service of the same constitutional values of federalism and separation of powers—provides a constitutional meta-norm[67] (or a so-called substantive canon of statutory construction[68]) that like-

64. "The Constitution protects federalism primarily by limiting federal lawmaking." Young, *supra* note 60, at 80. "By insisting that federal courts may not make federal law outside the constitutionally ordained legislative process, *Erie* became the central decision of modern process federalism." *Id.* at 115.

65. *Id.* at 67.

66. *Butner*, 440 U.S. at 55-56.

67. *See* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 307-08 (2016) (discussing "the background role played by constitutional . . . norms widely accepted as fundamental" in giving rise to "meta-norms in statutory interpretation").

68. ESKRIDGE ET AL., *supra* note 22, at 275 (distinguishing between "text-based" canons of interpretation, "which are guidelines for evaluating the linguistic, semantic, and structural meaning of enacted text," and "substantive" canons that "attempt to harmonize statutory meaning with policies rooted in the common law, other statutes, or the Constitution"); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117, 124 (2010) (distinguishing between "linguistic" canons that "apply rules of syntax to statutes" and "substantive" canons whose "purpose is to promote policies external to a statute" such as "constitutional values"); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 356-57 (2007) (distinguishing between "descriptive" canons "for determining intended meaning" and "normative" canons that promote values reflected in "our Constitution or . . . other aspects of our legal traditions").

wise prohibits alteration of the parties' state-law substantive rights and obligations via the vague equitable-powers provision[69] of the Bankruptcy Code.[70] Indeed, the Supreme Court's jurisprudence limiting bankruptcy courts' equitable powers is a wonderful illustration of Justice Barrett's conception of how substantive canons of statutory interpretation can properly function as constitutional implementation.[71]

The federal courts are illicitly creating substantive federal common law through their jurisprudence authorizing nondebtor releases. Indeed, that is apparent from the list of criteria—exclusively the product of judicial imagination—that supposedly trigger bankruptcy courts' power to grant discharge relief for nondebtors.[72] With respect to the third-party nondebtor claims extinguished via

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69. Such substantive canons are least controversial when used to construe vague or ambiguous statutory language. *See* ESKRIDGE ET AL., *supra* note 22, at 288; Barrett, *supra* note 68, at 123, 155, 158, 163-67, 175-76, 177, 181; Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 393-98 (2005). Indeed, as now-Justice Barrett's scholarship reveals, from the earliest days of the Republic, "the historical record clearly establishes that federal courts believed themselves empowered to deploy a substantive canon . . . for the purpose of clarifying truly ambiguous language." Barrett, *supra* note 68, at 158 (analyzing cases from 1789 to 1840).

70. 11 U.S.C. § 105(a) (2018). And the Supreme Court has made clear that such a substantive canon restricts bankruptcy courts' equitable powers not only with regard to "related to" claims governed by *Erie*'s constitutional holding, but also for claims governed solely by the extraconstitutional policy of *Erie*, such as creditors' claims against the debtor's bankruptcy estate. *See supra* notes 50-54 and accompanying text. As the Court stated:

> Bankruptcy courts do indeed have some equitable powers . . . . But the scope of a bankruptcy court's equitable power must be understood in the light of the principle of bankruptcy law . . . that the validity of a claim is generally a function of underlying substantive law. Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides.

Raleigh v. Ill. Dep't. of Revenue, 530 U.S. 15, 24-25 (2000). This substantive canon is bankruptcy's version of the traditional antipreemption canon reflected in the longstanding presumption against federal preemption of state law. *See* ANTONIN SCALIA & BRIAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 290 (2012); ESKRIDGE ET AL., *supra* note 22, at 289, 301; Barrett, *supra* note 68, at 153-54.

71. Barrett, *supra* note 68, at 168-82.

72. For a particularly elaborate and energetic derivation and rationalization of the criteria for approval of nondebtor releases that (1) not only differs substantially from the courts' interpretation and application of those criteria, but also (2) vividly illustrates the substantive lawmaking that is inevitably taking place, see Ben H. Logan, *A New Millennium of Article III Analysis: Which Court—a Bankruptcy Court or a District Court—Must Decide Whether to Confirm a Plan That Contains a Nonconsensual Third-Party Release? (Part I)*, 37 BANKR. L. LETTER, no. 12, Dec. 2017, at 1, 13-17; *see also* Silverstein, *supra* note 30, at 71-80 (constructing a modified version of the *Master Mortgage* requirements); *In re* Purdue Pharma L.P., 633 B.R. 53, 103 (Bankr. S.D.N.Y.) (suggesting that the "source for third-party releases and injunctions under a plan

nondebtor releases, *Erie*'s constitutional holding is that the parties' substantive state-law rights and obligations must be respected in federal bankruptcy proceedings, notwithstanding the grant of "related to" jurisdiction over such claims, in the absence of any explicit congressional authorization of nonconsensual nondebtor releases. Extinguishing the parties' substantive state-law rights and obligations via mere judicial edict is unconstitutional under *Erie*. Moreover, such a judicially crafted, federal common-law discharge power is also unconstitutional under the separation-of-powers limitations implicit in the Bankruptcy Clause itself.

B. The Bankruptcy Clause's Separation of Powers

The Supreme Court famously captured the essence of the constitutional Bankruptcy Power as follows:

> [I]t extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest is the discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress.[73]

The "great" discharge power, in particular, provided the impetus for inclusion of the Bankruptcy Clause in the Constitution.[74] The power to grant a discharge of indebtedness, however, does not descend from the equity powers of

i[s] federal common law" (citing Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 79-80, 83-84 (2006))), *vacated*, No. 21 cv 7532, 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021).

73. Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186 (1902) (quoting *In re* Klein, 14 F. Cas. 716, 718 (Catron, Circuit Justice, C.C.D. Mo. 1843) (No. 7,865)).

74. "Provision for a uniform federal bankruptcy power was in response to concerns regarding the extraterritorial effect of state-court discharge orders under state bankruptcy and insolvency legislation." Brubaker, *supra* note 41, at 128. "The authorization for Congress to enact '*uniform* Laws on the subject of Bankruptcies *throughout the United States*,' therefore, assured a debtor's discharge order from a *federal* court acting under a *federal* statute would have nationwide effect." *Id.* (footnotes omitted).

the Lord Chancellor. Bankruptcy discharge has always been a creature of statute.[75] Thus, the Constitution explicitly provides that "*Congress* shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies."[76]

At the heart of Congress's Bankruptcy Power is determining the appropriate distribution of someone's assets that warrants discharge of their obligations.[77] But nondebtor-release practice, as evidenced by the judicially divined factors or requisites for approval—including the requirement that a discharged nondebtor "has contributed substantial assets to the reorganization"[78]—presumes to lodge plenary authority for such a determination in the courts. Therefore, the distribution-discharge scheme effectuated via nondebtor release violates the separation-of-powers principle embedded in the text of the Bankruptcy Clause, which provides for legislative supremacy over matters of distribution and discharge.[79]

The Supreme Court's jurisprudence limiting bankruptcy courts' equitable powers also directly incorporates this structural constitutional bulwark for Congress's core legislative prerogatives. As the Court has directed, exercise of bankruptcy courts' equitable powers "must not occur at the level of policy choice at which Congress itself operated in drafting the [Bankruptcy] Code."[80] An exercise of equitable powers "that takes place at the legislative level of consideration" is "tantamount to a legislative act and therefore" is "beyond the scope of judicial authority."[81] The Bankruptcy Clause's separation-of-powers dimension, therefore, also supplies a nondelegation substantive canon of statutory construction

75. *See generally* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325 (1991) (providing a history of the bankruptcy discharge in Anglo-American jurisprudence); John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163 (1996) (discussing the English history).

76. U.S. CONST. art I, § 8, cl. 4 (emphasis added).

77. *See* Kuehner v. Irving Tr. Co., 299 U.S. 445, 453 (1937) (considering a challenge to Congress's Bankruptcy Power when stating that "if the [creditor]s' claims were to be discharged in the reorganization they must be admitted to participation on an equitable basis with other claims in shaping the reorganization and in distribution of that which is to go to creditors pursuant to any plan adopted," as "determined in the light of all circumstances Congress might properly consider").

78. Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 658 (6th Cir. 2002).

79. *Cf.* Steve H. Nickles & David G. Epstein, *Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code*, 3 CHAP. L. REV. 7, 17 (2000) (opining that by "stretching the discharge to protect non-debtors" the "courts are making law to the extent of violating constitutional separation of powers").

80. United States v. Noland, 518 U.S. 535, 543 (1996).

81. United States v. Reorganized CF & I Fabricators of Utah, Inc., 517 U.S. 213, 229 (1996).

limiting the scope of bankruptcy courts' equitable powers under § 105(a) of the Bankruptcy Code.[82]

Moreover, one of the larger systemic implications of the Court's important decision in *Czyzewski v. Jevic Holding Corp.*[83] is that implicit authority for such legislative-order determinations does not reside in the interstices of other vague Bankruptcy Code authorizations either.[84] Discharge of debt is the "greatest" power granted to Congress by the Bankruptcy Clause.[85] Hence, a general statutory "necessary and proper" authorization[86] "is too weak a reed upon which to rest [delegation of] so weighty a power."[87] As is equally true with the distribution priority issue the Court addressed in *Jevic*, given that the Bankruptcy Code

82. 11 U.S.C. § 105(a) (2018). On nondelegation substantive canons, see ESKRIDGE, *supra* note 67, at 330-31; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 630-31 (1992).

83. 137 S. Ct. 973, 983-85 (2017).

84. *See* Ralph Brubaker, *Taking Bankruptcy's Distribution Rules Seriously: How the Supreme Court Saved Bankruptcy from Self-Destruction*, 37 BANKR. L. LETTER, no. 4, Apr. 2017, at 1, 4-6, 11-12.

85. Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186 (1902) (quoting *In re* Klein, 14 F. Cas. 716, 718 (Catron, Circuit Justice, C.C.D. Mo. 1843) (No. 7,865)).

86. For example, as statutory authority for nondebtor releases, courts frequently point to the authorization in § 1123(b)(6) of the Bankruptcy Code, which states that a plan of reorganization may "include any other appropriate provision not inconsistent with the applicable provisions of this title," 11 U.S.C. § 1123(b)(6) (2018); *see* Brubaker, *supra* note 3, at 1017 n.209, or § 1123(a)(5), which merely provides a basis to *deny* confirmation if the plan does not "provide adequate means for the plan's implementation," 11 U.S.C. § 1123(a)(5) (2018).

87. *Jevic*, 137 S. Ct. at 985; *accord In re* Purdue Pharma, L.P., No. 21 cv 7532, 2021 WL 5979108, at *61-69 (S.D.N.Y. Dec. 16, 2021) (stating that such provisions, "like Section 105(a), confer[] on the Bankruptcy Court only the power to enter orders that carry out other, substantive provisions of the Bankruptcy Code. None of them creates any substantive right; neither do they create some sort of 'residual authority' that authorizes" nonconsensual nondebtor releases). Indeed, § 105(a) is itself a global "necessary and proper" authorization to "carry out" any and all "provisions of" the Bankruptcy Code. 11 U.S.C. § 105(a) (2018); *see* Daniel B. Bogart, *Resisting the Expansion of Bankruptcy Court Power Under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall*, 35 ARIZ. ST. L.J. 793, 843-76 (2003). If discharge of a nondebtor's obligations is beyond a court's power under that provision, then, subsidiary "necessary and proper" authorizations, such as § 1123(b)(6) or 1123(a)(5), are equally impotent. *Accord Purdue Pharma*, 2021 WL 5979108, at *62 (stating that "[i]f [§ 105(a)] does not confer any substantive authority on the bankruptcy court . . . then [§ 1123(b)(6)] can in no way be read to do so"). Thus, the Court in *Jevic* relied upon its jurisprudence limiting bankruptcy courts' equitable powers under § 105(a), even though the parties had not argued that the priority-violating distribution at issue was a proper exercise of the bankruptcy court's equitable powers. *See Jevic*, 137 S. Ct. at 987 (citing and quoting Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 207 (1988)); Brubaker, *supra* note 84, at 11-12.

does not explicitly authorize discharge of a nondebtor's obligations,[88] "such statutory silence should be interpreted as *denying* bankruptcy courts any power to authorize" such a nondebtor discharge.[89]

With respect to matters of distribution and discharge, therefore, the nondelegation constitutional canon for interpretation of the Bankruptcy Code is, at a minimum, a "no elephants in mouseholes" canon[90] and may even rise to the level of a stronger-form clear-statement rule.[91] Regardless of the strength of the presumption associated with the Bankruptcy Clause's separation-of-powers nondelegation canon, though, nothing in the Bankruptcy Code or the legislative record surrounding its enactment provides even a hint of congressional delegation to the bankruptcy courts of a power to create a common-law distribution and discharge scheme for nondebtors.[92]

There is no common-law discharge power. Nonconsensual nondebtor releases are an unconstitutional encroachment upon the exclusive "competency and discretion of Congress" concerning discharge of indebtedness.[93] Nondebtor releases contravene the constitutional restrictions that both *Erie* and the Bankruptcy Clause place upon the lawmaking powers of the federal courts.

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88. Indeed, the Bankruptcy Code explicitly states that a debtor's bankruptcy discharge "does *not* affect the liability of any other entity." 11 U.S.C. § 524(e) (2018) (emphasis added).

89. Brubaker, *supra* note 84, at 4; *accord Purdue Pharma*, 2021 WL 5979108, at *65-66. In the words of the *Jevic* opinion, "[t]he importance of [discharge] leads us to expect more than simple statutory silence if, and when, Congress were to intend" to authorize discharge of nondebtors' obligations. *Jevic*, 137 S. Ct. at 984. "Put somewhat differently, we would expect to see some affirmative indication of intent," such as that expressed in § 524(g). *Id.*; *see* 11 U.S.C. § 524(g)(4)(A)(ii)-(iii) (2018); *supra* note 19.

90. *See Jevic*, 137 S. Ct. at 984 (citing and quoting Whitman v. Am. Trucking Assns., Inc., 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes.")). On the "no elephants in mouseholes" substantive canon, see ESKRIDGE, *supra* note 67, at 337-40; and ESKRIDGE ET AL., *supra* note 22, at 285-86, 322-23.

91. *See* ESKRIDGE ET AL., *supra* note 22, at 275-76, 287-90; Barrett, *supra* note 68, at 171-73; Eskridge & Frickey, *supra* note 82, at 596-97.

92. *Contra In re* Kirwan Offs. S.à.r.l., 592 B.R. 489, 511 (S.D.N.Y. 2018) (opining that §§ 105(a) and 1123(a)(5) and (b)(6) authorize approval of a plan of reorganization containing nonconsensual nondebtor releases because "[t]his statutory scheme reflects Congress's exercise of its preemptive powers" and its "exceedingly broad" powers under the Bankruptcy Clause, which powers Congress "has delegated . . . to bankruptcy courts"), *aff'd on other grounds*, 792 F. App'x 99 (2d Cir. 2019). The *Kirwan* court appears to have been applying presumptions *of* (rather than *against*) preemption of state law, *see supra* note 70, and delegation of Congress's Bankruptcy Power to the courts.

93. Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186 (1902).

II. JUSTIFYING AN EXTRAORDINARY MANDATORY SETTLEMENT POWER ONLY IN BANKRUPTCY

As Simon points out, the judicially decreed criteria for approval of nonconsensual nondebtor releases do not replicate the Bankruptcy Code's substantive and procedural protections for the third-party nondebtor claims being discharged thereby.[94] For example, in conjunction with a Chapter 11 debtor's discharge, each and every creditor has the right to insist that it receive at least as much under the debtor's plan of reorganization as that creditor would receive in a liquidation of the debtor's assets.[95] Indeed, as Simon discusses,[96] if the courts were to impose such a requirement in conjunction with nondebtor releases, particularly for solvent nondebtors, many (if not all) releases could never be approved.[97] And for individual nondebtors, releases shield the individual from liability (and, indeed, from even being sued and the accompanying public scrutiny)

94. Simon, *supra* note 1, at 1206-15; *see also* Brubaker, *supra* note 3, at 980-1001 (explicating the many ways in which nondebtor releases are inconsistent with the Bankruptcy Code).

95. This is the so-called "best interests of creditors" requirement for confirmation of a plan of reorganization, set forth in 11 U.S.C. § 1129(a)(7) (2018).

96. Simon, *supra* note 1, at 1212-13.

97. *See* Brubaker, *supra* note 3, at 991-93. And on those occasions that courts have imposed such a requirement, it has typically been fatal to approval. *See, e.g.*, *In re* Ditech Holding Corp., 606 B.R. 544, 606-21 (Bankr. S.D.N.Y. 2019).

for alleged fraud and other intentional misconduct,[98] which the Bankruptcy Code provides can*not* be discharged.[99]

Equally if not more importantly, though, approval of nondebtor releases also does not replicate nonbankruptcy standards for resolution of disputed claims.[100] As the discussion in Section I.A reveals, by simply granting the federal courts "related to" bankruptcy jurisdiction over third-party nondebtor claims, the statutory design (pursuant to *Erie*) is for those claims to be heard and adjudicated in federal court, if at all, according to applicable nonbankruptcy substantive law

98. Through the smoke and mirrors of the so-called "channeling" injunction, *see supra* note 11, the fraud or intentional-tort claim against the individual debtor is extinguished, "leav[ing] the creditor with only its claim against the debtor's estate, without even purporting to address the merits of the released non-debtor claim." Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 19. When the individual nondebtor was acting as an agent on behalf of a corporate debtor with respect to the alleged misconduct, then, nondebtor releases essentially assign primary (and *exclusive*) responsibility for that agent's misconduct to the corporate debtor. That, however, turns the relative responsibility for such tortious misconduct completely upside down and (even worse) collapses the individual's primary responsibility into nothingness:

> A corporate agent who engages in wrongful conduct, such as fraud, is directly responsible [to fraud victims] as a tortfeasor and is not shielded from liability by virtue of the fact that the agent's fraudulent conduct was taken on behalf of a corporate principal. Because a corporation (a fictional person) cannot "do" anything, except through the actions of its corporate agents (real people), the corporation's fraud liability is purely *vicarious* liability, through which the corporation (*i.e.*, the corporate property) is *also* subjected to liability for the corporate agent's fraudulent conduct.

Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 AM. BANKR. INST. L. REV. 757, 772 (2005) [hereinafter Brubaker, *Corporate Discharge Exceptions*] (footnotes omitted); *see also In re* Purdue Pharma, L.P., No. 21 cv 7532, 2021 WL 5979108, at *29-30 (S.D.N.Y. Dec. 16, 2021) (perceptively recognizing that involuntarily released "claims against the [nondebtor] Released Parties are effectively being extinguished for nothing, even though they are described as being 'channeled'" and emphasizing that the "Debtors sidestepped" that inconvenient fact and "made no effort to clarify this"). The nondebtor-release factor that justifies extinguishing the corporate agent's primary liability based upon "an identity of interest between the debtor and the third party . . . such that a suit against the non-debtor is, in essence, a suit against the debtor," Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 658 (6th Cir. 2002), is the distracting shiny object that makes this "channeling sleight of hand" possible. Brubaker, *Nondebtor Release Jurisdiction*, *supra* note 11, at 19; *see* Brubaker, *Corporate Discharge Exceptions*, *supra*, at 772-73, 773 n.84.

99. *See, e.g.*, 11 U.S.C. § 523(a)(2), (6) (2018); Brubaker, *supra* note 3, at 999-1001; Posner & Brubaker, *supra* note 7. Approving discharge of such debts via nonconsensual nondebtor release, therefore, is not an appropriate exercise of a bankruptcy court's general equitable powers. *Accord Purdue Pharma*, 2021 WL 5979108, at *62; *see* Law v. Siegel, 571 U.S. 415, 421 (2014) ("Section 105(a) confers authority to 'carry out' the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits. That is simply an application of the axiom that a statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere.").

100. *See* Brubaker, *supra* note 3, at 972-80.

and the incident procedural apparatus for adjudicating those claims, such as the Federal Rules of Bankruptcy Procedure (which incorporate nearly all of the Federal Rules of Civil Procedure[101]). The extraordinary resolution of those claims effected via nondebtor release, however, is unknown to any of those governing sources of substantive or procedural law. And there is no bankruptcy-unique normative or policy justification for nondebtor releases' exceptional alteration of the parties' nonbankruptcy rights and obligations.

A. Mandatory Settlement via Nondebtor Release

Nondebtor releases are often clothed in the rhetoric of "compromise" and "settlement" of the third-party nondebtor claims at issue. Given the nonconsensual nature of the nondebtor releases of concern, though, the "settlement" effectuated via nondebtor release departs from the fundamental baseline norm that settlement of a claim cannot be imposed on a party without that party's consent.[102] That principle is undoubtedly borne of constitutional due-process guaranties, as "part of our 'deep-rooted historic tradition that everyone should have his own day in court.'"[103]

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101. *See* FED. R. BANKR. P. 7001-7071, 9014(a)-(c); TABB & BRUBAKER, *supra* note 53, at 925-28. Consequently, "[b]ankruptcy practice, especially bankruptcy litigation, is governed in large measure, by the same rules of procedure that apply in general federal civil practice." Christopher M. Klein, *Bankruptcy Rules Made Easy (2001): A Guide to the Federal Rules of Civil Procedure That Apply in Bankruptcy*, 75 AM. BANKR. L.J. 35, 35-36 (2001).

102. *See* Martin v. Wilks, 490 U.S. 755, 761-62, 768 (1989) ("[A] voluntary settlement . . . cannot possibly 'settle,' voluntarily or otherwise, the conflicting claims of [those] who do not join in the agreement."); Loc. No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986) ("Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party . . . without that party's agreement."). As Professor Richard A. Nagareda aptly noted, "[w]ords like 'peace,' 'settlement,' and 'resolution' have a certain soothing tone to them. When we hear those words in connection with mass torts, however, we also should hear the word 'coercion.'" RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 219 (2007).

103. Martin v. Wilks, 490 U.S. at 762 (quoting 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1st ed. 1981)). *See generally* Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Parties*, 1987 U. CHI. LEGAL F. 103 (examining the due-process rights of nonparties to consent decrees). The "day in court" sobriquet, however, only imperfectly captures the nature of the due-process right. A more accurate appellation is that which the text of the Due Process Clauses protects and which an inchoate cause of action is characterized as for purposes thereof: property belonging to the claimant. *See* NAGAREDA, *supra* note 102, at 60; Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 618-44 (2015).

Nondebtor releases, therefore, work a kind of representational settlement, akin to a class-action settlement, in which someone else is negotiating and compromising creditors' claims against released nondebtors. As I have noted before, nonconsensual nondebtor releases impose a mandatory non-opt-out settlement of creditors' third-party nondebtor claims, wholly without regard to whether such a mandatory non-opt-out settlement is appropriate, permissible, or even constitutional.[104]

The approval process for nondebtor releases does not adhere to the constitutional due-process requirement of an adequate unconflicted litigation representative for the third-party nondebtor claims compromised thereby.[105] Even

104. Brubaker, *supra* note 3, at 974-80.

105. *See* Taylor v. Sturgell, 553 U.S. 880, 900-01 (2008); Richards v. Jefferson Cnty., 517 U.S. 793, 798-802 (1996); Hansberry v. Lee, 311 U.S. 32, 40-46 (1940). "[N]o such representative speaks for the interests of any properly constructed 'class' of creditors whose non-debtor claims are extinguished through non-debtor releases." Brubaker, *supra* note 3, at 976; *accord* Patterson v. Mahwah Bergen Retail Grp., No. 21cv167, 2022 WL 135398, at *29-30 (E.D. Va. Jan. 13, 2022) (noting that "in the context of a non-debtor release in a bankruptcy action . . . no party litigates on behalf of the" releasing claimants, and since releasing claimants "had no one to adequately represent their interests . . . allowing the release of claims . . . does not comport with due process"); *In re* Aegean Marine Petroleum Network Inc., 599 B.R. 717, 724 (Bankr. S.D.N.Y. 2019) (noting that "[w]hen third-party releases are proposed," releasing claimants are not "adequately protected by court-certified . . . representatives" with "similar claims, who have incentives to pursue them, and who can be trusted to litigate or settle the . . . claims in a way that will fully protect the . . . interests" of the releasing claimants). Indeed, the representative of the debtor's bankruptcy estate (the trustee or debtor-in-possession) or collective claimant constituencies (such as official and unofficial committees) lack any authority or standing whatsoever to assert the claims of individual creditors against a nondebtor. *See* Caplin v. Marine Midland Grace Tr. Co., 406 U.S. 416 (1972). Moreover, any decision to permit such a representative assertion of creditor claims against nondebtors "is one that only Congress can make." *Id.* at 435. And as the Supreme Court has made clear, "virtual representation" simply from an alignment of interests does not satisfy due process because that would improperly "allow[] courts to 'create *de facto* class actions at will.'" Taylor v. Sturgell, 553 U.S. at 901 (quoting Tice v. Am. Airlines, Inc., 162 F.3d 966, 973 (7th Cir. 1998)). *Contra In re* Purdue Pharma L.P., 633 B.R. 53, 82, 86 (Bankr. S.D.N.Y.) (stating that "those who negotiated the plan's [nondebtor-release] settlements in essence represented all of the creditors in these cases"), *vacated*, No. 21 cv 7532, 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021).

Lack of adequate representation is also a significant structural deficiency of many non-class-action aggregate settlements. *See* ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 94-96, 117, 131, 178-80, 208 (2019); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 12-15, 67-71 (2021); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 554-55 (2013). *See generally* Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165 (2013) (analyzing representation and control issues in aggregate litigation); Howard Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519 (analyzing attorney representation issues in aggregate litigation).

more significantly, claimants are not provided any opportunity to opt out of the "settlement" imposed on them via nondebtor release.[106] In a series of decisions over the last thirty-five years, the Supreme Court has repeatedly and strongly suggested, if not explicitly held, that for the kinds of money damages claims typically compromised via nondebtor release, the "absence of . . . opt out violates due process."[107] Within the due-process triad of exit, loyalty, and voice,[108] then, nonconsensual nondebtor releases deny claimants both loyalty and by definition exit. In addition to their facial unconstitutionality on separation-of-powers grounds,[109] nondebtor releases thus raise grave due process concerns.[110]

In her article, Simon expresses no opinion on whether nonconsensual nondebtor releases are permissible or constitutional under existing law. Rather, her acceptance of nondebtor releases is a more practical response to the realities of existing nondebtor-release practice. She proposes salutary reforms, but her proposals would not alter the basic nature of any settlement produced by nonconsensual nondebtor release as a *mandatory* non-opt-out settlement.[111]

It is worth reemphasizing the unique and extraordinary nature of these nonconsensual nondebtor release "settlements," which simply *cannot* occur in any

106. *See* Brubaker, *supra* note 3, at 978-80.

107. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362-63 (2011); *see* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 349 (2011); Ortiz v. Fibreboard Corp., 527 U.S. 815, 847-48 (1999); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985); Williams, *supra* note 103, at 606-11.

108. *See* AM. L. INST., PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 2.07 & cmts. & reporters' notes (2010) (discussing the relationship between claimants' due-process rights and preclusive effect of aggregate proceedings); *id.* cmt. c, at 148 (organizing "various due process rights in terms of the typology of exit, voice, and loyalty rights often used to describe the array of ways that individuals might advance their interests within a variety of arrangements that are collective or aggregative in nature").

109. *See supra* Part I.

110. Indeed, "third-party releases strike at the heart of [claimants'] foundational [due process] rights." *Patterson*, 2022 WL 135398, at *1. And to the extent that nondebtor releases violate claimants' due process rights, they may be subject to collateral attack. *See* AM. L. INST., *supra* note 108, § 2.07 & cmt. b, at 148 ("Strictures of constitutional due process comprise the most significant constraints on the preclusive effect of the aggregate proceeding."). *See generally* Debra Lynn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. REV. 1079 (discussing the relationship between due-process right to adequate representation and preclusive effect); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002) (discussing the relationship between due-process opt-out right and preclusive effect).

111. Her proposals also do not address the problem of lack of adequate (unconflicted) representation of the interests of claimants with respect to their claims *against the released nondebtor*. *See supra* notes 105, 108-110, and accompanying text. The importance of adequate representation is intensified by the mandatory nature of nonconsensual nondebtor-release "settlements." *See* AM. L. INST., *supra* note 108, § 1.02 reporters' notes at 19.

other context. Why, then, should this extraordinary mandatory settlement power exist *only* in cases in which a codefendant has filed bankruptcy? After asking and diligently exploring that question for over twenty-five years, I have yet to receive or discover a credible response.

B. Bankruptcy's "Necessity" Fiction

The truth about nonconsensual nondebtor releases and the mandatory settlements they impose on claimants is that they are a manifestation of a more general deceit indulged throughout the bankruptcy reorganization system, in order to disregard cornerstone principles governing parties' fundamental distributional entitlements.[112] I will call this bankruptcy's "necessity" fiction. And as Simon's article starkly demonstrates, bankruptcy's necessity fiction (via the bankruptcy grifter phenomenon) is now also distorting the tort system.

The bankruptcy reorganization process is extremely complex and, by design, incredibly flexible and fluid. That is its genius. Those who administer the system, particularly judges and lawyers, do so with an earnest and ever-present desire to, whenever possible, preserve the debtor's business intact and prevent the value destruction, job loss, and other unfortunate collateral consequences that would accompany a fire-sale liquidation.[113]

However, in many different contexts throughout the bankruptcy reorganization process, parties with significant control over that process seize upon and opportunistically exploit the exigencies surrounding the debtor's financial difficulties in order to alter various parties' distribution rights, as expressed in the Bankruptcy Code's explicit priority and distribution provisions.[114] The various

112. As the Supreme Court has recognized, "[t]he priority system applicable to [creditor] distributions has long been considered fundamental to the Bankruptcy Code's operation" and "constitutes a basic underpinning of business bankruptcy law." Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 984, 983 (2017). Indeed, such a formal system of distribution and priority "is an indispensable, defining feature of any bankruptcy system." Brubaker, *supra* note 84, at 1.

113. *See* AM. BANKR. INST. COMM'N TO STUDY THE REFORM OF CHAPTER 11, 2012-2014 FINAL REPORT AND RECOMMENDATIONS 2-3, 6, 12 (2014); NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 303, 309 (1997); Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 802, 798 (2010) (noting that "the bankruptcy bar has historically been [relatively] unified and public-minded in its views about the core aims and operation of the bankruptcy process" and that bankruptcy judges "share the outlook of the bar from which they were selected and to which they remain responsive—that of skilled professionals who place a high value on pragmatic solutions to financial distress").

114. *See* David A. Skeel, *The Empty Idea of "Equality of Creditors,"* 166 U. PA. L. REV. 699 (2017); Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235 (2013). Examples include: (1) so-called "roll ups" and "cross collateralization" in debtor-in-possession (DIP) financing orders, *see* David A. Skeel,

judicial doctrines created to approve these priority-altering distribution techniques frequently rely upon the justification (and even required factual findings) that doing so is "important," "necessary," or "essential" to the debtor's successful reorganization and, at least in the earliest stages of the institutionalization of these practices, that the variation is an "exceptional" one that is to be approved in only "rare" circumstances. That is the necessity fiction, which time and eventual institutionalization of these practices expose as little more than a rote incantation of magic words.[115]

Nonconsensual nondebtor releases follow the same pattern in altering the fundamental rights of creditors with respect to their claims against released nondebtors. As pronounced by the Courts of Appeals, such releases "should be reserved for those unusual cases in which such an order is necessary for the success of the reorganization."[116] That standard for approval, however, and the dynamics of the context in which these releases are bargained for and approved, ensure that nonconsensual nondebtor releases will *not* be limited to rare or exceptional cases.

Jr., *The Past, Present and Future of Debtor-in-Possession Financing*, 25 CARDOZO L. REV. 1905 (2004); Charles J. Tabb, *A Critical Reappraisal of Cross-Collateralization in Bankruptcy*, 60 S. CAL. L. REV. 109 (1986); George G. Triantis, *A Theory of the Regulation of Debtor-in-Possession Financing*, 46 VAND. L. REV. 901 (1993); (2) "critical vendor" orders, *see* Ralph Brubaker, *Reassessing Our Commitment to Unsecured Creditor Equality: Critical Vendor Orders After* Kmart *(Part I)*, 24 BANKR. L. LETTER, no. 5, May 2004, at 1; Charles Jordan Tabb, *Emergency Preferential Orders in Bankruptcy Reorganizations*, 65 AM. BANKR. L.J. 75 (1991); (3) settlements approved under FED. R. BANKR. P. 9019, *see* Christopher W. Frost, *Settlements, Absolute Priority, and Another Look at Inter-Class Give-Ups*, 27 BANKR. L. LETTER, no. 6, June 2007, at 1; (4) "363 sales" of the debtor's business, *see* Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of* Chrysler *and* GM, 2010 U. ILL. L. REV. 1375; (5) "gifting" provisions in a plan of reorganization, *see* Ralph Brubaker, *Taking Chapter 11's Distribution Rules Seriously: "Inter-Class Gifting Is Dead! Long Live Inter-Class Gifting!,"* 31 BANKR. L. LETTER, no. 4, Apr. 2011, at 1; Bruce A. Markell, *The Clock Strikes Thirteen: The Blight of Horizontal Gifting*, 38 BANKR. L. LETTER, no. 12, Dec. 2018, at 1; and (6) "structured dismissals," *see* Brubaker, *supra* note 84; Christopher W. Frost, *Structured Dismissals: Smooth Off-Ramp or Artful Dodge?*, 35 BANKR. L. LETTER, no. 10, Oct. 2015, at 1.

115. For example, full and immediate payment of a "critical" vendor's prebankruptcy unsecured claim was originally founded upon the premise, derived from equity-receivership practice in railroad reorganizations, that payment of that creditor "*is necessary for the continued operation of the railroad during reorganization*, (e.g., if a previously unpaid creditor occupies a monopoly position vis-a-vis the railroad during reorganization and threatens to withhold his supplies unless paid)." *In re* N.Y., New Haven & Hartford R.R. Co., 278 F. Supp. 592, 602 n.15 (D. Conn. 1967), *aff'd*, 405 F.2d 50 (2d Cir. 1968). Entry of such orders now, however, is commonplace and routine in many districts. *See* DEBRA I. GRASSGREEN, JOHN W. LUCAS, VICTORIA A. NEWMARK & MICHAEL R. SEIDL, FIRST DAY MOTIONS: A GUIDE TO THE CRITICAL FIRST DAYS OF A BANKRUPTCY CASE 58-68 (3d ed. 2012); Brubaker, *supra* note 84, at 9 (observing that "no one could credibly" claim that critical vendor orders are rare "these days (and would undoubtedly burst into laughter and/or elicit a similar response with any attempt to do so)").

116. *In re* Seaside Eng'g & Surveying, Inc., 780 F.3d 1070, 1078 (11th Cir. 2015).

Given the extraordinary nature of the relief at stake and the supposed rarity of its grant, one might legitimately expect that the concept of "necessary to successful reorganization" means reorganization in the sense of saving the debtor's business from destruction. But that is not what it means, according to the necessity fiction. Consider, for example, the *Blitz* case (and Walmart's nondebtor release therein) that Simon discusses,[117] which involved liquidation of a defunct business's assets.[118]

If successful reorganization does not mean saving the debtor's business, then all it means is confirming a plan of reorganization, the terms of which are the product of negotiations among the dominant players.[119] In practice and as applied, therefore, "necessary to successful reorganization" for purposes of the necessity fiction simply means necessary to do the deal embodied in the plan of reorganization.[120] Moreover, given that a successful reorganization is the product of negotiations, nondebtor-release beneficiaries themselves, as key participants in the negotiations, can always manufacture the "evidentiary" record required for approval, merely through their negotiation behavior.

To understand why that is the case, consider the negotiations over a nonconsensual nondebtor release, given in exchange for a nondebtor's contribution to a settlement fund. In order for a judge to approve the release as "necessary to successful reorganization," the judge will have to find that the only means of procuring the nondebtor's contribution to the settlement fund is by giving the nondebtor a nonconsensual liability release.[121] Therefore, the negotiation position

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117. *See* Simon, *supra* note 1, at 1175.

118. *See* Clifford Krauss, *A Factory's Closing Focuses Attention on Tort Reform*, N.Y. TIMES (Oct. 4, 2012), https://www.nytimes.com/2012/10/05/business/in-a-shuttered-gasoline-can-factory-the-two-sides-of-product-liability.html [https://perma.cc/E32J-BV6E]; *see also* Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J.F. 409, 420-21 (2021) (discussing nondebtor releases in the liquidating Chapter 11 of a defunct retail electricity provider). This limitless nature of the concept of a "reorganization" was apparent from one of the earliest big bankruptcy grifts, the *Drexel Burnham Lambert* case, which was also a liquidation of a shuttered business. *See* Brubaker, *supra* note 3, at 962-63, 1018-21.

119. *See* Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1751 (2020) ("Chapter 11 implements a structured renegotiation framework.").

120. Indeed, the Eleventh Circuit recently dropped the pretense that a nondebtor release can only be approved if it is necessary to a successful reorganization. *See* Markland v. Davis (*In re* Centro Group, LLC), No. 21-11364, 2021 WL 5158001 (11th Cir. Nov. 5, 2021). The court in *Centro Group* held that a nonconsensual nondebtor release can be approved even if "the purpose of the [release] is not to ensure success for a reorganized entity by eliminating liability against third parties but is instead to facilitate a settlement agreement." *Id.* at *3.

121. *See, e.g.*, *id.*, 2021 WL 5158001, at *3 (stating that a nonconsensual nondebtor release "is 'integral' to the settlement" if "the parties would not have entered into a settlement agreement without it").

of the nondebtor is preordained by the operative legal rule. The nondebtor will absolutely insist upon receiving a nonconsensual nondebtor release as an inviolable deal-breaker condition of making any contribution to the settlement fund, and when the resulting release is presented to the bankruptcy court for approval, will enthusiastically testify accordingly. And truthfully so, since the operative legal rule itself turns on a negotiating position. Even the most obvious bluff, on the stand and under oath, does not risk punishable perjury, because the nondebtor is not so much testifying about objectively verifiable past facts as the nondebtor is testifying about its negotiating position: "I will not contribute anything to a settlement without a nonconsensual nondebtor release."

Permitting the practice of approving nonconsensual nondebtor releases that are "necessary to successful reorganization," while "preach[ing] caution"[122] (as Courts of Appeals have done) is simply extreme naivete – especially if the hope is that this approach will exert any principled restraint on the practice. "Necessary to successful reorganization" is a negotiating position proffered by a nondebtor who will directly benefit from that which it insists is essential to any settlement deal.[123] By positively inviting the nondebtor to manufacture the "evidence" necessary for approval, through its negotiating behavior, this standard virtually guarantees that approval will not and cannot be limited to "rare" and "unusual" cases, which the growing prevalence of the bankruptcy grifter phenomenon vividly illustrates.[124]

As Justice Breyer's opinion in the *Jevic* case insightfully observes, in striking down an extra-statutory priority deviation approved on the basis of the necessity fiction, such a standard "will lead to similar claims being made in many, not just a few, cases," which "threatens to turn a 'rare case' exception into a more general

122. *In re* Ingersoll, Inc., 562 F.3d 856, 864 (7th Cir. 2008).

123. As the Second Circuit accurately noted in *Metromedia*, then, "a nondebtor release is a device that lends itself to abuse." *In re* Metromedia Fiber Network, Inc., 416 F.3d 136, 142 (2d Cir. 2005). And "[i]t is . . . 'precisely this conditioning of financial participation by non-debtors on releases that is subject to the sort of abuses foreseen' in *Metromedia*." *In re* Johns-Manville Corp., 517 F.3d 52, 66 (2d Cir. 2008) (quoting *In re* Karta Corp., 342 B.R. 45, 55 (S.D.N.Y. 2006)), *rev'd on other grounds sub nom.* Travelers Indem. Co. v. Bailey, 557 U.S. 137, 155 (2009).

124. And even if (1) there were, in fact, cases in which the only way, from an ex ante perspective, to save an operating debtor's business is to grant a nondebtor a nonconsensual liability release (theoretically possible, but extremely unlikely), and (2) it were possible, as a practical evidentiary matter, to reliably restrict grants of nonconsensual nondebtor releases to such cases (even more unlikely), they would still be a fundamentally objectionable robbing of Peter to pay Paul. *See* Brubaker, *supra* note 3, at 1021-33; Douglas G. Baird, Anthony J. Casey & Randal C. Picker, *The Bankruptcy Partition*, 166 U. PA. L. REV. 1675, 1686-90 (2018).

rule."[125] "[O]nce the floodgates are opened, [the negotiating parties] can be expected to make every case that 'rare case.'"[126] Indeed, bankruptcy judges are intimately familiar with this "transformation of relief circuit courts describe as 'extraordinary' into a routine part of nearly every chapter 11 case."[127]

This is not to say that requested nondebtor releases are always approved, but it does demonstrate that the determining factors for when they will be approved are not transparent. Given the influence of the Chapter 11 forum-shopping phenomenon,[128] one suspects that a "big case" dynamic may be operative.[129] Because necessary to reorganization means nothing more than necessary to do the deal, nondebtor releases will often be necessary to reorganization in an ex post sense: if the court does not approve the nondebtor-release deal embodied in the plan of reorganization, the deal will fall apart, and the parties will have to start over in trying to negotiate a new deal. The larger the case, the more consequential this "necessity" will be. In extremis, this ex post "necessity" of saving the deal could even present the prospect that the costs of negotiating a new deal (when added to the costs already incurred in negotiating the nondebtor-release deal) would completely exhaust the incremental going concern value of the debtor entity (over and above liquidation value), necessitating liquidation in order to maximize creditor recoveries. That, however, is a "necessity" produced solely by the rule

125. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 986 (2017).

126. *Id.* (quoting Frederick F. Rudzik, *A Priority Is a Priority Is a Priority—Except When It Isn't*, 34 AM. BANKR. INST. J., Sept. 2015, at 16, 79).

127. *In re* Astria Health, 623 B.R. 793, 801 n.25 (Bankr. E.D. Wash. 2021) ("This is an example of the Lake Wobegon effect whereby many ordinary and average things are postured as extraordinary, causing the very concept of extraordinariness to lose meaning."); *see also In re* Aegean Marine Petroleum Network Inc., 599 B.R. 717, 726 (Bankr. S.D.N.Y. 2019) ("Almost every proposed Chapter 11 Plan that I receive includes proposed releases."); *In re* Purdue Pharma, L.P., No. 21 cv 7532, 2021 WL 5979108, at *3 (S.D.N.Y. Dec. 16, 2018) ("When every case is unique, none is unique."); Patterson v. Mahwah Bergen Retail Grp., No. 21cv167, 2022 WL 135398, at *2 (E.D. Va. Jan. 13, 2022) (noting that despite court-of-appeals admonitions that nonconsensual nondebtor releases are to be granted cautiously and infrequently, in only rare, unusual, and exceptional circumstances, "the Bankruptcy Court for the Richmond Division of this district regularly approves third-party releases," and the "ubiquity" and "prevalence" of releases "undermines assertions that they are integral to the success of this particular reorganization").

128. *See infra* notes 132, 133, 198, and accompanying text.

129. *Cf.* Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U. L. REV. 919, 973 (1991) (finding that bankruptcy cases of public companies are never dismissed for lack of good faith, despite the presence of circumstances that prompt dismissal in other cases).

permitting nondebtor-release deals.[130] That "necessity" will never exist if non-debtor releases are prohibited because the parties simply will not negotiate non-debtor-release deals.

The emptiness of the necessity fiction lays bare the absence of any legitimate justification for giving bankruptcy courts the unique, extraordinary power to impose mandatory non-opt-out settlements (that are otherwise impermissible and unconstitutional) of tort victims' claims against solvent entities who have not themselves filed bankruptcy. Nonconsensual nondebtor releases are not about saving an operating debtor's business or any other bankruptcy-unique policy objective. In mass tort bankruptcies, they are all about creating an alternative system for resolving the mass tort liability of solvent nondebtors—an ad hoc system that adheres to neither bankruptcy nor nonbankruptcy norms for achieving fair aggregate settlements.[131]

With nondebtor releases and bankruptcy grifting, bankruptcy's necessity fiction, and its artful manipulation of parties' distributional rights vis-à-vis a bankruptcy debtor, has jumped from the bankruptcy system into the tort system, where it is trampling core tenets of compensatory and procedural justice in connection with victims' claims against bankruptcy grifters. The availability of this ad hoc and superpowerful mandatory non-opt-out settlement device only in bankruptcy, combined with the well-known and rapidly escalating phenomenon of unrestricted forum shopping (and now even judge shopping) in corporate

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130. And that ex post "necessity" bootstrap is also then frequently used to immunize nondebtor releases from any scrutiny on appeal, by dismissing any appeal using the also highly controversial "equitable mootness" doctrine. *See, e.g.*, R[2] Invs., LDC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc.), 691 F.3d 476, 483-86 (2d Cir. 2012); *see* Christopher W. Frost, *Pragmatism vs. Principle: Bankruptcy Appeals and Equitable Mootness*, 15 N.Y.U. J. L. & BUS. 477, 506 (2019) ("*Charter* rests on the notion that equitable mootness is necessary to protect the deal itself."). As my good friend, the late great Professor Christopher W. Frost incisively observed, the "tendency to protect the deal," through an ex post "necessity" standard, "carries over to the equitable mootness decision" on appeal. *Id.* at 515. Equitable mootness doctrine, therefore, mirrors nondebtor release doctrine in that "[t]he very existence of the doctrine creates the circumstances that make it necessary." *Id.* at 523. Consequently, appropriate skepticism regarding the "necessity" of releases also exposes the unstable foundations of claims that appellate challenges thereto should be dismissed as equitably moot. *See, e.g.*, *Patterson*, 2022 WL 135398, at *40-41 (characterizing such a claim as "the height of irony" given that "the Released Parties have given themselves broad releases and have sought to immunize the unconstitutional releases from appellate review with the inclusion of an inflexible Nonseverability Provision" in the plan of reorganization).

131. If the nondebtor's mass tort liability poses a credible threat of insolvency for the released non-debtor, there is even less reason for the courts to fashion an ad hoc distribution and discharge scheme for that nondebtor. That nondebtor can simply file bankruptcy. The unique function and utility of bankruptcy—indeed, its entire purpose and raison d'être—is to deal with the intercreditor equity and entity viability threats posed by that sort of debt overhang, including (and perhaps even especially) debt overhang precipitated by massive disputed obligations.

Chapter 11 filings,[132] is causing a migration of mass tort litigation out of the tort system and into the bankruptcy system.[133] We thus see the rise in bankruptcy grifting that Simon's article rightly decries.

III. MANDATORY BANKRUPTCY AGGREGATION WITHOUT NONDEBTOR RELEASES

Simon's reluctance to embrace an outright ban on nonconsensual nondebtor releases is also motivated by her expressed fear of losing beneficial settlements if nonconsensual nondebtor releases are prohibited.[134] She holds up the Takata settlement as a model of a beneficial settlement produced by giving the settling nondebtors (Honda/Acura and Nissan/Infiniti[135]) a discharge from their Takata airbag liability in exchange for their contributions to the settlement fund.[136]

I am less optimistic about the prospects of mandatory settlements facilitating just resolutions,[137] and tend to place much more confidence in the power of claimants' exit rights to produce fair settlement terms.[138] As Professor Richard A. Nagareda trenchantly observed, "[a]bsent the ability to alter unilaterally [claimant]s' preexisting rights to sue in tort . . . settlement designers must purchase those rights by way of the benefits promised to [claimants] for remaining

132. *See* Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. (forthcoming 2022), https://ssrn.com/abstract=3851339 [https://perma.cc/Z9F6-7G4V]; Adam J. Levitin, *Judge Shopping and the Corruption of Chapter 11* (Georgetown Univ. L. Ctr., Working Paper, Sept. 3, 2021), https://ssrn.com/abstract=3900758 [https://perma.cc/2NKQ-RFWA].

133. *See* Gluck & Burch, *supra* note 105, at 47-51 (noting that "bankruptcy court has emerged as an alternative centralizing federal court"); Patterson v. Mahwah Bergen Retail Grp., No. 21cv167, 2022 WL 135398, at *2 (E.D. Va. Jan. 13, 2022) (noting that the fact that "the Bankruptcy Court for the Richmond Division of this district regularly approves third-party releases" is a "practice [that] contributes to major companies . . . using the permissive venue provisions of the Bankruptcy Code to file for bankruptcy here").

134. *See* Simon, *supra* note 1, at 1205 ("Without the possibility of channeling or releasing claims, many nondebtor companies and individuals would withhold significant contributions that benefit claimants.").

135. *See* TAKATA AIRBAG TORT COMPENSATION TRUST FUND, http://www.takataairbaginjurytrust.com [https://perma.cc/K45Q-T26M].

136. *See* Simon, *supra* note 1, at 1205. Although she also acknowledges that the Takata settlement is aberrational and the circumstances producing it were unique. *Id.* at 1182-83.

137. And that is especially so when no serious attention is paid to separate (unconflicted) representation of creditors' distinct interests regarding their claims *against the released nondebtor*. *See supra* notes 105, 111, and accompanying text.

138. *See* John C. Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 417-28 (2000); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 367-70.

in the settlement. [Claimant]s' preexisting rights to sue truly must be purchased rather than simply appropriated."[139] Preserving claimants' right to agree (or not) to participate in a proposed settlement, therefore, "furnish[es] a kind of market test of a settlement's fairness and adequacy, particularly of the specific compensation offers that will be made under the settlement."[140] And conjecture regarding released nondebtors' willingness to pay plaintiffs a "peace bonus" in excess of the aggregate sum they would pay without a nondebtor release is just that—unverified (and perhaps unverifiable) speculation. It seems just as, if not more, likely that any value created by a nonconsensual nondebtor release is captured entirely by the released nondebtors and the lead plaintiffs' lawyers who negotiate the nondebtor-release deal.[141]

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139. NAGAREDA, *supra* note 102, at 158-59; *see id.* at 121, 136.

140. Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 964 (1995); *see also* BURCH, *supra* note 105, at 205, 212 ("If a mass exodus occurs after a global deal, that can signal that something is amiss. . . . The more [claimants] vote with their feet, the stronger the message becomes that the deal is unattractive."); Coffee, *supra* note 138, at 424 (arguing that "[i]f plaintiffs' counsel and defendants have struck a 'sweetheart' deal that shortchanges" claimants, the best remedy is "to invite [claimants] to 'vote with their feet'"). And in that regard, I would note that the mandatory nondebtor settlements in Takata did not actually provide for "full payment" of all released nondebtors' liability to every individual claimant, as ultimately determined through the claims resolution process. The nonconsensual nondebtor releases for Honda/Acura and Nissan/Infiniti gave them immunity from any liability for punitive damages. *See* Disclosure Statement for Third Amended Joint Chapter 11 Plan of Reorganization of TK Holdings, Inc. and Its Affiliated Debtors at 34, *In re* TK Holdings, Inc., No. 17-11375-BLS (Bankr. D. Del. Jan. 5, 2018) [hereinafter Takata Disclosure Statement], https://restructuring.primeclerk.com/takata/Home-DocketInfo?DocAttribute=3105&DocAttrName=PLANDISCLOSURESTATEMENT [https://perma.cc/DKX7-E9AA]. And in any case in which a claimant opts to litigate its compensatory damages claim to judgment in a court, that judgment is not paid immediately; it is paid over a five-year period, without interest. *Id.* at 34-35.

141. *See, e.g.*, Takata Disclosure Statement, *supra* note 140, at 36-37 (disclosing that released nondebtors will pay compensation to lead plaintiffs' counsel for "work in designing, negotiating, and implementing the Channeling Injunction and [claims resolution] trust"). As Professor Nagareda observed, "the challenge lies in lending a structure to peacemaking that affords latitude for creativity to generate value but, at the same time, inhibits plaintiffs' lawyers and defendants from largely appropriating that value for themselves." NAGAREDA, *supra* note 102, at xi; *cf.* BURCH, *supra* note 105, at 63-64 (stating, in the context of multidistrict litigation (MDL) settlements, that "the limited evidence available suggests that if these premiums exist, the gains unlocked in exchange for delivering peace may be [paid to lead plaintiffs' attorneys for] common-benefit fees—not bigger plaintiff awards"). Simon's proposed "best interests" test would require inherently uncertain (and manipulable) claim valuation estimates, which does not give me confidence that each individual nonconsenting claimant would reliably receive at least as much they would in the absence of the nondebtor release, let alone a "peace bonus," if her proposal were implemented. *See* Simon, *supra* note 1, at 1212-14. Such a purely monetary calculus also ignores the nonmonetary values that many individual claimants attach

I am also more sanguine about the prospects for aggregate bankruptcy settlements with nondebtors, even if *mandatory* settlements via nondebtor release go away. Part of the rhetorical power of bankruptcy's necessity fiction is creating the false impression that nondebtors simply will not settle without nonconsensual discharge of all their liability. Indeed, as Professors Howard M. Erichson and Benjamin C. Zipursky have pointed out, a similar non sequitur pervades discussions of mass tort resolutions generally: "[O]ne sees a conflation of the *desire* for closure and the *need* for closure, a merger of ideas that occurs even more easily when one party takes the [negotiating] stance that it needs closure."[142] Of course, the forces that make aggregate settlements beneficial for plaintiffs (or their lawyers), defendants, and the judiciary will not suddenly disappear in a world without nonconsensual nondebtor releases.[143] Rather, aggregation will be achieved through other mechanisms, just as the decline of class-action aggregation and mandatory class-action settlements of mass torts in the wake of *Amchem Products, Inc. v. Windsor*[144] and *Ortiz v. Fibreboard Corp.*[145] (and then *Wal-Mart Stores, Inc. v. Dukes*[146]) led to the rise of the so-called quasi-class action through multidistrict litigation (MDL) consolidations.[147]

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to their "day in court." *See* BURCH, *supra* note 105, at 31-34, 201-04. Such nonmonetary values, however, are fully protected by assigning individual claimants a "property" right in their individual causes of action, which (not coincidentally) is what due process jurisprudence does. *See* Michael I. Krauss, *Property Rules vs. Liability Rules*, *in* 2 ENCYCLOPEDIA OF LAW AND ECONOMICS § 3800, at 788-90 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); *supra* notes 103, 107, and accompanying text.

142. Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 319 (2011). "The question is not, however, whether [certain] participants *want* closure—of course they do. The question is whether closure, or a very high level of comprehensiveness in settlement, is *needed* . . . from a social perspective." *Id.* "Any adequate evaluation of the comparative value of a comprehensive settlement must include broad considerations that scholars have not even begun to address," particularly if one adopts the extreme position necessary to sustain nonconsensual nondebtor releases—"that closure trumps consent." *Id.* at 320.

143. *See* BURCH, *supra* note 105, at 24-30; Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1771-80 (2005); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1574 (2004) ("Indeed, since the very beginnings of U.S. tort law, a variety of aggregate settlement institutions have powerfully shaped the resolution of particular cases in some of the most important fields of tort practice.").

144. 521 U.S. 591 (1997).

145. 527 U.S. 815 (1999).

146. 564 U.S. 338 (2011).

147. *See* Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1711-12, 1714-15 (2017); Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 965-86 (2012); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL.

The most important element of any judicial process that can facilitate comprehensive aggregate resolutions is getting all claims into one court, which can then bring to bear the full range of judicial-management techniques for producing efficient, fair, and comprehensive resolutions.[148] In that regard, there is tremendous untapped potential for mandatory bankruptcy *consolidation* of tort victims' claims against both debtors and nondebtors to replace the bankruptcy grifter system of mandatory bankruptcy *settlements* through nonconsensual nondebtor releases. And the essential architecture for such mandatory consolidation already exists in the bankruptcy jurisdiction, removal, and venue provisions of the Judicial Code.

A. Tort Victims' Claims Against the Debtor

With respect to creditors' claims against bankruptcy debtors, including the disputed, unliquidated claims of tort victims, bankruptcy is a powerful aggregation device. Many components work together to produce bankruptcy's immense aggregation power. At the heart of it is bankruptcy's extremely broad definition of the bankruptcy "claims" that are eligible to receive a distribution from the debtor's bankruptcy estate,[149] which expressly include not only "disputed" and "unliquidated" tort claims, but also the "contingent" claims[150] of future claimants who have not yet been (but will be) injured from the debtor's prebankruptcy conduct.[151]

L. REV. 2205, 2205-09 (2008); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 113-14 (2010).

148. The state of the art for such techniques is helpfully compiled by the Federal Judicial Center in its *Manual for Complex Litigation*, now in its fourth edition. FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION (4th ed. 2004). For a concise and scholarly overview, see TIDMARSH & TRANGSRUD, *supra* note 11, at 289-455. For a compilation of best judicial practices in mass tort bankruptcies, see S. ELIZABETH GIBSON, JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES (2005).

149. A debtor's bankruptcy estate is comprised, inter alia, of "all legal or equitable interests of the debtor in property as of the commencement of the case," as well as "[a]ny interest in property that the estate acquires after the commencement of the case," such as through the debtor's postpetition business operations, and until confirmation of a plan of reorganization, which "vests all of the property of the estate in the [reorganized] debtor." 11 U.S.C. §§ 541(a)(1), (7), 1141(b) (2018).

150. 11 U.S.C. § 101(5)(A) (2018).

151. Binding such unknown, uninjured future claimants to bankruptcy proceedings in which they cannot meaningfully participate obviously raises many difficult due process issues. Due process, though, is not an insuperable obstacle if, *inter alia*, an adequate fiduciary representative is appointed to represent the interests of future claimants. *See* TABB & BRUBAKER, *supra* note

Bankruptcy's statutory automatic stay immediately enjoins assertion of any "claim" against the debtor outside of the bankruptcy court.[152] This leaves filing a "proof of claim" against the debtor's bankruptcy estate in the bankruptcy court in which the debtor's bankruptcy case is pending as creditors' only recourse with respect to their claims against the debtor.[153] Confirmation of a plan of reorganization establishes the aggregate distribution "fund" available to pay each class of creditor claims.[154] Each individual creditor's pro rata distribution from that "fund" (which is typically a less than payment-in-full distribution for general unsecured creditors such as tort victims) is then determined by the claims "allowance" process.[155]

The plan of reorganization may well establish various alternative-dispute-resolution processes for voluntary settlement of disputed claims.[156] But the Bankruptcy Code also provides creditors recourse to a judicial claims allowance determination by the bankruptcy judge, in a "summary" proceeding without a jury.[157] In the case of personal injury and wrongful death claims, however, the tort victim has a statutory right to a jury trial in a federal district court.[158]

53, at 937-70. *See generally* Ralph Brubaker, *Back to the Future Claim: Due Process In and Beyond the Mass Tort Reorganization (Part I)*, 34 BANKR. L. LETTER, no. 11, Nov. 2014 (formulating a comprehensive framework for analyzing future claimants' due-process rights in bankruptcy); Ralph Brubaker, *Back to the Future Claim: Due Process In and Beyond the Mass Tort Reorganization (Part II)*, 35 BANKR. L. LETTER, no. 1, Jan. 2015 [hereinafter Brubaker, *Future Claim II*] (same).

152. 11 U.S.C. § 362(a) (2018).

153. *See id.* § 501(a).

154. *See* Brubaker, *supra* note 3, at 968-69; Brubaker, *Corporate Discharge Exceptions*, *supra* note 98, at 761.

155. *See* TABB, *supra* note 59, § 7.1, at 636, 639, § 7.26, at 724.

156. For further discussion, see S. ELIZABETH GIBSON, CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS (2000), which provides a detailed description and analysis of such claims resolution facilities in mass tort bankruptcy cases, as compared to those produced by pre-*Ortiz* mandatory class settlements. *See also* S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 WIDENER L.J. 299 (2013) (examining the bankruptcy trust system as part of the broader asbestos personal-injury compensation framework). For a revealing and insightful analysis of the claims resolution facilities under MDL settlements, see BURCH, *supra* note 105, at 134-67. For general background on claims resolution facilities, see Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361 (2005).

157. *See* 11 U.S.C. § 502 (2018); 28 U.S.C. § 157(b)(1), (2)(B) (2018); Katchen v. Landy, 382 U.S. 323, 336-37 (1966). The "summary" label is a reference to the traditional process, inherited from English bankruptcy practice, of so-called summary proceedings in equity before bankruptcy commissioners appointed by the Lord Chancellor. *See* Ralph Brubaker, *Justice Story, Bankruptcy Injunctions, and the Anti-Injunction Act of 1793*, 92 TEX. L. REV. SEE ALSO 67, 76 (2014); *see also* Brubaker, *"Summary" Theory*, *supra* note 53, at 122-26.

158. *See* 28 U.S.C. §§ 157(b)(2)(B), (O), 157(b)(5), 1411(a) (2018).

The ultimate aggregative power of bankruptcy comes from the fact that confirmation of a plan of reorganization not only fixes creditors' distribution rights from the debtor's bankruptcy estate, it also "discharges" the debtor from any prebankruptcy claim, "whether or not a proof of the claim . . . is filed" or "such claim is allowed."[159] All creditors (broadly defined to include even future, unknown, uninjured claimants) are thus bound to the distribution rights established by the confirmed plan of reorganization, whether or not they file a claim or otherwise appear and participate in the bankruptcy proceedings—and they cannot thereafter assert their discharged claims against the debtor or the debtor's property.[160] Indeed, another automatic statutory injunction, the discharge injunction, enjoins creditors from doing so.[161] And the bankruptcy court's territorial jurisdiction to bind creditors extends to any and all who have "minimum contacts" with the United States of America.[162]

That is bankruptcy's "special" statutory preclusion design to which the Supreme Court has alluded, most recently in *Taylor v. Sturgell*.[163] Like class actions,[164] that preclusion mechanism is how bankruptcy effectuates its powerful aggregation of all prebankruptcy claims against a bankruptcy debtor of every stripe, including disputed tort claims.[165] Indeed, bankruptcy claims aggregation, which is a form of mandatory aggregation by preclusion, functions in precisely

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159. 11 U.S.C. § 1141(d)(1)(A)(i)-(ii) (2018).

160. Bankruptcy's statutory free-and-clear sale and vesting provisions essentially "discharge" the debtor's property (and bankruptcy purchasers of the debtor's property) from any continuing liability on prebankruptcy claims also. *See id.* §§ 363(f), 1141(c); Brubaker, *Corporate Discharge Exceptions*, *supra* note 98, at 771.

161. 11 U.S.C. § 524(a)(2) (2018).

162. Nationwide service of process is available in all federal bankruptcy proceedings. *See* FED. R. BANKR. P. 7004(d), 9014(b). "With nationwide service, the forum is the United States. So minimum contacts with the United States (Fifth Amendment due process) suffice; minimum contacts with a particular state (Fourteenth Amendment due process) are beside the point." Double Eagle Energy Servs., LLC v. MarkWest Utica EMG, LLC, 936 F.3d 260, 264 (5th Cir. 2019).

163. 553 U.S. 880, 895 (2008) (quoting Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989) (stating that "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process")).

164. *See* NAGAREDA, *supra* note 102, at 9, 71-73; TIDMARSH & TRANGSRUD, *supra* note 11, at 139 (pointing out that "the class action's preclusive effect on the claims of class members is the crux of why class actions are . . . so powerful").

165. "When the bankruptcy court confirms a plan, its terms become binding on debtor and creditor alike. Confirmation has preclusive effect, foreclosing relitigation of 'any issue actually litigated by the parties and any issue necessarily determined by the confirmation order.'" Bullard v. Blue Hills Bank, 575 U.S. 496, 502 (2015) (quoting 8 COLLIER ON BANKRUPTCY ¶ 1327.02[1][c], at 1327-6 (16th ed. 2014)).

the same manner as settlement of a mandatory class action in achieving *universal* aggregation.[166]

In combination, those are the means by which bankruptcy "channels" creditors' claims: (1) out of the various otherwise available nonbankruptcy state and federal fora and into one court, the federal bankruptcy court presiding over the debtor's bankruptcy case, and (2) away from the debtor and toward and against only the "fund/s" the plan establishes for payment of creditors' claims.[167]

B. Tort Victims' Related Claims Against Nondebtors

1. Mandatory, Universal Settlement via Nondebtor Release

By replicating the effects of the bankruptcy discharge and discharge injunction for creditors' claims against solvent nondebtors, nonconsensual nondebtor releases and permanent injunctions allow nondebtors to get in on bankruptcy's mandatory, universal aggregation by preclusion.[168] Most importantly from the perspective of both nondebtors and tort victims, that mandatory, universal aggregation by preclusion puts a hard cap on released nondebtors' liability exposure at the amount of the "substantial assets [contributed] to the reorganization."[169] But that criterion for approval of a nondebtor release is extremely (and troublingly) vague. Indeed, "nothing in the process by which releases are approved requires contributions by released nondebtors to approximate the value

166. *See* Brubaker, *Future Claim II*, *supra* note 151, at 11 (noting that "a class action settlement is extremely analogous to the binding distribution scheme effectuated by a confirmed plan of reorganization in Chapter 11, complete with a preliminary injunction analogous to bankruptcy's automatic stay, an anti-suit injunction upon final approval of the settlement analogous to bankruptcy's discharge injunction, and in the case of the limited-fund [mandatory] class action at issue in *Ortiz*, no ability whatsoever for individual claimants to opt-out of the settlement, which is of course precisely the function of the bankruptcy discharge effectuated by confirmation of a plan of reorganization" (footnotes omitted)).

167. *See supra* note 11.

168. *See* Travelers Indem. Co. v. Bailey, 557 U.S. 137, 151-54 (2009) (confirmation of plan containing nonconsenual nondebtor release precludes subsequent suit on released claims); Stoll v. Gottlieb, 305 U.S. 165 (1938) (same); Brubaker, *supra* note 6, at 9-11. "Indeed, that is the entire purpose and function of a nonconsensual non-debtor 'release'—to forever and definitively extinguish and bar, by final judgment of a federal court, any collateral suit on the third-party non-debtor claims 'released' thereby." *Id.* at 11.

169. Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 658 (6th Cir. 2002).

of the released claims"[170] nor any other meaningful review of the structural or substantive fairness of the nondebtor release deal.[171]

In the taxonomy of aggregation devices, mandatory universal aggregation by preclusion is the most powerful and thereby carries the most potential to ride roughshod over individual claimants' substantive, procedural, and constitutional rights, as nonconsensual nondebtor releases and the resulting bankruptcy grifter phenomenon amply illustrate. But a range of other aggregation mechanisms exist.[172] And with respect to the third-party nondebtor tort claims resolved via nondebtor release (i.e., mandatory *settlement*), bankruptcy contains another very powerful aggregation structure for mandatory *consolidation*.

2. *Mandatory, Universal Consolidation of Personal Injury Claims*

The essential architecture for mandatory consolidation of mass tort claims against nondebtors is already present in existing bankruptcy law. Section 157(b)(5) of the Judicial Code provides for single-district consolidation of all creditors' related personal injury claims against a nondebtor, in a manner similar to an MDL consolidation.[173] But a § 157(b)(5) bankruptcy consolidation of personal injury claims is even more powerful than an MDL consolidation in two significant respects. First, unlike an MDL consolidation, which can only consolidate cases pending in the federal courts, a § 157(b)(5) bankruptcy consolidation can centralize claims pending in both federal and state courts, through the broader removal power available under the bankruptcy removal statute.[174] Second, unlike an MDL consolidation, which is solely "for coordinated or consolidated pretrial proceedings,"[175] a § 157(b)(5) bankruptcy consolidation is for *all* purposes, including trial in a federal district court.

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170. Brubaker, *supra* note 3, at 992 (typeface altered). Curing that deficiency is the principal object of Simon's proposed reforms of nondebtor-release practice, particularly her proposed "best interests" requirement. *See* Simon, *supra* note 1, at 1212-14; *supra* notes 95-97, 141, and accompanying text.

171. *See* Brubaker, *supra* note 3, at 977-78.

172. For an excellent survey of the landscape, see TIDMARSH & TRANGSRUD, *supra* note 11, at 39-256.

173. 28 U.S.C. § 157(b)(5) (2018). For other discussions of § 157(b)(5) as an aggregation device, see TIDMARSH & TRANGSRUD, *supra* note 11, at 234-35, 239-42; TABB & BRUBAKER, *supra* note 48, at 866-76; Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1649-62 (2008); Georgene Vairo, *Mass Tort Bankruptcies: The Who, the Why, and the How*, 78 AM. BANKR. L.J. 93, 121-25 (2004).

174. 28 U.S.C. § 1452(a) (2018).

175. *Id.* § 1407(a).

The consolidation power of § 157(b)(5) for tort victims' claims against nondebtors starts with the breadth of federal bankruptcy jurisdiction, which as previously noted,[176] extends to creditors' third-party claims against nondebtors that are "related to" the debtor's bankruptcy case.[177] For any such third-party "related to" claim pending in state court when the debtor files bankruptcy (or filed in state court thereafter), the bankruptcy removal statute provides that either party may remove that "claim or cause of action" into federal court.[178] Bankruptcy removal, therefore, is a more surgical removal of only a "claim or cause of action" within a pending civil action, rather than the entire "civil action," which is the object of a general civil removal.[179] Moreover, bankruptcy removal is at the instance of only one of the parties to an individual "claim or cause of action."[180] Consequently, it is impossible for an opposing party to frustrate bankruptcy removal through the kind of jurisdictional and removal spoilers that can prevent general civil removal of state-law tort claims.[181]

For example, imagine hundreds or thousands of personal injury suits against two alleged joint tortfeasors (*D* and *ND*) are pending in state and federal courts all over the country, and one of those alleged joint tortfeasors (*D*) files Chapter 11. All the tort claims against *D* now become subject to the mandatory, universal bankruptcy aggregation process previously discussed.[182] In addition, though, as long as the pending tort claims against *ND* are "related to" *D*'s bankruptcy case, *ND* can immediately remove all of those pending tort claims from state court into federal court,[183] and any such claims that are subsequently filed in state court will likewise be immediately removable.[184]

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176. *See supra* notes 27-28 and accompanying text.

177. 28 U.S.C. § 1334(b) (2018).

178. *Id.* § 1452(a).

179. *See id.* § 1441(a).

180. *See id.* § 1452(a).

181. For example, if a plaintiff sues on only state-law claims and names even one nondiverse defendant, then there is no basis for federal jurisdiction and, thus, no basis for removal under 28 U.S.C. § 1441(a) (2018). Even if a plaintiff sues only diverse defendants on only state-law claims, if the suit is in the state of at least one defendant's citizenship, then § 1441(b)(2) precludes removal based on diversity jurisdiction. And even if there is a good basis for federal jurisdiction and removal, all defendants must consent to a removal under § 1441(a). Gamesmanship to prevent removal under the special class- and mass-action removal statutes is also possible. *See* TIDMARSH & TRANGSRUD, *supra* note 11, at 93-96.

182. *See supra* Section III.A.

183. *See* FED. R. BANKR. P. 9027(a)(2).

184. *See id.* 9027(a)(3).

Like general civil removal, bankruptcy removal is "to the district court for the district where [the removed claim was] pending."[185] *ND*'s bankruptcy removal, therefore, places all of the tort claims against it in federal court, but scattered across federal districts all over the country. This is where § 157(b)(5) becomes important.

Section 157(b)(5) provides that a district-court judge in the district where *D*'s bankruptcy case is pending (the so-called "home court" district) "shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose."[186] After (or in conjunction with) removing all of the "related to" tort claims to federal court, therefore, *ND* can file a § 157(b)(5) motion in the district court in *D*'s home-court bankruptcy district, requesting that all of the tort claims against it in federal court (those that were just removed, those that were previously pending, and those that might subsequently be filed or removed) be transferred to *D*'s home-court bankruptcy district for consolidation there.[187]

Notice, then, that § 157(b)(5) gives one district-court judge in *D*'s home-court bankruptcy district a discretionary power, much like the MDL statute gives to the Judicial Panel on Multidistrict Litigation (JPMDL), to impose mandatory

185. 28 U.S.C. § 1452(a) (2018).

186. *Id.* § 157(b)(5). The principal purpose and effect of § 157(b)(5) and its companion personal injury and wrongful death (PIWD) claim provisions enacted in 1984, 28 U.S.C. §§ 157(b)(2)(B) & (O), (b)(4), (b)(5), 1411(a) (2018), are directed at claims against the debtor's estate, discussed *supra* Section III.A. *See* Ishaq Kundawala, *Unveiling the Mystery, History, and Problems Associated with the Jurisdictional Limitations of Bankruptcy Courts over Personal Injury Tort and Wrongful Death Claims*, 42 MCGEORGE L. REV. 739, 756-58 (2011). With respect to creditors' PIWD claims against the estate, those provisions change (1) the allocation of adjudicatory power as between Article III district courts and their non-Article III bankruptcy court units, (2) creditors' jury trial rights, and (3) the presumptive centralized venue for all claims allowance proceedings only in the home bankruptcy-court district. The PIWD claim provisions (1) take away bankruptcy courts' power to finally adjudicate PIWD claims against the estate (2) without a jury, by giving PIWD creditors a right to a jury trial in a federal district court in their clams allowance proceedings. In addition, (3), § 157(b)(5) explicitly provides an alternative venue for claims allowance proceedings and, thus, has a *de*centralization purpose and effect as applied to creditors' PIWD claims against the debtor's estate. As the Sixth Circuit held in the *Dow Corning* case, though, by its terms § 157(b)(5) is *not* limited to PIWD claims against the debtor's estate, and thus, at least with respect to "related to" PIWD claims (i.e., *not* against the debtor's bankruptcy estate), § 157(b)(5) can (somewhat incongruously) be construed and applied in furtherance of a *centralization* objective. Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (*In re* Dow Corning Corp.), 86 F.3d 482, 495-97 (6th Cir. 1996); *see* TABB & BRUBAKER, *supra* note 53, at 913-14.

187. I use the term consolidation herein loosely to mean the equivalent of centralization in one district, whether or not there is a formal consolidation of related claims pursuant to FED. R. CIV. P. 42(a).

consolidation in one federal district of all of the "related to" tort claims against *ND*. And just like the tort claims against bankruptcy debtor *D*, which are subject to bankruptcy's universal, mandatory aggregation process,[188] a § 157(b)(5) mandatory consolidation of the tort claims against *ND* can also be universal, encompassing any and all of the "related to" tort claims that have been or will be filed against *ND* in any court in the country.

Such a § 157(b)(5) consolidation can not only capture the efficiencies and settlement facilitation potential from consolidating all of the tort claims against *ND* in one court, but also enable the *joinder* efficiencies and settlement facilitation from placing the claims of all victims whose claims are against both *D* and *ND* in the same court.[189] And each and every victim will have the right to a jury trial in a federal district court in *D*'s home-court bankruptcy district for both of its claims—its proof of claim against bankruptcy debtor *D* and its third-party "related to" claim against nondebtor *ND*.[190]

To say that a mandatory, universal consolidation of all "related to" claims against *ND can* occur via § 157(b)(5) is, of course, not to say that the district court *should* order consolidation of those claims in *D*'s bankruptcy case. But the district court would have at its disposal the same kinds of considerations the JPMDL weighs in deciding whether to order an MDL consolidation.[191] Moreover, if the district court decides that a § 157(b)(5) consolidation is not appropriate, the district court can also order a mandatory, universal *remand* of all removed state-law claims under bankruptcy's unique discretionary abstention and remand provisions.[192]

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188. *See supra* Section III.A.

189. *See* AM. L. INST., *supra* note 108, § 1.03 & cmts. b-c; Robert G. Bone, *Revisiting the Policy Case for Supplemental Jurisdiction*, 74 IND. L.J. 139, 140 & n.7, 143, 149 (1998).

190. *See* 28 U.S.C. §§ 157(b)(5), 1411(a) (2018); *supra* note 186 and accompanying text.

191. *See* John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225 (2008); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245 (2008).

192. "[A] Section 157(b)(5) motion 'requires an abstention analysis.'" Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (*In re* Dow Corning Corp.), 86 F.3d 482, 497 (6th Cir. 1996) (quoting Coker v. Pan Am. World Airways Inc. (*In re* Pan Am Corp.), 950 F.2d 839, 844 (2d Cir. 1991)). The bankruptcy jurisdiction statute contains a very broad, discretionary authority to abstain from hearing any claim within federal bankruptcy jurisdiction "in the interest of justice, or in the interest of comity with State courts or respect for State law." 28 U.S.C. § 1334(c)(1) (2018). Likewise, the bankruptcy removal statute provides that a removed claim or cause of action may be remanded "on any equitable ground." *Id.* § 1452(b). "Codification of a discretionary abstention power [in 1978] acknowledged (and likely expanded) an existing body of Supreme Court precedent recognizing the propriety of a federal bankruptcy court staying its hand, in cases such as *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940)." Brubaker, *supra* note 28, at 798 n.204; *see id.* at 840 & n.360 (summarizing

There is also tremendous underexplored potential in hybrid approaches, similar to the originally intended operation of the MDL statute, that exploit the efficiency and settlement advantages of pretrial centralization, but that permit any individual trials to occur in victims' local communities.[193] As Professor Nagareda insightfully recognized, "aggregation in a world in which the modern class action does not, and will not, realistically shoulder the entire regulatory load" requires "*hybridization*—the combination of individual actions with some manner of centralizing mechanism" that combines "traditional litigation features with aggregate ones."[194] The flexible, discretionary nature of both § 157(b)(5)[195] and the bankruptcy abstention and remand provisions[196] can accommodate all manner of such creative hybrid-resolution models.

IV. THE ROLE OF THE SUPREME COURT

Simon envisions reforming nonconsensual nondebtor-release practice. My vision is for mandatory, universal consolidation to replace mandatory, universal settlement via nondebtor release. Can either prospect be realized?

Simon's reforms would likely depend on some combination of judicial or congressional intervention. Given our cumulative experience with nondebtor releases, I am pessimistic about the likelihood of the courts "organically"[197] reforming nondebtor-release practice, particularly given the forum-shopping dynamic that will likely continue to fuel and accelerate a race to the bottom on

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that body of Supreme Court case law). The closest analogy to bankruptcy's discretionary abstention and remand statutes is codification in the general supplemental jurisdiction statute, 28 U.S.C. § 1367(c) (2018), of the discretionary power to decline to exercise supplemental jurisdiction. *See* Brubaker, *supra* note 28, at 863-65 & n.444.

193. *See* BURCH, *supra* note 105, at 162-66, 210-14.

194. Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1113-14, 1171 (2010).

195. Section 157(b)(5) permits the home-court district judge to set the venue of a personal injury or wrongful death claim in the home-court district "or in the district court in the district in which the claim arose." 28 U.S.C. § 157(b)(5) (2018). Nothing in § 157(b)(5) would preclude the home-court district court from making an initial centralization transfer of all tort claims against *ND* to the home-court district of *D*'s pending bankruptcy case and then later transferring individual tort claims to the districts where the claims arose for trial.

196. There are no time limits for discretionary bankruptcy abstention or remand. *See, e.g.*, FED. R. BANKR. P. 9027(d). Thus, even after a § 157(b)(5) centralization of all tort claims against *ND* in the home-court district of *D*'s pending bankruptcy case, the home-court district court could permit trials of individual tort claims against *ND* to take place in the (state or federal) courts in which the claims were originally filed, via remand or abstention.

197. Simon, *supra* note 1, at 1215.

nondebtor releases.[198] As for congressional action, I fear that corporate interests, and even certain powerful segments of the plaintiffs' and bankruptcy bars, could frustrate any meaningful legislative reforms.[199]

My proposal's comparative implementation advantage is that its actualization resides within the authority of one actor—the Supreme Court—in fulfilling its conventional function of resolving circuit splits. Nonconsensual nondebtor-release practice is illegitimate and unconstitutional substantive lawmaking by the federal courts, which the Supreme Court should put an end to. And in navigating the innate mass tort tension between individual victims' rights and autonomy, on the one hand, and the relentless forces of aggregation, on the other, the Supreme Court appears to be the only meaningful watchdog that can ensure structural protections for individual victims—at least from the most egregious systemic abuses, which nondebtor releases are.[200]

Were the Supreme Court to prohibit nonconsensual nondebtor releases, there are credible indications that § 157(b)(5) bankruptcy consolidations would fill the space created by prohibition of nonconsensual nondebtor releases. Even in a world in which nonconsensual nondebtor releases are permissible, codefendants have on occasion, with mixed results, attempted the bankruptcy removal and consolidation strategy outlined in Part III.[201]

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198. *See supra* notes 128, 132, 133, and accompanying text.

199. Moreover, recent legislative activity indicates that if Congress were to address nonconsensual nondebtor releases, outright prohibition may be just as (if not more) likely than reforms of the kind Simon proposes. *See* S. 2497, 117th Cong. (2021) (proposing 11 U.S.C. § 113(a) to prohibit nonconsensual nondebtor releases and permanent injunctions); H.R. 4777, 117th Cong. (2021) (same); Jonathan Randles, *Elizabeth Warren Targets Sacklers' Legal Protection in Purdue Bankruptcy*, WALL ST. J. (July 23, 2021), https://www.wsj.com/articles/elizabeth-warren-targets-sacklers-lawsuit-exemptions-in-purdue-bankruptcy-11627041600 [https://perma.cc/MC9H-DHD8].

200. And that view of the Supreme Court's institutional role in mass torts may help explain the *Amchem* and *Ortiz* decisions. *See* Coffee, *supra* note 138, at 437 ("Indeed, the goal of [claimant] autonomy . . . seems to be the one thread that unites *Amchem* and *Ortiz* with earlier Supreme Court decisions such as *Hansberry v. Lee* and *Martin v. Wilks*." (footnotes omitted)); *cf.* Thomas D. Morgan, *Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements*, 79 GEO. WASH. L. REV. 734, 741 (2011) ("The only people with a powerful bias toward particularized representation, in short, are the clients whose interests the law purports to protect.").

201. *See, e.g.*, *In re* Fed.-Mogul Glob., Inc., 300 F.3d 368 (3d Cir. 2002) (affirming the denial of a § 157(b)(5) consolidation of break-pad claims against automotive manufacturers in bankruptcy case of brake-pad manufacturer); Lindsey v. Dow Chem. Co. (*In re* Dow Corning Corp.), 113 F.3d 565 (6th Cir. 1997) (ordering a § 157(b)(5) consolidation in Dow Corning's bankruptcy case of breast-implant claims against Dow Chemical and Corning Inc., corporate parents of breast-implant manufacturer Dow Corning); *In re* Imerys Talc Am., Inc., No. 19-mc-103, 2019 WL 3253366 (D. Del. July 19, 2019) (denying a § 157(b)(5) consolidation of talc

The only significant obstacle to fully effective use of § 157(b)(5) consolidations is the circuits' disagreement over the scope of third-party "related to" bankruptcy jurisdiction, which was consciously designed to be as broad as the Constitution permits.[202] Here, too, the Supreme Court can and should resolve this critical issue of federal jurisdiction, whose importance transcends mass tort bankruptcies and pervades the entirety of bankruptcy courts' dockets,[203] including even the most prosaic consumer bankruptcy cases.[204]

The vast and sprawling case law regarding the scope of third-party "related to" bankruptcy jurisdiction is in a state of utter and dizzying disarray, all of which can best be understood and explained through one straightforward, central question: is third-party "related to" bankruptcy jurisdiction simply a grant of conventional transactional supplemental jurisdiction? If so,[205] then all the confusion surrounding third-party "related to" bankruptcy jurisdiction vanishes, and a nightmarishly unwieldy and problematic corner of federal jurisdiction is greatly simplified and modernized. If not, then there is seemingly no escape from

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claims against Johnson & Johnson (J&J) in the bankruptcy case of J&J's talc supplier); *see* TABB & BRUBAKER, *supra* note 53, at 905-19.

202. *See* Brubaker, *supra* note 28, at 793-99.

203. Most significantly, the confusion regarding the scope of third-party "related to" bankruptcy jurisdiction frustrates the full implementation of modern joinder devices, embodied in both the Federal and Bankruptcy Rules of Civil Procedure, in bankruptcy litigation. *See* Brubaker, *supra* note 51, at 1-9; Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an* In Rem *Model of Bankruptcy Jurisdiction*, 15 EMORY BANKR. DEV. J. 261, 274-84 (1999) [hereinafter Brubaker, *One Hundred Years*]; Brubaker, *supra* note 28, at 921-40.

204. For example, the uncertainty regarding the scope of third-party "related to" bankruptcy jurisdiction bedevils a bankruptcy court's ability to liquidate and enter a money judgment on the debt of an individual (i.e., not corporate) debtor declared nondischargeable, because the court has determined, for instance, that the debtor committed fraud. *See* Ralph Brubaker, *Federal Bankruptcy Jurisdiction to Enter a Money Judgment on a Nondischargeable Debt (Part I): A Tale of Two Seventh Circuit Decisions and Related-To Jurisdiction*, 40 BANKR. L. LETTER, no. 5, May 2020, at 1; Ralph Brubaker, *Federal Bankruptcy Jurisdiction to Enter a Money Judgment on a Nondischargeable Debt (Part II): A Tale of Two Seventh Circuit Decisions and Related-To Jurisdiction*, 40 BANKR. L. LETTER, no. 8, Aug. 2020, at 1; Brubaker, *supra* note 28, at 910-21.

205. The Second, Seventh, Ninth, and Eleventh Circuits have all indicated that third-party "related to" bankruptcy jurisdiction is a grant of transactional supplemental jurisdiction. *See* Townsquare Media, Inc. v. Brill, 652 F.3d 767, 771-72 (7th Cir. 2011); Hosp. Ventures/Lavista v. Heartwood II, LLC (*In re* Hosp. Ventures/Lavista), 265 F. App'x 779 (11th Cir. 2008), *aff'g* 358 B.R. 462, 468-81 (Bankr. N.D. Ga. 2007); Sasson v. Sokoloff (*In re* Sasson), 424 F.3d 864, 868-69 (9th Cir. 2005); Klein v. Civale & Trovato, Inc. (*In re* Lionel Corp.), 29 F.3d 88, 92 (2d Cir. 1994). Ironically, given the *Pacor* decision discussed *infra* notes 207-209 and accompanying text, even the Third Circuit has, at times, indicated that the reach of third-party "related to" bankruptcy jurisdiction is coextensive with that of the general supplemental jurisdiction statute. *See, e.g.*, Pelora v. United States, 488 F.3d 163, 172 n.8 (3d Cir. 2007).

the quagmire into which the courts have thoughtlessly stumbled by blindly following the Third Circuit's badly misguided *Pacor* decision.[206]

In the *Pacor* case, the Third Circuit assuredly declared that third-party "related to" bankruptcy jurisdiction most definitely is *not* supplemental jurisdiction.[207] But as I have explained elsewhere at length, every credible indication points to the conclusion that third-party "related to" bankruptcy jurisdiction is a statutory grant of modern transactional supplemental jurisdiction.[208] Indeed, "use of the identical term 'related to' in both [the bankruptcy jurisdiction statute] § 1334 and [the general supplemental jurisdiction statute] § 1367 . . . suggests that supplemental jurisdiction is what Congress always intended when it used that term in § 1334."[209]

If third-party "related to" jurisdiction is a grant of conventional supplemental jurisdiction, then there is federal bankruptcy jurisdiction over any third-party "claims [that] arose from the same nucleus of operative fact"[210] as a claim

206. Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984). For a discussion of *Pacor*'s many missteps, see Brubaker, *supra* note 28, at 869-87.

207. *Pacor*, 743 F.2d at 994. For an explanation of why that was a manifestly erroneous conclusion, see Brubaker, *supra* note 28, at 878-80; and TABB & BRUBAKER, *supra* note 53, at 883-84.

208. My book-length exploration of these issues is Brubaker, *supra* note 28. For more concise treatments, see Brubaker, *supra* note 51; and Brubaker, *One Hundred Years*, *supra* note 203.

209. Pierce v. Conseco Fin. Servicing Corp. (*In re* Lockridge), 303 B.R. 449, 455 (Bankr. D. Ariz. 2003). In fact, every time "Congress has sought to expressly create supplemental jurisdiction, it has used the 'related' terminology, and to the extent that a grant of 'related' jurisdiction has a plain or ordinary meaning, it is recognized as connoting supplemental jurisdiction." Brubaker, *supra* note 28, at 862-63 (footnotes omitted); *accord Townsquare Media*, 652 F.3d at 771 ("One might think that the bankruptcy court . . . would have the same supplemental jurisdiction as the district court . . . especially since Congress has given the district courts (including therefore bankruptcy courts) jurisdiction over proceedings 'related to' bankruptcy." (citing *Sasson*, 424 F.3d at 868-69 (holding that "the bankruptcy court's '*related to*' jurisdiction also includes the district court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367 'over all claims that are so *related to* claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution" (emphasis added)))); Frank R. Kennedy, *The Bankruptcy Court Under the New Bankruptcy Law: Its Structure, Jurisdiction, Venue, and Procedure*, 11 ST. MARY'S L.J. 251, 285-88, 287 (1979) (executive director of the congressional commission that led to the 1978 legislation opining that the new statutory grant of "related to" jurisdiction over third-party disputes "requires a consideration of the potential reach of a concept or doctrine of ancillary [now known as supplemental] jurisdiction"); *see also* George Brody, *Frank R. Kennedy*, 82 MICH. L. REV. 189, 192 (1983) (describing Frank Kennedy's work as the executive director of the congressional commission).

210. United Mine Workers v. Gibbs, 383 U.S. 715, 728 (1966).

by or against the debtor's bankruptcy estate.[211] In my previous example, then, all of the tort claims against *ND* undoubtedly would be within "related to" bankruptcy jurisdiction, and a § 157(b)(5) bankruptcy consolidation is permissible.[212]

Crucially, this mandatory, universal consolidation of the personal injury claims against *ND* could even include any future claim of an as-yet-uninjured victim, to the extent that a future claimant's related claim against *D* is a bankruptcy "claim" within the meaning of the Bankruptcy Code, eligible for a distribution and subject to discharge (and thus mandatory, universal aggregation) in *D*'s bankruptcy case.[213] The inability to aggregate such future claims is one of the principal shortcomings of other aggregation devices.[214] But bankruptcy has the means—entirely within its existing statutory structure—to aggregate not only future claims against the debtor, but also future claims against nondebtors via § 157(b)(5).

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211. A claim by or against the federally created bankruptcy estate is a constitutional federal-question claim under the "original ingredient" or federal-entity theory of constitutional federal questions, first articulated by Chief Justice Marshall's opinion in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823-26 (1824). *See* Brubaker, *One Hundred Years*, *supra* note 203, at 282-83; Brubaker, *supra* note 28, at 813-31. Thus, "the relationship between that claim and the [third-party nondebtor] claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *Gibbs*, 383 U.S. at 725.

212. Thus, in the 1997 *Dow Corning* case, discussed *supra* note 201, the critical prior ruling—which cleared the way for the Sixth Circuit to order a § 157(b)(5) consolidation of breast-implant claimants' third-party claims against codefendants Dow Chemical and Corning Inc. in the bankruptcy case of Dow Corning—was the Sixth Circuit's previous decision in 1996 that there was federal bankruptcy jurisdiction over those third-party nondebtor claims because they were "related to" Dow Corning's bankruptcy case. *See* Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (*In re* Dow Corning Corp.), 86 F.3d 482, 485-95 (6th Cir. 1996). The Sixth Circuit is among those courts that apply the grant of third-party "related to" bankruptcy jurisdiction in a manner that is indistinguishable from supplemental jurisdiction. *See* Brubaker, *supra* note 28, at 905-10.

213. *See supra* Section III.A. The primary stand-alone claim in an Article III constitutional category, to which a future claimant's claim against *ND* would be supplemental, could be either (1) the future claimant's subsequently filed proof of claim in *D*'s bankruptcy case, or (2) *ND*'s proof of claim filed in *D*'s bankruptcy case (even *before* the future claimant is injured) asserting a *contingent* right to indemnification or contribution from *D*. *See* Brubaker, *supra* note 28, at 875-77. To the extent that a § 157(b)(5) consolidation contemplates consolidation of even *future* tort claims against a nondebtor, due process would seem to require appointment of an adequate fiduciary representative for the claims of future claimants *against the nondebtor* in conjunction with consideration of the § 157(b)(5) consolidation motion. *See supra* notes 150-151 and accompanying text.

214. *See* AM. L. INST., *supra* note 108, § 3.10 cmt. b, at 233-34; TIDMARSH & TRANGSRUD, *supra* note 11, at 17-18, 213-15, 242-45. Indeed, "the need to fashion a binding peace for both pending claims and future ones . . . represents the central challenge in mass tort litigation generally." NAGAREDA, *supra* note 102, at 167.

Under *Pacor*'s interpretation, which concludes that third-party "related to" bankruptcy jurisdiction is not supplemental jurisdiction, the absence of any federal bankruptcy jurisdiction over the tort claims against *ND* is an absolute nonstarter for a § 157(b)(5) consolidation.[215] By correcting the severe systemic flaw that *Pacor* introduced into the critical infrastructure of federal bankruptcy jurisdiction, therefore, the Supreme Court would, in the process, also open the door to maximally effective § 157(b)(5) consolidations and aggregate settlements. Indeed, one of the prominent policy rationales for modern transactional supplemental jurisdiction is facilitating joinder of related claims in one court and, thereby, settlement of complex disputes.[216] In fact, § 157(b)(5) consolidations would be an immensely more powerful and fairer centralization process than MDL consolidations.

The comprehensiveness of a § 157(b)(5) consolidation will be particularly appealing to nondebtor defendants,[217] who would be the necessary drivers of the centralization process, through exhaustive removals and § 157(b)(5) consolidation motions. Even more importantly, § 157(b)(5) consolidations should prove more advantageous to tort claimants than MDL consolidations.

MDL consolidations are hamstrung by the inability of MDL transferee courts to try transferred cases without the consent of all parties. Moreover, remands to transferor courts for trial are exceedingly rare.[218] MDL consolidations, therefore, have become a procedure focused almost exclusively upon settlement, in which plaintiffs cannot wield their most effective settlement cudgel: a credible threat of taking cases to trial.[219] This "sharply skews the MDL bargaining process in favor of defendants."[220] A § 157(b)(5) bankruptcy consolidation, by contrast, in which

215. *See, e.g.*, *In re* Fed.-Mogul Glob., Inc., 300 F.3d 368, 379-84 (3d Cir. 2002); *In re* Imerys Talc Am., Inc., No. 19-mc-103, 2019 WL 3253366, at *2-7 (D. Del. July 19, 2019).

216. *See* Brubaker, *supra* note 28, at 906-07 & nn.571-72, 935.

217. *See* AM. L. INST., *supra* note 108, § 3.10 cmt. b, at 233; BURCH, *supra* note 105, at 26-27; Erichson, *supra* note 143, at 1775-80.

218. *See* BURCH, *supra* note 105, at 209-10 (reporting a remand rate of only three percent of the over 500,000 consolidated civil actions since JPMDL's inception in 1968). And it is not uncommon for an MDL settlement to occur without any merits-based rulings in the MDL transferee court that can clarify potential settlement values. *See id.* at 108, 110, 113-14; Gluck & Burch, *supra* note 105, at 15-16, 54-57.

219. *See* NAGAREDA, *supra* note 102, at 19-20 ("In the face of defendants' intransigence, mass tort plaintiffs' lawyers have only one real bargaining chip, but it is a big one: their power to take cases to trial."); Silver & Miller, *supra* note 147, at 123 (noting that the "standard economic model of settlement" indicates that "the weapon that pressures a defendant to pay a reasonable amount in settlement" is "the threat of forcing an exchange at a price set by a jury").

220. Delaventura v. Columbia Acorn Tr., 417 F. Supp. 147, 153-54 (D. Mass. 2006); *see also* Silver & Miller, *supra* note 147, at 123-24 ("Being stuck forever in a court that cannot preside over a trial

every personal injury claimant would have a statutory right to a jury trial on their claims against *ND* in the transferee federal district court (where *D*'s bankruptcy case is pending),[221] could restore a more level playing field for both aggregate settlement negotiations with *ND* and resolution of residual "opt out" cases against *ND*.[222]

CONCLUSION

Simon's *Bankruptcy Grifters* article shines a bright and penetrating light on alarming injustices occurring through the intimidatingly complex and mysterious machinations of corporate bankruptcy proceedings. As a practical matter, the Supreme Court is the only institution that can put a stop to bankruptcy grifting, by prohibiting nonconsensual nondebtor releases. By reversing *Pacor*'s error, the Supreme Court can also pave the way for a fairer bankruptcy process for aggregate resolution of mass tort claims against nondebtors.

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and that wants a global settlement at all costs, plaintiffs caught up in MDLs have little bargaining leverage."); *cf.* BURCH, *supra* note 105, at 108 ("When [MDL transferee] judges don't engage with the merits through pretrial motions and trials, the relative strength of plaintiffs' cases may matter little in settlement negotiations.").

221. *See* 28 U.S.C. §§ 157(b)(5), 1411(a) (2018).

222. Technically, nonconsenting plaintiffs do not affirmatively "opt out" of a non-class aggregate settlement, such as an MDL settlement or, for example, a settlement in conjunction with a § 157(b)(5) consolidation of victims' claims against *ND*. Rather, they fail to affirmatively "opt in." *See* Erichson, *supra* note 143, at 1812. As discussed *supra* notes 191-196 and accompanying text, the district court in *D*'s home-court district would have substantial venue flexibility for resolution of the tort claims of such residual "opt out" plaintiffs against *ND*. It could (1) retain those cases in the home-court district, (2) transfer them to the districts where each claim arose (e.g., where the plaintiff was injured), or (3) permit them to proceed in the (state or federal) courts in which they were originally filed via abstention and remand.

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Bankruptcy Law Letter

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A Case Study in Federal Bankruptcy Jurisdiction: Core Jurisdiction (or Not) to Approve Non-Debtor "Releases" and Permanent Injunctions in Chapter 11

By Ralph Brubaker

In a two-part article in the previous two issues of *Bankruptcy Law Letter*,[1] my friend Ben Logan has put forth a considerable effort to bolster the bankruptcy court's recent decision in the *Millennium Lab* case.[2] That decision held that non-Article III bankruptcy courts can enter final orders (i) approving nonconsensual plan of reorganization provisions and (ii) issuing implementing injunctions (together, known by the euphemism *non-debtor "releases"*) that permanently extinguish and bar nonconsenting creditors from pursuing direct claims of liability against non-debtor parties. In *Millennium Lab*, for example, the non-debtor "release," approved by final order of the bankruptcy court, extinguished any and all claims the debtor's creditors might have against, inter alia, the debtor's officers, directors, and corporate parents, including fraud and RICO claims asserted in a federal district-court lawsuit by certain of the debtor's prepetition lenders against both of the debtor's corporate parents and two of the debtor's individual corporate officers, one of whom was the debtor's founder.

Millennium Lab was wrongly decided. It is unconstitutional for a non-Article III bankruptcy court to enter such a final judgment, and Logan's analysis ultimately is misguided in several (and quite fundamental) ways, as I hope to make clear in this article. Most critically, Logan (and the *Millennium Lab* opinion) misperceive the applicable jurisdictional unit at issue when a judge is asked to approve a non-debtor "release." The relevant litigation unit, for purposes of jurisdictional analysis, is *not* the plan confirmation "proceeding." The jurisdictional unit over which the judge must exercise jurisdiction in order to approve a non-debtor "release" is each individual jurisdictional "claim" of a creditor against a non-debtor that is sought to be extinguished via nonconsensual "release" thereof.

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Because Logan and *Millennium Lab* focus on the wrong jurisdictional unit, their entire jurisdictional analysis is flawed.

Logan is quite right, though, to emphasize the importance of this particular jurisdictional issue that has now conspicuously surfaced in the wake of the Supreme Court's *Stern v. Marshall* decision.[3] As Logan points out, the constitutionality of a non-Article III bankruptcy judge entering final judgment approving a non-debtor "release" was seriously questioned long before the *Stern* decision (as were other jurisdictional difficulties now being "discovered" post-*Stern*). Indeed, I wrote (at some length) about precisely the problem at issue in *Millennium Lab* when I was a young assistant professor, in an article published 20 years ago, in which I observed that "[p]erhaps the most complicated and confusing aspect of the controversy surrounding nondebtor releases and injunctions is the preliminary inquiry for any exercise of judicial power—jurisdiction."[4] And my quest to understand the difficult, but fascinating jurisdictional implications of non-debtor "releases" is what sparked my abiding and more general interest in federal bankruptcy jurisdiction and procedure as a field worthy of sustained scholarly inquiry, pursuit of which has now occupied a large part of my academic career.

Subsequent maturation of the Supreme Court's governing jurisprudence (and, hopefully, my own understanding thereof) has not changed my views regarding the basic constitutional impediment to a non-Article III bankruptcy court issuing a final judgment approving a non-debtor "release." The essential contours of the problem remain unchanged by *Stern*, *Arkison*,[5] and *Wellness*.[6] Understanding why such an order is unconstitutional, though, requires a solid foundation in a wide range of first principles of federal bankruptcy jurisdiction and general federal courts law—a virtual whirlwind tour of my upper-level law-school course in Bankruptcy Procedure.[7]

Subject Matter Jurisdiction Versus the Adjudicatory Authority of Non-Article III Judicial Officers

Federal bankruptcy jurisdiction, in general, and non-debtor "releases," in particular, implicate two easily confused and conflated, but very different kinds of "jurisdictional" issues, each of which has both a constitutional and a statutory dimension. One kind of jurisdictional issue is typically referred to as determining the existence of *federal subject matter jurisdiction*, a necessary and preliminary requisite for

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any dispute to be addressed by a federal court. For there to be federal subject matter jurisdiction over a particular matter, (1) it must be one that is within the carefully limited kinds of "cases and controversies" properly the subject of federal jurisdiction, as delineated in Article III, § 2 of the Constitution, and (2) Congress must have vested the federal courts with subject matter jurisdiction to decide such a matter by a duly enacted jurisdictional statute. The scope of federal subject matter jurisdiction (limited by both the Constitution and the terms of federal jurisdiction statutes) implicates *judicial federalism* concerns regarding the appropriate allocation of judicial power as between the federal courts and the state courts. What disputes can we essentially take from the state courts and place before the federal courts through federal bankruptcy jurisdiction?[8]

Non-debtor releases do (as we'll see) inevitably implicate subject-matter jurisdiction constraints regarding the outermost limits of federal bankruptcy jurisdiction (over what the statute designates "related to" proceedings). That was not, however, the primary jurisdictional issue addressed in the *Millennium Lab* opinion and Logan's assiduous defense thereof. Rather, *Millennium Lab* concerned the *Marathon* and *Stern* jurisdictional issue of the proper allocation of federal bankruptcy jurisdiction as between Article III and non-Article III tribunals, necessitated by constitutional limitations on the adjudicatory powers of non-Article III bankruptcy judges.

The *Marathon/Stern* limitations are a product of Article III, § 1's protection of *separation-of-powers* and *judicial independence* values, through its guarantee that the federal "judicial Power" will be exercised only by judges with life tenure and irreducible compensation. Because bankruptcy judges do not enjoy these Article III protections, their adjudicatory authority is necessarily limited. Thus, for matters within Congress's grant of bankruptcy jurisdiction to the federal courts (i.e, within federal subject matter jurisdiction over bankruptcy matters), there is a complex allocation of adjudicatory powers as between the Article III district courts and their non-Article III bankruptcy courts (that are a unit of the district court in each district).

This division of adjudicatory authority is reflected in the statutory structure that empowers bankruptcy judges to enter final judgment only (1) in what the statute now denominates "core" proceedings, involving matters within the traditional "summary" jurisdiction of specialized bankruptcy tribunals, or (2) with consent of the litigants, in other matters within the scope of federal bankruptcy jurisdiction. For matters *not* within bankruptcy judges' core/summary jurisdiction—traditionally the subject of a so-called "plenary" suit in a superior court of law or equity—the litigants have an inviolate constitutional right to final judgment from an Article III judge. The jurisdictional statute authorizes bankruptcy judges to "hear" such a non-core "related to" matter, but final judgment must be from an Article III district judge after a *de novo* review.[9] The issue in *Millennium Lab* (still *sub judice*, currently on appeal) is whether approval of a nonconsensual non-debtor "release" is such a non-core/plenary matter.

Confirmation of a Plan of Reorganization or Final Adjudication of Third-Party Non-Debtor Claims?

In resolving that issue—whether approval of a nonconsensual non-debtor "release" is a non-core/plenary matter in which a party thereto has an inviolable constitutional right to final judgment from an Article III judge—Logan is also correct in identifying the central bone of contention that is completely determinative: What, exactly, is a judge exercising jurisdiction over when that judge enters a final judgment approving a nonconsensual non-debtor

"release"? There are two alternative, competing conceptions of what that judge is exercising jurisdiction over: (1) confirmation of a plan of reorganization, or (2) final adjudication of creditors' claims against a non-debtor.

Non-Article III Bankruptcy Judges Have Core/Summary Jurisdiction to Confirm a Plan of Reorganization

The conception of Logan (and the bankruptcy court in *Millennium Lab*) is that when a judge enters final judgment approving a nonconsensual non-debtor "release," the matter or "proceeding" over which the judge is exercising jurisdiction is confirmation of a plan of reorganization. And that is the case, so the argument goes, since approval of a non-debtor "release" is only done in conjunction with confirmation of a plan of reorganization, after the judge finds that inclusion of the non-debtor "release" is appropriate under federal bankruptcy law standards. Thus, approval of the non-debtor "release" is part and parcel of confirmation of the plan itself. As the *Millennium Lab* bankruptcy court stated, "[i]n this matter, the operative proceeding for purposes of a constitutional analysis is confirmation of a plan."[10]

If that is the appropriate conception of the matter or "proceeding" over which the judge is exercising jurisdiction, then Logan is right that *Millennium Lab* was correctly decided. Regardless of one's interpretation of the Supreme Court's cumulative jurisprudence regarding the appropriate test or theory or analysis for determining the kinds of matters that a non-Article III bankruptcy judge can constitutionally determine by final order or judgment,[11] confirmation of a plan of reorganization indisputably *is* one of those core, traditionally summary matters.[12] That, however, is *not* an appropriate conception of the matter over which the judge is exercising jurisdiction when entering a final judgment approving a nonconsensual non-debtor "release."

Specifying the Applicable Jurisdictional Unit

Because the subject matter jurisdiction of all federal courts is limited, as is the jurisdiction of any non-Article III tribunal, either kind of "jurisdictional analysis requires a conception of the fundamental unit of litigation" so that matters within that limited jurisdiction can be distinguished from matters that are not.[13] And the fundamental unit of litigation for purposes of jurisdictional analysis is an individual "claim."

Whether the jurisdictional statute speaks in terms of jurisdiction over a "civil action" (as does, e.g., the general federal question statute[14] and the diversity statute[15]) or a "proceeding" (as does the bankruptcy jurisdiction statute[16]), "[o]riginal jurisdiction attaches on a claim-by-claim or 'claim-specific' basis."[17] Indeed, "the original jurisdiction of the district courts is claim-specific in a pervasive and fundamental sense that pertains to the entire statutory and constitutional structure of federal subject matter jurisdiction."[18] And the Third Circuit has also expressly adopted such "a claim by claim analysis to determine the extent of a Bankruptcy Court's [core] jurisdiction."[19]

For purposes of jurisdictional analysis, an individual "claim"—over which a federal court either does or does not have jurisdiction—is "an assertion by one claiming party of a right to some form of judicial relief" against another party.[20] One jurisdictional "claim," therefore, "is defined in terms *both* of a particular pair of parties" to that one "claim" for relief *and* the particular legal right or obligation being asserted between those two parties.[21] Just as a nonbankruptcy "civil action" in a federal district court may be comprised of multiple claims being asserted between two or more parties (each of which must be within the subject matter jurisdiction of the court), the same is true of any given "proceeding" within the bankruptcy jurisdiction of a federal district

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court and referred to the bankruptcy court (under a standing order of reference).[22] And this is especially true for a plan confirmation "proceeding," precisely because (as Logan points out) it is "a unitary omnibus civil proceeding for the reorganization of *all* obligations of the debtor and disposition of *all* its assets."[23] All of a debtor's creditors, therefore, against whom various forms of judicial relief is sought (including discharge of each of their claims against the debtor), are parties to a plan confirmation proceeding.[24] Consequently, a court may exercise jurisdiction over hundreds and even thousands of jurisdictional "claims" in confirming a plan of reorganization.

Individual analysis of each and every jurisdictional "claim" in a plan confirmation proceeding is rarely necessary because the traditional "claims" at issue in plan confirmation are ones (1) that are clearly within the federal subject-matter grant of bankruptcy jurisdiction, and (2) on which a non-Article III bankruptcy judge can clearly enter a final order as a conventional core/summary matter: various "claims" regarding "the reorganization or adjustment of all obligations of *the debtor* and disposition of all *the debtor's* assets."[25]

Non-debtor "releases," though, bring jurisdictional "claims" (asserting a right to relief between two *non-debtor* parties) into the confirmation "proceeding," which jurisdictional "claims" are *not* so clearly within (1) the federal grant of subject-matter jurisdiction in bankruptcy or (2) the conventional core/summary jurisdiction of a non-Article III bankruptcy judge. Indeed, in its *Continental Airlines* decision, the Third Circuit noted, "with some concern," regarding a bankruptcy court's "jurisdiction to release and permanently enjoin [creditor]s' claims against non-debtors":

> Although bankruptcy subject matter jurisdiction can extend to matters between non-debtor third parties affecting the debtor or the bankruptcy case [through the grant in § 1334(b) of the Judicial Code of original jurisdiction over proceedings "related to" a bankruptcy case], a court cannot simply presume it has jurisdiction in a bankruptcy case to ["release" and] permanently enjoin third-party . . . actions against non-debtors. We must remain mindful that bankruptcy jurisdiction is limited, as is the explicit grant of authority to bankruptcy courts.[26]

The jurisdictional analysis required for approval of a non-debtor release by a bankruptcy judge, therefore, must address both (1) the subject matter jurisdiction of a federal court to approve a jurisdictional "claim" requesting approval of a nonconsensual non-debtor "release," and (2) assuming the existence of federal subject matter jurisdiction, whether it is constitutional for a non-Article III bankruptcy court to issue a final judgment approving that "release."

"Related To" Subject Matter Jurisdiction Over "Released" Third-Party Claims

In analyzing a federal court's subject matter jurisdiction in bankruptcy to approve a nonconsensual non-debtor "release" as applied to the relevant litigation unit, a jurisdictional "claim," consider a typical individual claim extinguished by a nonconsensual non-debtor "release" provision: one creditor's (C's) alleged right to recover damages from one individual "released" non-debtor (ND, who is a shareholder and President of the debtor corporation, D) alleged to have committed common-law fraud in inducing C to lend money to D. As Logan points out, if "extinction of"[27] that fraud claim by a federal court is authorized at all, it can only be by virtue of some federal bankruptcy law authorizing extinguishment of C's fraud claim against ND.

Since the right to extinguish that fraud claim, if it exists, is grounded in federal law, one might be tempted, therefore, to conclude that federal subject-matter jurisdiction over the jurisdictional "claim" at issue (seeking

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extinguishment of C's fraud claim against ND) is easily established as a conventional constitutional[28] and statutory[29] federal-question claim "arising under" the provisions of federal law, to wit, the Bankruptcy Code.[30] The matter is not so simple, though.

There is no provision in the Bankruptcy Code explicitly authorizing extinguishment of C's fraud claim against ND. Indeed, until the Fourth Circuit's 1989 decision in the A.H. Robins reorganization,[31] "it was virtually unthinkable . . . that a bankruptcy court could enter an order discharging the *in personam* liability of a nondebtor party to a debtor's creditors."[32] Thus, to extinguish C's fraud claim against ND, a bankruptcy court must rely upon the grant of authority in Bankruptcy Code § 105(a) to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of" general Code sections regarding plan confirmation and implementation. "Section 105, however, is not an independent source of jurisdiction, a notion that § 105(c) now makes explicit."[33] By virtue of Code § 105(c), therefore, a "claim" seeking an order issued under § 105(a) does not "arise under" the Bankruptcy Code for jurisdictional purposes, simply by virtue of the fact that Code § 105(a) codifies general equitable powers. And the fact that the courts have fashioned federal standards for the circumstances under which it is appropriate to approve a nonconsensual non-debtor "release" is also insufficient to make the request therefor a jurisdictional claim "arising under" the Bankruptcy Code, within the meaning of the bankruptcy jurisdiction statute (Judicial Code § 1334(b)).[34]

If there is no statutory grant of federal subject matter jurisdiction in that portion of the bankruptcy jurisdiction statute providing for jurisdiction over claims "arising under" the Bankruptcy Code, then what is the source of subject matter jurisdiction over the jurisdictional "claim" requesting extinguishment of C's fraud claim against ND? As the courts have recognized, the only jurisdictional grant that could reach such a third-party claim (to finally adjudicate the *in personam* rights of a creditor against a non-debtor) is the statutory provision for federal jurisdiction over claims "related to" a bankruptcy case.[35] In fact, a third-party claim "between nondebtors which [may] have an effect on the bankruptcy estate" is a standard example of "related to" bankruptcy jurisdiction.[36]

Thus, in vacating a nonconsensual non-debtor "release" issued on the authority of Code § 105(a), the Third Circuit appropriately framed the subject-matter jurisdiction inquiry as follows: "At issue is whether the District Court [which issued the final order confirming the plan in that case] properly exercised 're-lated to' jurisdiction over [the creditors' 're-leased'] claims against [the 'released'] non-debtors Basic and Lummus," reasoning as follows:

> While aspects of the § 105(a) analysis may be relevant to the "related to" jurisdiction inquiry, these inquiries are analytically distinct. Section 105(a) permits a bankruptcy court to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. But as the statute [in § 105(c)] makes clear, § 105 does not provide an independent source of federal subject matter jurisdiction. *See also In re Johns-Manville Corp.*, 801 F.2d 60, 63 (2d Cir.1986) ("Section 105(a) does not . . . broaden the bankruptcy court's jurisdiction, which must be established separately[.]"). "Related to" jurisdiction must therefore exist independently of any plan provision purporting to involve or enjoin claims against non-debtors. *In re Zale Corp.*, 62 F.3d 746, 756 (5th Cir.1995). Although the Plan proponents argue that it is efficacious to use § 105(a) to extend injunctive relief in favor of non-debtors in order to create a "bigger pot" of assets for all . . . claimants, the exercise of bankruptcy power must be grounded in statutory bankruptcy jurisdiction.[37]

In remanding the *Millennium Lab* non-

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debtor "release" for reconsideration by the bankruptcy court, therefore, the district court (citing *Combustion Engineering*) was absolutely correct: "The permanent release of a non-debtor, third-party's claim against another non-debtor—whether through a chapter 11 plan or otherwise—is an exercise of the Bankruptcy Court's 'related to' jurisdiction."[38] And in assessing the existence of federal subject-matter jurisdiction to "release" such non-debtor claims in *Combustion Engineering*, the Third Circuit looked to controlling precedent regarding "related to" jurisdiction to adjudicate the third-party claims sought to be "released."[39]

In *Millennium Lab*, the bankruptcy court found that it did have "related to" jurisdiction,[40] but also explicitly "question[ed] whether this 'related to' analysis is the proper analytical framework to begin with."[41] Similarly, Logan asserts that approval of a nonconsensual non-debtor "release" is an exercise of "arising under" and "arising in" jurisdiction to confirm a plan of reorganization, *not* "related to" jurisdiction over the "released" third-party non-debtor claims. That approach, though, would permit an oblique enlargement of subject matter jurisdiction, permitting a final judgment of a federal court to extinguish (by nonconsensual "release") third-party non-debtor claims that Congress has not given the federal courts any bankruptcy jurisdiction to adjudicate.

As Bankruptcy Judge Rasure astutely noted, "[i]f proceedings over which the Court has no independent jurisdiction could be metamorphisized into proceedings within the Court's jurisdiction by simply including their release in the proposed plan, this court could acquire infinite jurisdiction."[42]

> [T]he Court cannot permit third-party non-debtors to bootstrap their disputes into a bankruptcy case in this fashion. There must be some independent statutory basis for the Court to exercise jurisdiction over the third-parties' disputes before the Court may adjudicate them.[43]

"By using their § 105 powers to release [i.e., extinguish] nondebtor claims that they could not adjudicate directly, [federal] bankruptcy courts violate the cardinal principle that a court's 'in aid of jurisdiction' powers cannot be used to expand the court's jurisdictional reach."[44]

Such a circuitous expansion of federal courts' subject matter jurisdiction also implicates *constitutional* limitations on the scope of federal bankruptcy jurisdiction. "Released" third-party non-debtor claims are typically state-law claims for which the judicial federalism concerns surrounding subject-matter jurisdiction limitations are most acute,[45] and the statutory "related to" grant was intended to replicate the Article III constitutional limits on the permissible reach of federal courts' bankruptcy jurisdiction.[46]

Answering the *Millennium Lab* bankruptcy court's "question," then, a "related to" jurisdictional analysis "is the proper analytical framework to begin with," as a principled limitation on the subject matter jurisdiction of the federal courts, in order to ensure that federal courts can extinguish by "release" only those third-party non-debtor claims that the Constitution and Congress have authorized federal courts to adjudicate.[47]

A Party's Constitutional Right to Final Judgment from an Article III Court

For matters within the scope of federal bankruptcy jurisdiction, absent consent of the litigants, the bankruptcy-court jurisdiction statute (Judicial Code § 157) authorizes a non-Article III bankruptcy court to enter final judgment (subject to deferential appellate review) only in "core" proceedings.[48] From its very inception, "Congress's obvious objective" with the statutory core/non-core construct was to "giv[e] bankruptcy courts as much core jurisdiction as is constitutionally permissible (but no more than is constitutionally

permissible)."[49] And after the Supreme Court's decisions in *Stern* and *Arkison*, it is now clear that the determinative inquiry in deciding whether a particular proceeding is core or non-core (with only one exception) is entirely a constitutional one.[50]

Hence, a federal bankruptcy proceeding is a "core" proceeding, in which a bankruptcy judge can enter final judgment without litigant consent, if (and only if) that is *constitutionally* permissible under Article III (and even if that proceeding is *not* one that the statute itself explicitly designates as "core").[51] Conversely, if the proceeding is one in which the parties have a *constitutional* right to final judgment from an Article III judge (even if that proceeding is one that the statute itself expressly denominates as "core"), then the bankruptcy court should "simply treat the claims as non-core."[52]

It is exceedingly perplexing, therefore, why Logan devotes so much effort to arguing that, *purely as a statutory matter*, confirmation of a plan of reorganization containing nonconsensual non-debtor "releases" must be considered a proceeding "arising under" the Bankruptcy Code or "arising in" the bankruptcy case, within the meaning of the bankruptcy-court jurisdiction statute. True, the bankruptcy-court jurisdiction statute uses those two jurisdictional nexuses to define "what core proceedings are: matters arising under Title 11 or in a Title 11 case."[53] The BIG take-away from *Stern*, though, is that even an explicit statutory designation of a particular claim as "core" (such as § 157(b)(2)(C) as applied to the counterclaim at issue in *Stern*) is not entitled to even a *presumption* of constitutional validity. And as Logan acknowledges,[54] this means that the statutory designation of certain "arising under" proceedings (e.g., § 547 preference suits and § 548 fraudulent conveyance actions) as "core" may well be unconstitutional.[55] Reasoning from a statutory "core" designation to, therefore, constitutional validity (as Logan clearly does) is a *non sequitur* that completely reverses the appropriate analysis.

Specifying the Applicable Jurisdictional Unit

The constitutional analysis of both Logan and the *Millennium Lab* bankruptcy court is also stymied by their misperception of the relevant jurisdictional unit as the entire plan confirmation "proceeding." Jurisdictional analysis, however, must be applied to the "claim" at issue with a non-debtor "release." As the Third Circuit stated in prescribing "a claim by claim analysis to determine the extent of a Bankruptcy Court's [core] jurisdiction," "the claim-by-claim approach [i]s the only one consistent with the teachings of *Marathon*" and *Stern*.[56] Otherwise, a party could join a *Marathon/Stern*-like "claim" in an otherwise purely summary/core "proceeding" and thereby obtain final judgment on the *Marathon/Stern* claim from a bankruptcy judge.[57] And, of course, that is precisely the danger with nonconsensual non-debtor "releases," particularly given the nature of a plan confirmation "proceeding."

The Bankruptcy Code itself does not strictly prescribe or limit what kinds of provisions may be included in a plan of reorganization.[58] Likewise, because plan confirmation is litigated as a "contested matter," joinder rules do not prescribe or limit the kinds of jurisdictional "claims" that can be adjudicated as part of the plan confirmation "proceeding."

> Defining the scope . . . of a given contested matter (governed by Bankruptcy Rule 9014) is not nearly so clean and clear [as it is for an "adversary proceeding" (largely governed by the FRCP as incorporated into the Bankruptcy Rules)]. The scope of any particular contested matter is neither prescribed nor limited by the Bankruptcy Rules; unlike adversary proceedings, those FRCP governing the joinder of claims and parties are not generally applicable to contested matters. Indeed, the only joinder FRCP that is generally applicable to [a contested matter] is the loose, permissive Rule 21:

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> Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against any party.

There are no rigid rules or set principles, though, to determine what claims and parties should or should not be included in a particular contested matter. The bundling of claims and parties in contested matter litigation is, therefore, fluid and uncertain.[59]

Thus, if the plan confirmation "proceeding" were the relevant litigation unit for jurisdictional analysis, there is nothing intrinsic in the structure of a plan confirmation "proceeding" to prevent a non-Article III bankruptcy judge from entering final judgment on a *Marathon*/*Stern* "claim" that has been interjected into the plan confirmation process. Consequently, "[w]hen presented with a mixture of core and non-core claims, [a court] must employ a claim-by-claim analysis to determine whether the bankruptcy court could enter a final order for [each] claim."[60] "[N]on-core claims do not become core simply by virtue of being pursued in the same litigation as core claims."[61]

The appropriate constitutional analysis, therefore, must seek to determine whether it is constitutional for a non-Article III bankruptcy judge to enter final judgment on the jurisdictional "claim" at issue in approving a nonconsensual non-debtor "release." For analytical clarity, then, we can return to our illustrative jurisdictional "claim": the request that a non-Article III bankruptcy court extinguish (by "release") C's common-law fraud claim against ND.

Specifying the Constitutional Nature of the Jurisdictional Claim at Issue

The Supreme Court has repeatedly quoted[62] (as did the Court in *Stern*[63]) the venerable *Murray's Lessee* decision as the definitive statement of the kinds of claims on which a party is entitled to final judgment from an Article III court: Congress cannot "withdraw from judicial cognizance any matter which, *from its nature*, is the subject of a suit at the common law, or in equity, or admiralty,"[64] or what Justice Rehnquist described in his *Marathon* concurrence as "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789."[65] Likewise, in federal bankruptcy proceedings, the Court focused on the *nature* of the claim being asserted in determining whether "the matter at issue, *from its nature*, was the subject of a plenary suit" that could not be heard by a non-Article III bankruptcy tribunal[66] and, thus, "could only be enforced by a plenary suit, at law or in equity," in an Article III court.[67]

Returning to the jurisdictional claim between C and ND, a nonconsensual non-debtor "release" seeks to extinguish C's common-law fraud claim against ND. While a creditor's fraud claim against a debtor's bankruptcy estate is a quintessential traditional "summary" matter, appropriately adjudicated by a non-Article III bankruptcy tribunal, a creditor's fraud claim against a non-debtor indisputably is not. Indeed, until the Bankruptcy Reform Act of 1978, there was generally no "bankruptcy" jurisdiction whatsoever over such a third-party non-debtor claim, and the Founding generation certainly would not have considered such a claim to have been any part of the "bankruptcy" proceedings at all, much less an appropriate matter for adjudication by bankruptcy commissioners. C's fraud claim against ND, therefore, is "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789."[68]

A Non-Debtor "Release" Is a Final Judgment on the "Released" Claim

Logan and the *Millennium Lab* bankruptcy court, however, object to this framing of the nature of the jurisdictional "claim" at issue in approving a nonconsensual non-debtor "release" of C's fraud claim against ND. Their

principal objection is that in approving a nonconsensual non-debtor "release" of C's fraud claim against ND, the court does not actually address and adjudicate "the merits" of C's claim against ND under the applicable state common law of fraud; rather, the court applies a federal bankruptcy law standard to determine whether that third-party non-debtor fraud claim should be extinguished by nonconsensual "release" thereof. All of that is true, but why that would be at all relevant is a mystery. The contention that those differences justify allowing a non-Article III bankruptcy judge to extinguish C's fraud claim against ND by "release" loses sight of the nature of the constitutional right at issue and that which it protects.

Because C's common-law fraud claim against ND is "the stuff of the traditional actions at common law,"[69] that claim is protected by the Article III guarantee that it cannot be "withdraw[n] from judicial cognizance."[70] In other words, if that claim is to be subjected to federal "judicial Power" within the meaning of Article III, § 1, then that judicial power must be exercised by a judge enjoying the Article III, § 1 protections of lifetime tenure and irreducible compensation.[71] Most importantly, "*Stern v. Marshall* indicates that the determinative aspect of the Article III 'judicial Power' that must remain in the Article III district courts" with respect to such a traditional private-rights claim "is the power to enter final judgment" on that claim.[72] Indeed, the *Stern* Court stated its holding, as follows: "The Bankruptcy Court in this case exercised the judicial power of the United States by entering final judgment on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection."[73] The Court's consistent, repeated formulation, throughout its opinion, of that which was unconstitutional in *Stern* was "the Bankruptcy Court's entry of final judgment on" that claim.[74]

Likewise, then, the determinative feature indicating that a non-Article III bankruptcy court's final judgment approving a nonconsensual non-debtor "release" of C's common-law fraud claim against ND is an unconstitutional exercise of federal "judicial Power" over that claim, is that extinguishment of the claim by nonconsensual "release" thereof *is* a final judgment on C's fraud claim against ND. That is made clear by the Supreme Court's *Stoll v. Gottlieb*[75] and *Travelers Indemnity Co. v. Bailey*[76] decisions.

Stoll v. Gottlieb, decided in 1938 under the Bankruptcy Act of 1898, involved the preclusive effect of a nonconsensual non-debtor "release" provision in a confirmed plan of reorganization (before such provisions acquired a veneer of legitimacy and the euphemistic "release" moniker). Third-party non-debtors had guaranteed the corporate debtor's bond debt, and a "proposed plan of reorganization with [a] provision for the extinction of the guaranty" was confirmed by final judgment of a district court sitting in bankruptcy.[77] Subsequently, one of the bondholders, who had been properly notified of the plan confirmation proceedings and, thus, made a party thereto, filed suit in an Illinois state court against the guarantors seeking to enforce the guaranty obligation. The principal question in that state-court litigation was the claim preclusive *res judicata* effect of the order confirming the debtor's plan of reorganization, with the state appellate courts (including the justices of the Illinois Supreme Court) sharply differing on that question.[78] The U.S. Supreme Court granted certiorari "to determine the effect to be given decrees of a court of the United States,"[79] and as a matter of federal law binding on even state courts, held that the bondholder's guaranty claim was extinguished by the confirmation order. And the Supreme Court more recently reaffirmed the holding of *Stoll v. Gottlieb*, as applied to a nonconsensual non-debtor "release" provision in a plan of reorganization confirmed by final order of a non-

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Article III bankruptcy court, in the 2009 *Travelers Indemnity Co. v. Bailey* decision.[80]

For our present purposes, the technical issue of *res judicata* law decided in *Stoll v. Gottlieb* and *Bailey*—precluding any collateral challenge to the subject matter jurisdiction of either a district court or a bankruptcy court that approved a non-debtor "release," which jurisdiction the Court assumed, without deciding, was *nonexistent* in each case—is less important than the bottom-line holding that a nonconsensual non-debtor "release" provision in a confirmed plan of reorganization extinguishes a "released" non-debtor claim, e.g., C's state-law fraud claim against ND. The most elemental aspect of *res judicata* law resides in the fact that that which gives rise to the claim preclusive bar of *res judicata* is a *final judgment* on the claim at issue.[81] The ultimate holding of both *Stoll v. Gottlieb* and *Bailey*, therefore, is that an order confirming a plan containing a nonconsensual non-debtor "release" of C's state-law fraud claim against ND *is a final judgment on that claim*. In the words of the Restatement (Second) of Judgments, by virtue of the nonconsensual non-debtor "release" provision in the plan of reorganization, confirmed by final judgment of a federal court, C's state-law fraud claim against ND "is extinguished and the [confirmation] judgment bars a subsequent action on that claim."[82]

In confirming a plan containing a nonconsensual non-debtor "release" of C's state-law fraud claim against ND, therefore, it is "clear that the bankruptcy court entered a judgment which, in releasing [ND] from any liability to [C] on the [state-law fraud claim], extinguished [that] claim."[83] Indeed, that is the entire purpose and function of a nonconsensual non-debtor "release"—to forever and definitively extinguish and bar, by final judgment of a federal court, any collateral suit on the third-party non-debtor claims "released" thereby. The confirmation order, then, is a final judgment on each and every third-party non-debtor claim coming within the terms of the "release" provision.[84]

Entry of a final judgment to which the claim preclusive bar of *res judicata* attaches is the exercise of Article III "judicial Power" that must remain in an Article III district court with respect to a traditional private-rights claim such as C's state-law fraud claim against ND. Indeed, the context in which the Supreme Court in *Stern v. Marshall* was determining which court (the bankruptcy court or the district court) could, consistent with Article III, enter final judgment on the claim at issue, was for purposes of determining the claim preclusive *res judicata* effect to be afforded the final judgment of a federal court (either the bankruptcy court or the district court) versus the conflicting final judgment of a Texas state court.[85]

A "bankruptcy court's confirmation order . . . is a final judgment," and the plan's non-debtor "release provisions and the bankruptcy court [confirmation] order expressly apply to the same parties and claims as [those of any] suit" on the released non-debtor claims.[86] Because such third-party non-debtor claims are "the stuff of the traditional actions at common law"[87] that cannot be "withdraw[n] from judicial cognizance,"[88] it is unconstitutional for a non-Article III bankruptcy court to enter such a final judgment "releasing" (i.e., extinguishing) those claims.

The Celotex Corp. v. Edwards *Case*

The Supreme Court addressed the constitutional prohibition against a non-Article III bankruptcy court entering final judgment on such a non-debtor third-party claim in *Celotex Corp. v. Edwards*.[89] In contrast to a nonconsensual non-debtor "release," and as the Court emphasized, the particular relief granted by the non-Article III bankruptcy court in *Celotex* was *not* a final judgment on the third-party

non-debtor claims at issue. Consequently, the bankruptcy judge's order was *not* unconstitutional.

The particular non-debtor third-party claims at issue in *Celotex* were claims of the debtor's prebankruptcy judgment creditors against sureties who had, before the debtor filed Chapter 11, posted supersedeas bonds securing the debtor's obligation to pay those judgments if they were affirmed on appeal. After the debtor filed Chapter 11, the bankruptcy court issued a temporary § 105 status-quo injunction, as a supplement to the automatic stay of § 362, staying the judgment creditors from taking any action to enforce a supersedeas bond against the surety thereon. The Supreme Court ultimately affirmed the jurisdiction of the bankruptcy court to temporarily enjoin prosecution of the third-party non-debtor claims at issue because those claims were within the subject-matter grant of federal bankruptcy jurisdiction over claims "related to" the debtor's bankruptcy case.

Most significantly, for our present purposes, Justice Stevens penned a lengthy and impassioned dissent (joined by Justice Ginsburg), arguing that "the majority attaches insufficient weight to the fact that the challenged injunction was issued by a non-Article III judge."[90] The majority's response to that argument highlights the critical importance of a *final judgment* on a non-debtor third-party claim in demarcating the boundary between (i) the permissible powers of a non-Article III bankruptcy judge and (ii) the Article III "judicial Power" that must and can only be exercised by an Article III district judge.

The *Celotex* majority did not disagree with Justice Stevens's contention that the third-party non-debtor claims at issue were, like the claim at issue in *Marathon*, "the stuff of the traditional actions at common law"[91] that cannot be "withdraw[n] from judicial cognizance"[92]—what the current jurisdictional statute categorizes as a non-core "related to" claim. Moreover, both majority and dissent agreed that the jurisdictional statute provides (as mandated by the constitutional holding of *Marathon*) that "only the district court has the power to enter 'any final order or judgment' " on such a non-debtor third-party claim.[93] The *Celotex* majority, though, was untroubled by the bankruptcy court's temporary stay of the non-debtor third-party claims because that "Section 105 injunction [wa]s only an interlocutory stay" of the third-party non-debtor claims.[94] "Thus, the [non-Article III] Bankruptcy Court did not lack jurisdiction . . . to issue the Section 105 injunction because that injunction was not a 'final order or judgment' " on those third-party non-debtor claims.[95]

Logan (and the *Millennium Lab* bankruptcy court), therefore, are undoubtedly correct that *Marathon* and *Stern* cannot be read so broadly as to prohibit a non-Article III bankruptcy court from entering any order that "affects" or "impacts" a third-party non-debtor claim. *Marathon* and *Stern*, however, do prohibit a non-Article III bankruptcy judge from entering a *final judgment* on such a third-party non-debtor claim, and a plan confirmation order approving a nonconsensual non-debtor "release" provision, and *permanently* enjoining the "released" (i.e., extinguished) third-party non-debtor claims, *is a final judgment* on those claims.[96]

The Constitutionality of a Non-Article III Bankruptcy Judge's Final Judgment Is Not Determined by the Grounds for the Judgment

Logan seeks to obscure the inescapable conclusion that a nonconsensual non-debtor "release" is a final judgment on the "released" non-debtor claims, with multiple immaterial observations. Again, the principal refrain of Logan (and the *Millennium Lab* bankruptcy court) is that in approving a nonconsensual non-debtor "release" of, e.g., C's fraud claim against ND, the court does not actually ad-

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dress and adjudicate "the merits" of C's claim against ND under the applicable state common law of fraud; rather, the court applies a federal bankruptcy law standard to determine whether that third-party non-debtor fraud claim should be extinguished by nonconsensual "release" thereof. There are two distinct assertions embedded in that observation; neither, however, permits a non-Article III bankruptcy judge to issue a final judgment confirming a plan containing nonconsensual non-debtor "release" provisions.

First, that a court does not address and adjudicate "the merits" of a claim does not deprive an order extinguishing that claim from the force and effect of a final judgment on that claim. For example, assume that C's state-law fraud claim against ND is "related to" D's bankruptcy case, and ND brings a declaratory judgment action in the bankruptcy court claiming that C's state-law fraud claim is barred by an applicable statute of repose. Can the non-Article III bankruptcy judge issue a declaratory judgment that C's state-law fraud claim is extinguished and forever barred by the statute of repose simply because that would not require the court to address and adjudicate "the merits" of C's claim against ND under the applicable state common law of fraud? Obviously not; that declaratory judgment would be a final judgment on C's state-law fraud claim against ND that could only be entered by an Article III district court.[97]

The further assertion of Logan and the *Millennium* Lab bankruptcy court, though, is that in the case of a nonconsensual non-debtor "release," the declaratory judgment from the bankruptcy court that C's state-law fraud claim against ND is extinguished and forever barred is entered on the basis of *federal bankruptcy law* that extinguishes that claim. The proposition that a non-Article III bankruptcy judge can finally adjudicate any and all matters of federal bankruptcy law is, however, highly dubious, and in the case of nonconsensual non-debtor "releases," is simply untrue.

By defining "core" matters to include all proceedings "arising under" the Bankruptcy Code,[98] it was certainly Congress's intent that bankruptcy courts should finally adjudicate any and all matters of federal bankruptcy law. As we saw with federal subject matter jurisdiction, though, that is true only with respect to claims that are *not* premised upon Code § 105. A bankruptcy court bankruptcy court is necessarily relying upon the authority of Code § 105(a) in fashioning the federal bankruptcy law standards for approving a nonconsensual non-debtor "release," and § 105(c) makes clear that "Section 105(a) does not . . . broaden the bankruptcy court's jurisdiction, which must be established separately."[99] As Justice Stevens stated in his *Celotex* dissent, the mere request for § 105 relief "cannot be a jurisdictional bootstrap enabling a bankruptcy court to exercise jurisdiction that would not otherwise exist."[100] As is also true with federal subject matter jurisdiction, then (discussed above), there must be an independent basis (apart from the reliance upon § 105(a)) for a bankruptcy court to enter final judgment on "released" third-party non-debtor claims.

Moreover, even if it were clear that Congress did intend for approval of a nonconsensual non-debtor "release" to be a core matter "arising under" the Bankruptcy Code, the Supreme Court's decisions in *Katchen v. Landy*,[101] *Granfinanciera*,[102] *Langenkamp v. Culp*,[103] and *Stern*[104] "call[] into doubt the constitutionality of the entire category of 'arising under' core proceedings as an independent basis for final judgment by a non-Article III bankruptcy judge."[105] Indeed, Logan acknowledges that this is the case and that the constitutionality of a non-Article III bankruptcy judge entering final judgment cannot turn on whether state law or federal law provides the grounds for decision.[106]

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The constitutionality of a non-Article III bankruptcy judge entering final judgment turns on the nature of the claim adjudicated thereby—whether it is "the stuff of the traditional actions at common law"[107] that cannot be "withdraw[n] from judicial cognizance."[108] A claimant has a constitutional right to final judgment from an Article III judge on any such traditional private-rights claim involving "the liability of one individual to another under the law as defined."[109] A confirmation order approving a nonconsensual non-debtor "release" provision is a final judgment on such traditional private-rights claims and, therefore, can only be entered by an Article III district court judge. Indeed, that constitutional issue is undoubtedly why Code § 524(g) requires that a confirmation order approving non-debtor "releases" of certain third-party non-debtor asbestos claims (expressly authorized thereby) must be "issued or affirmed by the district court."[110]

The Constitutionality of a Non-Article III Bankruptcy Judge's Final Judgment Is Not Determined by the Kind of "Proceeding" in Which It Is Entered

Logan makes one other argument that warrants a brief comment, because it is the kind of argument that often seems attractive but that is ultimately unsound.[111] Proceeding (no pun intended) from the erroneous assumption that the plan confirmation "proceeding" is the relevant unit of jurisdictional analysis, Logan argues that the right to final judgment from an Article III court only attaches to "proceedings" that resemble traditional "suits" at law or in equity:

> It is no accident that the [*Murray's Lessee* and] *Granfinanciera* Court[s] used the word "suit" to describe the sort of matter reserved for Article III adjudication. . . . [T]he sort of matter that requires Article III adjudication generally involves a plaintiff and a defendant, proceeds before a court pursuant to the full rules of civil procedure and ultimately results in a disposition on the merits of the claim.[112]

Initially, Logan's conception of the kind of "suit"[113] to which constitutional rights attach is unduly narrow. For example, when Mr. Chief Justice Marshall famously posed that question, "What is a suit?," his response was not at all restrictive. Rather, he described the concept in the broadest possible terms as "the prosecution, or pursuit, of some claim, demand, or request … in a Court of justice," encompassing "every species of remedy" by which a party "claims to obtain something to which he has a right."[114] Chief Justice Marshall, therefore, perceived a "suit" in "law language" as consisting of "a diversity of suits and actions" for "the lawful demand of one's right."[115] This broad framing of a "suit," in which parties thereto may have a right to final judgment from an Article III court, would certainly encompass a plan confirmation proceeding approving nonconsensual non-debtor "release" provisions.

More fundamentally, though, Logan misperceives that to which the Article III constitutional right attaches. Logan is probably correct, that in describing those private-rights matters in which the litigants have a constitutional right to final judgment from an Article III court, the *Murray's Lessee* Court was referring to the kinds of formal suits conducted in the English superior courts of law, equity, and admiralty at the time of the Founding. But the point of that Court's famous description was not that the Article III right attaches because there is such a formal "suit"; the point was that certain matters, because of their nature, *had to be adjudicated* through a formal suit in a superior court: "We do not consider congress can . . . withdraw from judicial cognizance any *matter*, which *from its nature*, is the *subject* of a suit at the common law, or in equity, or admiralty."[116] Likewise, in its summary-plenary jurisprudence in the context of bankruptcy adjudications, the Court focused upon the nature of the claim being asserted in order to determine whether that claim "could only be enforced by a plenary suit, at law or in

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equity" in an Article III court.[117] The constitutional right to final judgment from an Article III court, therefore, attaches to certain claims, which by their nature, are the same kinds of claims that were (required to be) adjudicated by formal suit in an English superior court in 1789.

Were the constitutional right as ephemeral as Logan asserts, then Congress could indeed "withdraw from judicial cognizance"[118] the final adjudication of a private-rights matter, involving "the liability of one individual to another under the law as defined,"[119] via the simple expedient of enacting a procedural rule requiring that those private-rights claims be adjudicated as contested matters rather than adversary proceedings, and for good measure, that the contested matter adjudicating those private rights can be joined and determined in conjunction with a plan confirmation proceeding.

To say that a non-Article III bankruptcy judge can enter a final judgment extinguishing and forever barring any suit on the private-rights claim of one non-debtor against another non-debtor, e.g., C's state-law fraud claim against ND, simply because the bankruptcy judge enters that final judgment in a plan confirmation proceeding that does not resemble a traditional "suit" at law or in equity in the superior courts of eighteenth-century England, and because there is some federal bankruptcy law that authorizes extinguishing that private-rights claim, is to say that final adjudication of that private-rights claim can be "withdraw[n] from judicial cognizance."[120] Article III categorically forbids that.

ENDNOTES:

[1]Ben H. Logan, A New Millennium of Article III Analysis: Which Court—a Bankruptcy Court or a District Court—Must Decide Whether to Confirm a Plan that Contains a Nonconsensual Third-Party Release? (Part I), 37 Bankr. L. Letter No. 12, at 1 (Dec. 2017); Ben H. Logan, A New Millennium of Article III Analysis: Which Court—a Bankruptcy Court or a District Court—Must Decide Whether to Confirm a Plan that Contains a Nonconsensual Third-Party Release? (Part II), 38 Bankr. L. Letter No. 1, at 1 (Jan. 2018).

[2]In re Millennium Lab Holdings II, LLC, 575 B.R. 252, R.I.C.O. Bus. Disp. Guide (CCH) P 12944 (Bankr. D. Del. 2017).

[3]Stern v. Marshall, 564 U.S. 462, 131 S. Ct. 2594, 180 L. Ed. 2d 475, 55 Bankr. Ct. Dec. (CRR) 1, 65 Collier Bankr. Cas. 2d (MB) 827, Bankr. L. Rep. (CCH) P 82032 (2011).

[4]Ralph Brubaker, Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten *Callaway v. Benton* Case, 72 Am. Bankr. L.J. 1, 13 (1998), available at https://ssrn.com/abstract=2176443.

[5]Executive Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 189 L. Ed. 2d 83, 59 Bankr. Ct. Dec. (CRR) 160, 71 Collier Bankr. Cas. 2d (MB) 875, Bankr. L. Rep. (CCH) P 82642 (2014).

[6]Wellness Intern. Network, Ltd. v. Sharif, 135 S. Ct. 1932, 191 L. Ed. 2d 911, 61 Bankr. Ct. Dec. (CRR) 32, 73 C.B.C. 1575, Bankr. L. Rep. (CCH) P 82806 (2015).

[7]Like Logan, I will confine my analysis to the jurisdictional issues implicated by non-debtor "releases" and, thus, will assume *arguendo* that the Bankruptcy Code does authorize confirmation of a plan of reorganization containing nonconsensual non-debtor "release" provisions. I do not believe that is true, though, and my views in that regard are set forth in Ralph Brubaker, Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations, 1997 U. Ill. L. Rev. 959, available at https://ssrn.com/abstract=2176436. That conclusion is further buttressed by the Supreme Court's subsequent decisions regarding the limitations of courts' general equitable powers in bankruptcy cases and particularly the analytical structure of the Court's opinion in Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 197 L. Ed. 2d 398, 63 Bankr. Ct. Dec. (CRR) 242, 77 Collier Bankr. Cas. 2d (MB) 596, 41 I.E.R. Cas. (BNA) 1613, Bankr. L. Rep. (CCH) P 83082 (2017). See generally Ralph Brubaker, Taking Bankruptcy's Distribution Rules Seriously: How the Supreme Court Saved Bankruptcy From Self-Destruction, 37 Bankr. L. Letter No. 4, at 1 (Apr. 2017).

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Courts that come to the same conclusion—that nothing in the bankruptcy statute or courts' general equitable powers authorizes nonconsensual non-debtor "releases"—have often used the terminology that the court is "without jurisdiction" or lacks "subject matter jurisdiction" to approve such a non-debtor "release." See, e.g., In re Johns-Manville Corp., 517 F.3d 52, 66-67 (2d Cir. 2008), rev'd on other grounds sub nom., Travelers Indemn. Co. v. Bailey, 557 U.S. 137 (2009). See generally Ralph Brubaker, Supreme Court Validates "Clarified" *Manville* Insurance Injunction: Channeling . . . and So Much More!, 29 Bankr. L. Letter No. 8, at 1, 1-5, 7-9 (Aug. 2009). That use of the terminology of "jurisdiction" (meaning, literally, power) is not improper, but it is a bit confusing because it obviously is referring to a different (and more absolute) kind of "jurisdictional" limitation than those implicated (and discussed in this article) when one assumes that the statute does authorize non-debtor "releases."

[8]For a comprehensive background in the constitutional and statutory issues implicated by the grant of federal subject-matter jurisdiction over bankruptcy cases and proceedings, see Ralph Brubaker, On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory, 41 Wm. & Mary L. Rev. 743 (2000), available at https://ssrn.com/abstract=2175208. For a concise introduction to the topic, see Ralph Brubaker, One Hundred Years of Federal Bankruptcy Law and Still Clinging to an *In Rem* Model of Bankruptcy Jurisdiction, 15 Emory Bankr. Dev. J. 261 (1999), available at https://ssrn.com/abstract=2176482.

[9]For a comprehensive background in the constitutional and statutory issues implicated by the *Marathon/Stern* limitations on the jurisdiction of non-Article III bankruptcy judges, see Ralph Brubaker, A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After *Stern v. Marshall*, 86 Am. Bankr. L.J. 121 (2012), available at https://ssrn.com/abstract=2174645, and Ralph Brubaker, Non-Article III Adjudication: Bankruptcy and Non-Bankruptcy, With and Without Litigant Consent, 33 Emory Bankr. Dev. J. 11 (2016), available at https://ssrn.com/abstract=2980872.

[10]Millennium Lab, 575 B.R. at 271.

[11]The only qualifying proviso to append is that existing Supreme Court precedent leaves open the possibility that the Court might ultimately conclude that bankruptcy judges simply cannot enter final orders and judgments on any matter within the scope of federal bankruptcy jurisdiction and, thus, the entirety of bankruptcy judges' statutory core jurisdiction is unconstitutional. That possibility is consistent with a credible constitutional theory and seemed plausible (even if not probable) after the *Stern* decision. See Brubaker, 86 Am. Bankr. L.J. at 174-76. It seems highly unlikely after *Wellness*, though, because "a majority of the Justices—the *Stern* dissenters (Breyer, Ginsburg, Sotomayor, and Kagan) and the *Wellness* dissenters (Roberts, Scalia, and Thomas)—have now indicated their belief that the bulk of bankruptcy judges' core jurisdiction is indeed constitutionally valid." Brubaker, 33 Emory Bankr. Dev. J. at 39.

[12]See 6 Collier on Bankruptcy ¶ 3.05, at 421-22 (James Wm. Moore et al. eds., 14th ed. 1978).

[13]American Law Institute, Federal Judicial Code Revision Project 47 (2004) [hereinafter ALI, Judicial Code Project].

[14]28 U.S.C.A. § 1331.

[15]28 U.S.C.A. § 1332(a).

[16]28 U.S.C.A. §§ 1334(b), 157(a). "The federal 'judicial power' in bankruptcy . . . is and always has been exercised through various bankruptcy 'proceedings' connected with a particular debtor's bankruptcy case," and "a bankruptcy 'proceeding' within the meaning of the bankruptcy jurisdiction statute is the equivalent of a nonbankruptcy 'case,' 'civil action,' or 'suit.' " Ralph Brubaker, Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory *Ex parte Young* Relief, 76 Am. Bankr. L.J. 461, 540 (2002) (footnotes omitted), available at https://ssrn.com/abstract=2176482. See Connecticut Nat. Bank v. Germain, 503 U.S. 249, 112 S. Ct. 1146, 117 L. Ed. 2d 391, 22 Bankr. Ct. Dec. (CRR) 1130, 26 Collier Bankr. Cas. 2d (MB) 175, Bankr. L. Rep. (CCH) P 74457A (1992) (holding that a court of appeals may entertain an interlocutory appeal in a bankruptcy "proceeding" pursuant to the general interlocutory appeals provision, governing an appeal in a "civil action"); cf. Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 129, 116 S. Ct. 494, 133 L. Ed. 2d 461, 28 Bankr. Ct. Dec. (CRR) 243, 33 Collier Bankr. Cas. 2d (MB) 1338, Bankr. L. Rep. (CCH) P 76717 (1995) (opining that the general Judicial Code provisions for

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removal and remand of "civil actions" and "cases" can "comfortably coexist" with the bankruptcy removal and remand provisions).

[17]ALI, Judicial Code Project, at 16.

[18]ALI, Judicial Code Project, at 42. See John B. Oakley, The *Christianson* Case, Federal Jurisdiction, and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?, 76 Tex. L. Rev. 1829, 1831-32, 1858-59 (1998); John B. Oakley, Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute, 74 Ind. L.J. 25 (1998).

[19]Halper v. Halper, 164 F.3d 830, 838-39, 33 Bankr. Ct. Dec. (CRR) 906, Bankr. L. Rep. (CCH) P 77909 (3d Cir. 1999). See also In re Exide Techs., 544 F.3d 196, 206, 218-21 (3d Cir. 2008). Accord Waldman v. Stone, 698 F.3d 910, 921 (6th Cir. 2012); Dunmore v. U.S., 358 F.3d 1107, 1114 (9th Cir. 2004).

[20]ALI, Judicial Code Project, at 30.

[21]ALI, Judicial Code Project, at 30 (emphasis added).

[22]By contrast, the litigation unit for final-order appellate jurisdiction is an entire "civil action" or "proceeding" and all jurisdictional "claims" asserted therein. Appeals of individual "claims" before final resolution of an entire "civil action" or "proceeding" can be taken only via interlocutory appeal. See generally Ralph Brubaker, Bankruptcy Appeals: Finality and the Appellate Litigation Unit, 35 Bankr. L. Letter No. 6, at 1 (June 2015).

[23]In re Charles Street African Methodist Episcopal Church of Boston, 499 B.R. 66, 99 (Bankr. D. Mass. 2013) (emphasis added).

[24]11 U.S.C.A. § 1141(a). ("the provisions of a confirmed plan bind . . . any creditor [or] equity security holder . . . in the debtor") See Sanders Confectionary Prods, Inc. v. Heller Fin., Inc., 973 F.2d 474, 481 (6th Cir. 1992) (all "creditors and equity security holders in the debtor[ ] must … be considered parties" to the plan confirmation proceeding); In re Justice Oaks II, Ltd., 898 F.2d 1544, 1551 & n.5 (5th Cir. 1990) ("[a]ll creditors of a debtor are parties in interest" who are "obviously parties to the confirmation proceeding").

[25]Charles Street, 499 B.R. at 99 (emphasis added).

[26]In re Continental Airlines, 203 F.3d 203, 214 n. 12, 35 Bankr. Ct. Dec. (CRR) 176 (3d Cir. 2000).

[27]This is the phrase used by the Supreme Court in *Stoll v. Gottlieb* to describe the relief granted by a final judgment confirming a plan of reorganization containing what is now popularly known as a nonconsensual non-debtor "release" provision. Stoll v. Gottlieb, 305 U.S. 165, 168-69, 59 S. Ct. 134, 83 L. Ed. 104 (1938).

[28]U.S. Const. art III, § 2, cl. 1 (authorizing Congress to grant federal courts jurisdiction over claims "arising under" federal law).

[29]28 U.S.C.A. § 1334(b) (granting the federal district courts original jurisdiction over claims "arising under" the Bankruptcy Code).

[30]See Brubaker, 41 Wm. & Mary L. Rev. at 801.

[31]In re A.H. Robins Co., Inc., 880 F.2d 694, 700-02, 19 Bankr. Ct. Dec. (CRR) 997, Bankr. L. Rep. (CCH) P 72955 (4th Cir. 1989).

[32]Brubaker, 29 Bankr. L. Letter No. 8, at 7-8. Logan's suggestions to the contrary mischaracterize the state of the law before *Robins*. The only example he cites to the contrary, *Stoll v. Gottlieb*, was a preclusion case in which the Supreme Court assumed that the federal bankruptcy statute did *not* authorize extinguishing the creditor's claim against the non-debtor and, thus, that "the Bankruptcy Court did *not* have jurisdiction of the subject matter of the order" extinguishing that claim. 305 U.S. at 171 (emphasis added).

[33]Brubaker, 72 Am. Bankr. L.J. at 13.

[34]See In re Combustion Engineering, Inc., 391 F.3d 190, 224-25, 43 Bankr. Ct. Dec. (CRR) 271, Bankr. L. Rep. (CCH) P 80206 (3d Cir. 2004), as amended, (Feb. 23, 2005). Logan seems to admit as much. Logan, 37 Bankr. L. Letter No. 12, at 11. But, then, through a mystifying feat of logic, he asserts otherwise. Id. at 11-13, 18. I fear he has attempted to project his literal sleight-of-hand skills as an amateur magician (which are considerable) into the metaphysical realm. The "trick" he uses is subtly but pervasively conflating that which he constantly tells the reader are separate and distinct inquiries: (1) statutory authority to approve a nonconsensual non-debtor "release" and, if it exists, the requisite standards for approval and (2) jurisdiction (whether subject matter or core/non-core) to approve the "release." At the same time, (and unlike courts that authorize nonconsensual non-debtor releases) he forswears any explicit reliance

upon Code § 105(a), as if this could magically conjure otherwise non-existent jurisdiction. The Supreme Court saw through a similar "trick" in *Jevic*, recognizing that relief not explicitly authorized by the Code itself is the equivalent of an assertion of general equitable powers under Code § 105(a). See Jevic, 137 S. Ct. at 987; Brubaker, 37 Bankr. L. Letter No. 4, at 11-12.

[35]28 U.S.C.A. § 1334(b). From the perspective of subject-matter jurisdiction, which is the only purpose for which the bankruptcy jurisdiction nexuses were originally enacted in 1978 (see Brubaker, 41 Wm. & Mary L. Rev. at 855-57 & nn.415, 419), such a third-party claim is not properly considered as "arising in" the bankruptcy case, within the meaning of the jurisdictional statute. That "arising in" provision, like its predecessors in nineteenth-century bankruptcy statutes, was enacted to bring within federal bankruptcy jurisdiction all claims by and against the bankruptcy estate. Brubaker, 41 Wm. & Mary L. Rev. at 853, 858, 868 n.454; Brubaker, 86 Am. Bankr. L.J. at 138-39.

[36]Celotex Corp. v. Edwards, 514 U.S. 300, 307-08 n.5, 115 S. Ct. 1493, 131 L. Ed. 2d 403, 27 Bankr. Ct. Dec. (CRR) 93, 32 Collier Bankr. Cas. 2d (MB) 685, Bankr. L. Rep. (CCH) P 76456, 31 Fed. R. Serv. 3d 355 (1995).

[37]Combustion Eng'g, 391 F.3d at 224-25 (footnotes omitted).

[38]In re Millennium Lab Holdings II, LLC, 242 F. Supp. 3d 322, 327, Bankr. L. Rep. (CCH) P 83087 (D. Del. 2017), as amended, (Mar. 20, 2017).

[39]Combustion Eng'g, 391 F.3d at 225-33. See Ralph Brubaker, Unwrapping Prepackaged Asbestos Bankruptcies (Part I): Non-Debtor "Releases" and Permanent Injunctions, 25 Bankr. L. Letter No.1, at 1, 4-6 (Jan. 2005).

This aspect of the *Combustion Engineering* decision directly contradicts Logan's repeated assertions that a "bankruptcy court does *not* exercise 'related to' jurisdiction over the third-party claim when it confirms a plan with a [']release['] of that claim." Logan, 37 Bankr. L. Letter No. 12, at 15. Consequently, Logan argues that *Combustion Engineering* involved a strange and mysterious "other" kind of nonconsensual non-debtor "release" (a so-called "channeling" injunction) that we should simply ignore because such a "channeling" injunction "raises a host of issues beyond the scope of [ ]his article." Id. at 25 n.63.

Beguiling perversions of the *in rem* "channeling" rationale, to rationalize what Logan calls a " 'garden variety' third-party [']release[']" of *in personam* damages liability, is one of the standard techniques for minimizing/ignoring the immense jurisdictional problems surrounding nonconsensual non-debtor "releases." See generally Brubaker, 72 Am. Bankr. L.J. at 14-22; Brubaker, 29 Bankr. L. Letter No. 8, at 1-5, 9. Thus, what is described as a so-called "channeling" injunction, in reality, is often just a "garden variety" non-debtor "release," which is:

> a mechanism that forcibly converts creditors' *in personam* claims against a nondebtor into *in rem* claims against a debtor's property. In the process, those *in personam* rights against the nondebtor are extinguished, without any assurance that the substituted *in rem* rights against the debtor's property are the equivalent of the extinguished *in personam* rights.

Brubaker, 72 Am. Bankr. L.J. at 18.

Logan's description of the so-called "channeling" injunction in *Combustion Engineering* (with the forcible conversion/limitation of creditors' *in personam* damages claims coming in the form of "channeled" *in rem* claims against a "trust" set up by the confirmed plan) makes clear that he is describing precisely such a "garden variety" *in personam* nonconsensual non-debtor release. Logan's suggestion, therefore, that "a plan with [such a] [']channeling['] injunction *does* purport to decide the merits of the third-party claims" as part of approving the nonconsensual non-debtor "release" thereof, in a manner that differs from a "garden variety" non-debtor "release," is simply untrue. Logan, 37 Bankr. L. Letter No. 12, at 15 (emphasis added). "Through the channeling sleight of hand, the court completely extinguishes the claim against the nondebtor and leaves the creditor with only its claim against the debtor's estate [or successor trust], *without even purporting to address the merits of the released nondebtor claim*." Brubaker, 72 Am. Bankr. L.J. at 19 (emphasis added). Of course, the sleight of hand here is purely by Logan; the *Combustion Engineering* court did not cabin its jurisdictional analysis with the limitations Logan seeks to attribute thereto.

[40]Although, given the bankruptcy court's conception of the relevant jurisdictional unit (as confirmation of the plan of reorganization), it is not clear that the bankruptcy court

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concluded that it had "related to" jurisdiction over the "released" third-party non-debtor claims, which is the "related to" analysis *Combustion Engineering* compels. See Millennium Lab, 575 B.R. at 287 n.160.

[41]Millennium Lab, 575 B.R. at 287 & n.160.

[42]In re Digital Impact, Inc., 223 B.R. 1, 11 (Bankr. N.D. Okla. 1998).

[43]In re Midway Gold US, Inc., 575 B.R. 475, 519 (Bankr. D. Colo. 2017).

[44]Brubaker, 72 Am. Bankr. L.J. at 50. See Combustion Eng'g, 391 F.3d at 224-25 n.36 ("Section 105 provides bankruptcy courts with powers of equity similar to those granted in the All Writs Act," 28 U.S.C. § 1651, which "provides that 'all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions.' ").

[45]See generally Brubaker, 41 Wm. & Mary L. Rev. at 800-13.

[46]See Brubaker, 41 Wm. & Mary L. Rev. at 796-97, 799.

[47]See Brubaker, 72 Am. Bankr. L.J. at 50-54.

[48]28 U.S.C.A. § 157(b)(1).

[49]Brubaker, 86 Am. Bankr. L.J. at 146.

[50]See Brubaker, 33 Emory Bankr. Dev. J. at 13-14 & nn.5, 8, 40, 68-69. The only claims for which constitutional principles are not determinative are otherwise-core "personal injury tort and wrongful death claims against the estate," which the statute explicitly provides are not core proceedings. 28 U.S.C. § 157(b)(2)(B); see also id. § 157(b)(5) (mandating trial of "personal injury tort and wrongful death claims" in a federal district court); id. § 1411(a) (preserving "any right to trial by jury that an individual has under applicable non-bankruptcy law with regard to a personal injury or wrongful death tort claim").

[51]The non-exclusive nature of the list of statutorily specified "core" proceedings in § 157(b)(2), in conjunction with the so-called catch-all categories in § 157(b)(2)(A) & (O) and the extremely vague statutory specification in § 157(b)(1) of core proceedings as including all those that "arise in" a bankruptcy case, are all sufficiently capacious to give bankruptcy judges as much core jurisdiction as is constitutionally permissible. See 28 U.S.C. § 157(b)(1)-(2); id. § 157(b)(2)(A) & (O). See generally Brubaker, 86 Am. Bankr. L.J. at 136-41, 145-46.

[52]Arkison, 134 S. Ct. at 2173. See 28 U.S.C.A. § 157(c).

[53]Stern, 564 U.S. at 476. See Brubaker, 86 Am. Bankr. L.J. at 139-41.

[54]See Logan, 38 Bankr. L. Letter No.1, at 4-5.

[55]See Brubaker, 86 Am. Bankr. L.J. at 180-85; Brubaker, 33 Emory Bankr. Dev. J. at 50 n.181.

[56]Halper, 164 F.3d at 838-39.

[57]Id. at 839.

[58]See 11 U.S.C.A. § 1123(a)-(b).

[59]Brubaker, 35 Bankr. L. Letter No. 6, at 8.

[60]Dunmore, 358 F.3d at 1114.

[61]Exide, 544 F.3d at 220.

[62]See Brubaker, 33 Emory Bankr. Dev. J. at 38 & n.122.

[63]See Stern, 564 U.S. at 484.

[64]Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 284, 18 How. 272, 15 L. Ed. 372, 2 A.F.T.R. (P-H) P 2205, 1855 WL 8216 (1855) (emphasis added).

[65]Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90, 102 S. Ct. 2858, 73 L. Ed. 2d 598, 6 Collier Bankr. Cas. 2d (MB) 785, Bankr. L. Rep. (CCH) P 68698 (1982) (Rehnquist, J., concurring).

[66]Brubaker, 33 Emory Bankr. Dev. J. at 54 (emphasis added) (discussing Weidhorn v. Levy, 253 U.S. 268, 272, 40 S. Ct. 534, 64 L. Ed. 898 (1920) ("In order to set aside these [allegedly fraudulent] conveyances [made by the bankrupt] and subject the property to the administration of the court of bankruptcy a plenary suit was necessary.")).

[67]Bardes v. First Nat. Bank, 178 U.S. 524, 532, 20 S. Ct. 1000, 44 L. Ed. 1175 (1900).

[68]Marathon, 458 U.S. at 90 (Rehnquist, J., concurring).

[69]Marathon, 458 U.S. at 90 (Rehnquist, J., concurring).

[70]Murray's Lessee, 59 U.S. (18 How.) at 284.

[71]Stern, 564 U.S. at 484.

[72]Brubaker, 86 Am. Bankr. L.J. at 159.

[73]Stern, 564 U.S. at 469

[74]Stern, 564 U.S. at 487.

[75]Stoll v. Gottlieb, 305 U.S. 165, 59 S. Ct.

134, 83 L. Ed. 104 (1938).

[76]Travelers Indemn. Co. v. Bailey, 557 U.S. 137 (2009).

[77]Stoll v. Gottlieb, 305 U.S. at 168-69.

[78]See Gottlieb v. Crowe, 289 Ill. App. 595, 7 N.E.2d 469 (1937), rev'd, 368 Ill. 88, 12 N.E.2d 881 (1938), rev'd, 305 U.S. 165 (1938).

[79]Stoll v. Gottlieb, 305 U.S. at 167.

[80]Bailey, 557 U.S. at 151-54. See Brubaker, 29 Bankr. L. Letter No. 8, at 5.

[81]See Restatement (Second) of Judgments § 17 (1982).

[82]Restatement (Second) of Judgments § 17(2).

[83]Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1054 (5th Cir. 1987).

[84]The context in which claim preclusion is often addressed is determining whether a particular claim that was *not* explicitly disposed of by a judgment is nonetheless barred. See Clyde Spillenger, Principles of Conflict of Laws 199 (2d ed. 2015). That sometimes-difficult aspect of claim preclusion law is, however, not implicated by non-debtor "releases," since the terms of the "release" itself define which third-party non-debtor claims are being extinguished by the "release." The confirmation order, therefore, is a final judgment extinguishing those (and only those) non-debtor third-party claims expressly identified by the terms of the "release" itself. See Bailey, 557 U.S. at 147-51, 155; Brubaker, 29 Bankr. L. Letter No. 8, at 5-9. Cf. Spillenger, Conflict of Laws, at 199 (describing such a scenario as the "easy case" in claim preclusion law). In other words, unlike most judgments, a non-debtor "release" explicitly addresses its claim preclusive *res judicata* scope and effect, because invoking the claim preclusive *res judicata* bar of a final judgment is the entire purpose and function of the "release" judgment.

[85]See Stern, 564 U.S. at 467-73; Brubaker, 86 Am. Bankr. L.J. at 133-35.

[86]Trulis v. Barton, 107 F.3d 685, 691 (9th Cir. 1997).

[87]Marathon, 458 U.S. at 90 (Rehnquist, J., concurring).

[88]Murray's Lessee, 59 U.S. (18 How.) at 284.

[89]Celotex Corp v. Edwards, 514 U.S. 300 (1995). See generally Brubaker, 72 Am. Bankr. L.J. at 36-39, 44-47, 50 & n.208.

[90]Celotex, 514 U.S. at 313-14 (Stevens, J., dissenting).

[91]Marathon, 458 U.S. at 90 (Rehnquist, J., concurring).

[92]Murray's Lessee, 59 U.S. (18 How.) at 284.

[93]Celotex, 514 U.S. at 321-22 (Stevens, J., dissenting) (quoting 28 U.S.C. § 157(c)(1)).

[94]Celotex, 514 U.S. at 309 n.7 (emphasis in original).

[95]Celotex, 514 U.S. at 309 n.7 (emphasis added). Indeed, Justice Stevens "agree[d] with the majority that the Bankruptcy Judge's order [wa]s a temporary injunction, and thus it [wa]s not a 'final order or judgment' " on the third-party non-debtor claims at issue. Celotex, 514 U.S. at 324 n.11 (Stevens, J, dissenting). He would, however, have interpreted the core jurisdiction statute more narrowly: "I believe that a statutory scheme that deprives a bankruptcy judge of jurisdiction to 'determine' a case also deprives that judge of jurisdiction to issue binding injunctions—even temporary ones—that would prevent an Article III court with jurisdiction over the case from determining it." Id. The view of the *Celotex* majority, though, is consistent with a long line of Supreme Court decisions, decided within the framework of the Supreme Court's summary-plenary jurisprudence, that distinguished between (i) the summary jurisdiction of a non-Article III referee to temporarily enjoin even a plenary suit from going forward and (ii) the plenary jurisdiction of only an Article III district court to finally adjudicate a plenary matter. See Brubaker, 72 Am. Bankr. L.J. at 22-28, 44-47.

[96]The *Millennium Lab* bankruptcy court stated that "examin[ing] the legal consequences of the confirmation order to find fault with the entry of the order" is "backwards reasoning." 575 B.R. at 283. That, however, is precisely the analytical method that the Court employed in *Stern*.

[97]See Restatement (Second) of Judgments § 33 (effect of declaratory judgments); Perez v. PBI Bank, Inc., 69 F.3d 906, 910 (N.D. Ind. 2014) ("when a party seeks a dismissal of a lawsuit based on a statute of repose, it is seeking a judgment on the merits which necessarily involves the power of the court to decide the matter in the first instance"). The traditional terminology of preclusion law captures the notion that the judgment is, indeed, a final judgment extinguishing and barring further suit on the claim by characterizing it as a judg-

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ment "on the merits." See David L. Shapiro, Civil Procedure: Preclusion in Civil Actions 39-40 (2001). And ironically (given the argument of Logan and the *Millennium Lab* bankruptcy court), the courts have uniformly concluded that a confirmation order approving a nonconsensual non-debtor "release" provision *is* a final judgment "on the merits" of the "released" third-party non-debtor claims. See, e.g., Republic Supply Co. v. Shoaf, 815 F.2d at 1053 (holding that "the bankruptcy court, applying bankruptcy law, confirmed the Plan and disposed of [non-debtor's] liability on" the third-party non-debtor claim at issue and "[i]t was therefore a final judgment on the merits" of the "released" claim).

[98]28 U.S.C. § 157(b)(1).

[99]In re Johns-Manville Corp., 801 F.2d 60, 63 (2d Cir. 1986).

[100]Celotex, 514 U.S. at 327 (Stevens, J., dissenting).

[101]Katchen v. Landy, 382 U.S. 323 (1966).

[102]Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989).

[103]Langenkamp v. Culp, 498 U.S. 42 (1990).

[104]See generally Brubaker, 86 Am. Bankr. L.J. at 180-85.

[105]Brubaker, 86 Am. Bankr. L.J. at 183.

[106]Logan, 38 Bankr. L. Letter No. 1, at 4-5.

[107]Marathon, 458 U.S. at 90 (Rehnquist, J., concurring).

[108]Murray's Lessee, 59 U.S. (18 How.) at 284.

[109]Stern, 564 U.S. at 489 (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)).

[110]11 U.S.C. § 524(g)(3)(A). If such a nonconsensual non-debtor "release" is merely affirmed (rather than issued) by the district court, the Supreme Court's Article III jurisprudence may well require the district court to review the propriety of the "release" under a nondeferential *de novo* standard of review. See Brubaker, 33 Emory Bankr. Dev. J. at 14 n.8, 33 n.86.

[111]For example, a similar (and similarly misguided) argument was accepted by many courts in the context of determining the extent of states' constitutional sovereign immunity in federal bankruptcy proceedings. See generally Brubaker, 76 Am. Bankr. L.J. at 534-56.

[112]Logan, 38 Bankr. L. Letter No. 1, at 5.

[113]Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 407 (1821).

[114]Cohens v. Virginia, 19 U.S. (6 Wheat.) at 407-08.

[115]Cohens v. Virginia, 19 U.S. (6 Wheat.) at 407-08.

[116]Murray's Lessee, 59 U.S. (18 How.) at 284 (emphasis added).

[117]Bardes v. Hawarden Bank, 178 U.S. at 532. See also Weidhorn v. Levy, 253 U.S. at 272 ("In order to set aside these [allegedly fraudulent] conveyances [made by the bankrupt] and subject the property to the administration of the court of bankruptcy a plenary suit was necessary.").

[118]Murray's Lessee, 59 U.S. (18 How.) at 284.

[119]Stern, 564 U.S. at 489 (quoting Crowell v. Benson, 285 U.S. at 51).

[120]Murray's Lessee, 59 U.S. (18 How.) at 284.

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United States Bankruptcy Court, D. Delaware.

IN RE: MALLINCKRODT PLC, et al., Debtors.

Case No. 20-12522 (JTD)
|
Dated: February 8, 2022

Attorneys and Law Firms

Chapter 11

(Jointly Administered)

Re: D.I. 6067 & 6347

REVISED[1] OPINION[2]

1 This Opinion has been revised only to correct typos in footnotes 159 and 180, which are noted in bold.

2 This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014. Any terms not defined herein are defined in the Plan.

JOHN T. DORSEY, U.S.B.J.

***1** Debtors seek approval of the Fourth Amended Joint Plan of Reorganization of Mallinckrodt PLC and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code (the "**Plan**").[3] Hearings to consider the Plan and the objections to confirmation were held over sixteen days between November 2021 and January 2022 (the "**Confirmation Hearings**" or "**Confirmation**"). I have reviewed the Plan and the evidence presented in support and in opposition, and, except for the below-described modifications to the exculpation provision, I find that the Plan satisfies all the requirements of the Bankruptcy Code, and it is therefore confirmed.

3 D.I. 6067.

FACTUAL BACKGROUND

I. Pre-Petition

Debtors and their non-debtor affiliates operate a global specialty biopharmaceutical company that produces and sells both generic and branded pharmaceutical products including specialty products for the treatment of rare diseases and controlled substances, such as opioids.[4] The Mallinckrodt global enterprise operates as two separate business: (1) the specialty brands business ("**Specialty Brands**") and (2) the specialty generics business ("**Specialty Generics**"). The Specialty Brands business focuses on autoimmune and rare diseases in specialty areas such as neurology, rheumatology, and nephrology, among others. The Specialty Generics business offers a portfolio of over twenty generic product families, most of which are controlled substances such as opioids.

4 D.I. 128, Declaration of Stephen A. Welch, Chief Transformation Officer, in Support of Chapter 11 Petitions ("**First Day Declaration**"), AICX P2 Ex 1685.

In the years leading up to the commencement of these bankruptcy cases, Debtors faced an onslaught of litigation arising out of their production of certain drugs. On the one hand, certain Debtors, primarily those on the Specialty Generics side of the business, were named in over 3,000 lawsuits stemming from their production and sale of opioid medications (the "**Opioid Litigation**").[5] As of the Petition Date, Debtors had spent more than $100 million defending these suits and $30 million to settle just two of them. Litigation expenses were averaging a million dollars every week.[6] On the other hand, Debtors' Specialty Brands business faced more than two dozen lawsuits and government investigations arising out of its marketing and sale of a drug called Acthar H.P. Gel ("**Acthar**"), including a rebate-related litigation with the Centers for Medicare and Medicaid Services ("**CMS**")[7], a related *qui tam* False Claims Act action in which the Department of Justice ("**DOJ**") had intervened,[8] and a separate *qui tam* action concerning Debtors' charitable donations in which the DOJ had also intervened (collectively, the "**Federal/State Acthar Litigation**").[9] Debtors were also named in multiple private actions and putative class actions asserting claims arising out of the pricing of Acthar, which alleged, among other things, violations of antitrust and

consumer protection laws as well as unfair trade practices and securities law violations.[10] Managing the litigation ultimately became untenable and Debtors realized that they would need to file for chapter 11 protection and reorganize the enterprise.[11]

5 First Day Declaration ¶ 12.

6 First Day Declaration, ¶ 12.

7 *Mallinckrodt ARD LLC v. Verma*, 444 F. Supp. 3d 150 (D.D.C. 2020) (the "**CMS Litigation**").

8 The *qui tam* action filed in 2018 under the False Claims Act, *United States ex rel. Landolt v. Mallinckrodt Pharma. Inc.*, No. 18-11931-PBS (D. Mass) (the "**False Claims Act Litigation**"), involves the same pricing dispute at issue in the CMS Litigation, but with additional allegations that Debtors were knowingly using an incorrect rebate calculation for Acthar. Because of the False Claims Act's provision for treble damages, this litigation exposed Debtors to a judgment of potentially more than $1.9 billion. First Day Declaration at ¶ 20.

9 First Day Declaration ¶ 18.

10 Debtors originally estimated that all of the Acthar-related litigations could collectively result in more than $15 billion in alleged damages and penalties. As discussed below, that estimate has changed.

11 During this same time period, Debtors were also facing near-term debt maturity. Debtors' term loan lenders had agreed to extend new financing to deal with that maturing debt, but when the judgment in the CMS Litigation came down, the term lenders withdrew the financing, forcing Debtors to pursue a private exchange, which changed the company's financial position appreciably. 12-6-21 Tr. at 86-87 (Welch testimony).

***2** In February 2020, Debtors announced that they had reached the principal terms of a comprehensive opioid settlement with the Attorneys General of more than forty states and U.S. territories which was later finalized following negotiations with the Plaintiffs' Executive Committee,[12] the Guaranteed Unsecured Notes Ad Hoc Group, and each of their advisors (the "**Original Opioid Settlement**").[13] The Original Opioid Settlement provided for the creation of one or more trusts (the "**Opioid Trust(s)**") for the benefit of opioid claimants, which would be funded with $1.6 billion in structured cash payments, warrants to acquire 19.99% of the public common stock of the reorganized debtor, Mallinckrodt plc, and certain of Debtors' other assets.[14] All opioid claims would then be channeled to the Opioid Trust(s), which would in turn liquidate all claims asserted by opioid claimants.

12 The "**Plaintiffs' Executive Committee**" is a court-appointed committee in the national opioid multidistrict litigation. First Day Declaration at ¶ 88.

13 First Day Declaration.

14 First Day Declaration; Original Opioid Settlement Term Sheet, attached as Schedule 1 to the Restructuring Support Agreement at Debtors P2 Ex 84.

In March 2020, the Court in the CMS Litigation issued a judgment adverse to Debtors that established an approximately $650 million near-term liability, retroactively increasing back to 2013 the Medicaid rebates paid by ARD to state Medicaid programs.[15]

15 First Day Declaration ¶ 19.

In September 2020, Debtors reached an agreement in principle with CMS and the DOJ, contingent on a chapter 11 filing by Mallinckrodt plc, that resolved most of the Acthar-related claims and investigations held by the federal government. Debtors also reached an agreement in principle with each of the 50 states, Washington D.C., and Puerto Rico that would resolve claims asserted in the rebate related *qui tam* action (collectively, the "**Federal/State Acthar Settlement**").[16] The Federal/State Acthar Settlement provides for Debtors to pay a total of $260 million to the DOJ and various states in return for a release by the relevant governmental agencies of their Acthar-related claims.[17]

16 Memorialized in the settlement agreements filed on August 6, 2021, as Exhibit Q to the Plan Supplement, D.I. 3602.

17 *Id.*

By this time, Debtors had also begun negotiating with several creditor groups including the Guaranteed Unsecured Notes Ad Hoc Group, the Ad Hoc First Lien Term Lender Group, an ad hoc group of Debtors' revolving lenders, and the administrative agent under Debtors' credit facility, which ultimately resulted in an agreement on a comprehensive restructuring (the "**Noteholder Restructuring Agreement**"), whereby Debtors would reinstate their secured debt and issue new secured takeback second lien notes and equity interests in reorganized Mallinckrodt to the holders of Debtors'

fulcrum unsecured notes. The Original Opioid Settlement and Noteholder Restructuring Agreement were memorialized in a Restructuring Support Agreement (the "**RSA**"), which contemplated a comprehensive restructuring of Debtors' enterprise.[18]

[18] First Day Declaration at ¶ 15.

II. Post-Petition

On October 12, 2020 (the "**Petition Date**"), Debtors commenced these cases under chapter 11 of the Bankruptcy Code (the "**Code**"). Debtors continued to operate their business and manage their property as debtors in possession pursuant to Sections 1107(a) and 1108 of the Code. On October 27, 2020, an official committee of unsecured creditors (the "**Unsecured Creditors' Committee**" or "**UCC**") and an official committee of opioid claimants (the "**Opioid Claimants' Committee**" or "**OCC**") (together the "**Committees**") were appointed.[19] On March 16, 2021, Roger Frankel was provisionally appointed as the legal representative of the future claimants (the "**FCR**"), and finally appointed on June 11, 2021.[20] The Chapter 11 cases are jointly administered for procedural purposes only pursuant to Rule 1015(b).

[19] D.I. 306 and 308.

[20] D.I. 1747 and 2813.

***3** On November 30, 2020, I entered an order establishing certain deadlines for the filing of proofs of claim (the "**Bar Date Order**").[21] The Bar Date order established (i) February 15, 2021, as the General Bar Date for all non-governmental entities to file proofs of claim (other than opioid claims); and (ii) April 12, 2021, as the Governmental Bar Date for all proofs of claim (other than opioid claims).[22]

[21] D.I. 667.

[22] No bar date was set for opioid claims.

On April 20, 2021, Debtors filed their first iteration of the Plan and Disclosure Statement (the "**Original Plan**").[23] On June 18, 2021, Debtors filed the solicitation versions of the Plan and Disclosure Statement.[24] Plan supplements were filed in August and September 2021.[25]

[23] D.I. 2074.

[24] D.I. 2916, 2917.

[25] D.I. 3596-3602, 3604-3606, 3610, 3613, 3614, 4147, 4149, and 4639.

On September 2, 2021, Debtors reached an agreement in principle with the Governmental Plaintiff Ad Hoc Committee, the Multi-State Governmental Entities Group ("**MSGE**"), and the OCC (the "**OCC Settlement**").[26] The OCC Settlement (together with the Original Opioid Settlement, the "**Opioid Settlement**") requires Debtors to make an additional $125 million cash contribution to the Opioid Trust(s) (increasing the aggregate cash contribution to the Opioid Trust(s) to $1.725 billion) as well as contribute 50% of Debtors' interest in certain claims arising from their 2015-2018 share repurchase program. It further provides for certain mutual releases, which will be discussed in detail below.

[26] D.I. 4121-2, Global Opioid Settlement Term Sheet.

Also on September 2, 2021, following extensive mediation with this Court's then Chief Judge Sontchi, Debtors reached an agreement in principle with the UCC (the "**UCC Settlement**").[27] The UCC Settlement provides for two significant changes to the distributions to general unsecured creditors contained in the Original Plan. First, it increases the distributions to these creditors from the $100 million in previous iterations of the Plan to $135 million plus certain non-cash assets, all of which will be held in a general unsecured creditors trust (the "**GUC Trust**"). Second, instead of providing the distribution in a "pot" that would later be allocated as the claims are liquidated, the UCC Settlement provides for an allocation of the consideration among its members (the "**UCC Allocation**"), which will be discussed in detail below.

[27] D.I. 4121-1, General Unsecured Claims ("**GUC**") Settlement Term Sheet, AICX P2 Ex 1525. The UCC Allocation was determined after the terms of the settlement were agreed to.

III. The Plan

Debtors filed the Second Amended Plan on September 29, 2021.[28] The Plan incorporates the above-described settlements and classifies holders of claims and interests into the following classes:[29]

Summary of Classification and Treatment of Claims and Interests

Class Claim Status Voting Rights 1 Other Secured Claims Unimpaired Presumed to Accept 2(a) First Lien Revolving Credit Unimpaired Presumed to Accept FacilityClaims 2(b) 2024 First Lien Term Loan Claims Unimpaired Presumed to Accept or or Impaired Entitled to Vote 2(c) 2025 First Lien Term Loan Clams Unimpaired Presumed to Accept or or Impaired Entitled to Vote 3 First Lien Notes Claims Unimpaired Presumed to Accept or or Impaired Entitled to Vote 4 Second Lien Notes Claims Impaired Entitled to Vote 5 Guaranteed Unsecured Impaired Entitled to Vote NotesClaims 6(a) Acthar Claims Impaired Entitled to Vote 6(b) Generics Price Fixing Claims Impaired Entitled to Vote 6(c) Asbestos Claims Impaired Entitled to Vote 6(d) Legacy Unsecured Notes Claims Impaired Entitled to Vote 6(e) Environmental Claims Impaired Entitled to Vote 6(f) Other General Unsecured Claims Impaired Entitled to Vote 6(g) 4.75% Unsecured Notes Claims Impaired Entitled to Vote 7 Trade Claims Impaired Entitled to Vote 8(a) State Opioid Claims Impaired Entitled to Vote 8(b) Municipal Opioid Claims Impaired Entitled to Vote 8(c) Tribe Opioid Claims Impaired Entitled to Vote 8(d) U.S. Government Opioid Claims Impaired Entitled to Vote 9(a) Third-Party Payor Opioid Claims Impaired Entitled to Vote 9(b) PI Opioid Claims Impaired Entitled to Vote 9(c) NAS PI Opioid Claims Impaired Entitled to Vote 9(d) Hospital Opioid Claims Impaired Entitled to Vote 9(e) Ratepayer Opioid Claims Impaired Entitled to Vote 9(f) NAS Monitoring Opioid Claims Impaired Entitled to Vote 9(g) Emergency Room Impaired Entitled to Vote PhysiciansOpioid Claims 9(h) Other Opioid Claims Impaired Entitled to Vote 9(i) No Recovery Opioid Claims Impaired Deemed to Reject 9(j) Released Co-Defendant Claims Impaired Deemed to Reject 10 Settled Federal/State Acthar Impaired Entitled to Vote Claims 11 Intercompany Claims Unimpaired Presumed to Accept or or Impaired Deemed to Reject 12 Intercompany Interests Unimpaired Presumed to Accept or or Impaired Deemed to Reject 13 Subordinated Claims Impaired Deemed to Reject 14 Equity Interests Impaired Deemed to Reject

28 A Third Amended Plan was filed on December 29, 2021. A Fourth Amended Plan was filed on January 6, 2022. All citations to the Plan herein are to the Fourth Amended Plan.

29 D.I. 6067, Fourth Amended Plan at 57.

IV. Voting

***4** Debtors' claims and noticing agent, Prime Clerk LLC ("**Prime Clerk**"), filed a report detailing the results of the Plan voting process on October 31, 2021.[30] The Voting Report provides that Classes 1 and 2(a) are unimpaired and conclusively presumed to have accepted the Plan. Classes 4 through 9(h) and 10 are impaired (the "**Impaired Classes**") and were entitled to vote. Classes 2(b), 2(c), 4, 5, 6(c), 6(d), 6(g), 7-9(g), and 10 each voted to accept the Plan (the "**Voting Accepting Classes**"). Holders of Claims and Interests in Classes 9(i), 13, and 14 (together with Holders of Claims in Classes 11 and 12, to the extent Impaired under the Plan) shall receive no distribution under the Plan and are therefore conclusively deemed to have rejected the Plan pursuant to Section 1126(g) of the Code (the "**Deemed Rejecting Classes**"). Holders of Claims and Interests in Classes 3, 6(a), 6(b), 6(e) (solely as to Debtors Mallinckrodt Brand Pharmaceuticals LLC, Mallinckrodt LLC, Mallinckrodt plc, Mallinckrodt US Holdings LLC, and MNK 2011 LLC), 6(f) (solely as to Mallinckrodt ARD LLC, Mallinckrodt Hospital Products, Inc., Mallinckrodt LLC, Mallinckrodt Pharmaceuticals Ireland Limited, Mallinckrodt Pharmaceuticals Limited, Mallinckrodt plc, and ST Shared Services LLC), and 9(h) (the "**Voting Rejecting Classes**" and, together with the Deemed Rejecting Classes, the "**Rejecting Classes**") have voted to reject the Plan.[31]

30 D.I. 5087, Final Declaration of James Daloia Regarding Solicitation of Votes and Tabulation of Ballots, Covidien P2 Ex 10; see also Debtor P1 Ex 23, Tabulation Summary (together the "**Voting Report**").

31 Classes 11 and 12, Intercompany Claims and Interests, are either (a) unimpaired, in which case they are conclusively presumed to have accepted the Plan pursuant to Section 1126(f) of the Code or (b) impaired, in which case they are deemed to have rejected the Plan pursuant to Section 1126(g). In either case they were not entitled to vote. See Disclosure Statement at D.I. 2917, Covidien P2 Ex 2. See also Plan at III.B.11 and 12 ("No property will be distributed to the Holders of allowed Intercompany Claims. Unless otherwise provided for under the Plan, each Intercompany Claim will either be Reinstated or canceled and released at the option of the Debtors in consultation with [certain creditor constituencies]").

JURISDICTION

This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Confirmation of the Plan is a

core proceeding under 28 U.S.C. § 157(b)(2). The Court has exclusive jurisdiction to determine whether the Plan complies with the applicable provisions of the Code and should be confirmed.[32] Venue is proper under 28 U.S.C. § 1408 and 1409.

32 Additional discussion of this Court's jurisdiction is contained *infra* at 27.

DISCUSSION

For a plan of reorganization to be confirmed, it must meet the specific requirements of Section 1129 of the Code. *In re Armstrong World Indus.*, 348 B.R. 111, 120 (D. Del. 2006). "To satisfy the requirements of § 1129(a), all impaired classes must accept the Plan." *Id.* "Section 1129(b) allows the confirmation of a plan over the objection of an impaired class if the 'plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." *Id.* quoting 11 U.S.C. § 1129(b)(1). When a plan is confirmed pursuant to Section 1129(b) it is referred to as a "cramdown." "A cramdown may be necessary under certain circumstances to foreclose the possibility that a small minority would prevent confirmation of the plan." *Id.* "In the context of a cramdown, the debtor's standard of proof that the requirements of § 1129 are satisfied is preponderance of the evidence." *Id.*

Because there were numerous objections filed alleging non-compliance with many of the confirmation requirements, I will address them in connection with the individual Code sections.

I. Section 1122 (Classification of Claims)

Section 1122 provides that:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

***5** 11 U.S.C. § 1122. While "Section 1122(a) does not expressly provide that 'substantially similar' claims may not be placed in separate classes[,]" it is nevertheless clear from other provisions that "the Code was not meant to allow a debtor complete freedom to place substantially similar claims in separate classes." *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158 (3d Cir. 1993) (noting that requirements of Sections 1129(a)(8) and (a)(10) would be undermined if a debtor could gerrymander classes). Accordingly, the Third Circuit has held that "the classification of the claims or interests must be reasonable." *Id.* "In a 'cram down' case, this means that each class must represent a voting interest that is sufficiently distinct and weighty to merit a separate voice in the decision whether the proposed reorganization should proceed." *Id.* at 159.

The Plan here divides the Claims and Interests into classes and subclasses, as noted in the chart above.[33] Debtors argue that this satisfies Section 1122 of the Code "because the Claims and Interests in each Class differ from the Claims and Interests in each other Class based on the different rights and attributes of the respective Holders as well as to facilitate the different types of consideration provided to different Classes (i.e. equity, debt, Cash)."[34] Thus, they argue, "valid business, factual, and legal reasons exist for classifying separately the various Claims and Interests under the Plan."[35]

33 See Plan Art. III.A

34 Debtors' Brief in Support of Confirmation, D.I. 5016, at 20.

35 *Id.*

Three parties assert that their claims are misclassified: Sanofi-Aventis U.S. LLC ("**Sanofi**"),[36] Kenneth R. Greathouse, Stuart Rose, and Lloyd Glenn (collectively, the "**Glenridge Principals**" or "**Glenridge**"),[37] and Mr. Daniel Koppenhafer (acting *pro se*).[38]

36 D.I. 4702, Sanofi Objection.

37 D.I. 4701, Glenridge Objection.

38 D.I. 3797, Koppenhafer Objection.

Sanofi argues that the Plan improperly classifies its claims as Class 6(f) General Unsecured Claims instead of Class 7 Trade Claims. Sanofi alleges that Debtors had no justifiable basis to separate their claim and that Debtors' failure to classify Sanofi's claim with other like trade creditor claims is a violation of § 1122. Specifically, Sanofi argues that

Debtors derive substantial value from the sale of Acthar and related intellectual property that Debtors acquired under an Asset Purchase Agreement ("**APA**") with Sanofi. Without the APA, Sanofi contends, Debtors would not have generated the large revenue stream from Acthar that they have relied upon to fund these cases. Sanofi argues that the fact that Debtors continue to derive value from the APA shows that Sanofi is a trade creditor that provides benefits to Debtors just like the other Class 7 trade creditors. Further, Sanofi asserts that Debtors' projections in the Disclosure Statement clearly reflect Debtors' intent to continue to reap the benefits of the APA through future sales of Acthar.

Debtors argue that their classification of Sanofi separately was done to distinguish trade claimants – those with whom Debtors have a go-forward business relationship and provide goods and services necessary for Debtors' continued operations – from other general unsecured claimants. In support of this position, Debtors cite to *Matter of Jersey City Med. Ctr.*, in which the Third Circuit approved the separate classification of trade claims because the court found that the classification of claims separately had a reasonable basis. *Matter of Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987). Debtors argue that the classification of Sanofi as distinct from trade creditors is appropriate here because Sanofi does not provide goods or services to Debtors. On the contrary, Debtors breached the APA with Sanofi post-petition, as they considered it to be a burden on Debtors' estates.[39] Therefore, they argue, the classification of Sanofi in Class 6(f) instead of Class 7 is a valid exercise of their business judgment. I agree.

39 See discussion in the Ruling on Sanofi's Motion for Determination that Debtors Cannot Reject or Discharge Post-Confirmation Royalty Obligations. D.I. 5186.

***6** There is "one clear rule that emerges from otherwise muddled caselaw on § 1122 claims classification: thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan." *In re Greystone III Joint Venture* 995 F.2d 1274, 1279 (5th Cir. 1991), *on reh'g* (Feb. 27, 1992). Under Section 1122 of the Code, claims or interests within each class must be "substantially similar" to the other claims or interests in the class. *See* 11 U.S.C. § 1122; *In re Lightsquared Inc.*, 513 B.R. 56, 82-83 (Bankr. S.D.N.Y. 2014) ("[T]he separate classification of otherwise substantially similar claims and interests is appropriate so long as the plan proponent can articulate a 'reasonable' (or 'rational') justification for separate classification."). A debtor is prohibited from separately classifying similar unsecured claims without a legitimate business reason supported by credible proof. *See In re Boston Post Rd. Ltd. P'ship*, 21 F.3d 477, 483 (2d Cir. 1994) ("This Court thus holds that separate classification of unsecured claims solely to create an impaired assenting class will not be permitted; the debtor must adduce credible proof of a legitimate reason for separate classification of similar claims."). "It remains clear that Congress intended to afford bankruptcy judges broad discretion to decide the propriety of plans in light of the facts of each case." *Matter of Jersey City Med. Ctr.*, 817 F.2d at 1060–61; *Cf. In re U.S. Truck Co., Inc.*, 800 F.2d 581, 584–86 (6th Cir.1986) (discussing the legislative history of Section 1122).

Here, I find that Debtors have a legitimate business reason to classify Sanofi's claims separately from the trade creditors in Class 7. The Class 7 claimants are those who will have a future relationship with Debtors, providing goods and services necessary for Debtors' continued operations. Debtors do not wish to continue their relationship with Sanofi, because the agreements impose a burden on Debtors. Sanofi will not be providing any necessary goods or services to Debtors, and accordingly, Sanofi does not fit within Debtors' definition of a trade creditor. For these reasons, I find that Sanofi's claims are appropriately and permissibly classified, and the Plan satisfies Section 1122 of the Code. Sanofi's objection on this issue is therefore overruled.

Glenridge also objects to the classification scheme. The Glenridge Principals are parties to an agreement (the "**Royalty Agreement**") with debtor Mallinckrodt Pharmaceuticals Ireland Limited ("**MPIL**") that provides for MPIL's payment of royalties to the Glenridge Principals equal to a percentage of net sales of Acthar.[40] The Plan classifies Glenridge in Class 6(f) Other General Unsecured Claims and combines Class 6(f) with Class 6(e) Environmental Claims to share in a single distribution pool. Glenridge argues this is improper because "neither the Plan nor the UCC Settlement ... adequately explain the disparate treatment among the Class 6 subgroups. While there are certain obvious differences (the litigation claims of Classes 6(a), 6(b), and 6(c)), there is no explanation as to the differences that arise via alleged contractual claimants (Classes 6(d), 6(e), 6(f), and 6(g))."[41] Glenridge argues that the unsecured creditor group was broken up into various subgroups "in order to obtain approval of a less terrible deal than the deal originally proposed under the RSA in these cases."[42] However, they contend, "the end result remains the same: the royalty claims, including the Glenridge claims, are funding creditors outside of Class 6 and have been excluded from the benefit of the various deals made

to obtain confirmation of the Plan via the unsecured classes. And no effort is made to explain the reasoning behind such disparate treatment."[43]

40 Questcor, MPIL's predecessor, was originally also a party to the royalty agreement.

41 Glenridge Supplemental Objection, D.I. 5104.

42 *Id.*

43 *Id.*

Debtors counter that they had good reasons to adopt the classification scheme they did – namely to maximize the likelihood of settlement with creditors in one or more of the subclasses. Debtors argue that "notwithstanding that all claims in Class 6 are unsecured claims, the claims are different in nature (ranging from funded debt to contingent litigation claims, environmental claims, and non-supporting trade claims), sit at different Debtors, and the holders of such claims are separately represented in these cases. To have classified all such claims together would have significantly diminished Debtors' ability to reach settlements with these constituents, as Debtors would have no way of providing the settling class with its own bargained-for treatment, separate from the other unsecured claimants in the class."[44] I agree.

44 D.I. 5660, Debtors' Omnibus Reply to Supplemental Objections at 16.

***7** Glenridge has not pointed to any evidence that Debtors' classification of claims was done for any improper purpose. The explanation offered by Debtors for their classification scheme is reasonable, particularly in light of the settlements Debtors were able to reach with most of the Class 6 subgroups. Glenridge's objection on this issue is therefore overruled.

Mr. Koppenhafer argues that the 4.75% Unsecured Notes should be included in the same class as the Guaranteed Unsecured Notes because they have equal rights and priority. Debtors point out that the two groups have very different legal entitlements. The 4.75% Notes are issued by MIFSA and guaranteed only by the parent company, PLC.[45] The Guaranteed Unsecured Notes, however, while also issued by MIFSA and guaranteed by PLC, are also guaranteed by 60 other debtor entities including the ones that own Debtors' IP and most other operating assets. At the same time, there are different structuring rights in the relevant debt documents that show a distinct difference between the two notes.[46] Because the two groups have different prebankruptcy entitlements, Debtors argue, they may be classified separately. I agree.

45 1-6-22 Tr. at 101-102.

46 Debtors' P2 Exhibit 95-98.

As discussed above, Debtors have satisfied the standards of Section 1122. The Class 6(g) 4.75% Notes are different and have divergent debt structuring rights than the Class 5 Guaranteed Unsecured Notes. Their differences allow Debtors to classify them in different groups. Mr. Koppenhafer's objection is therefore also overruled.

II. Section 1123(a)

Only one creditor has raised an objection based on Debtors' alleged failure to comply with Section 1123(a) of the Code. Section 1123(a) requires that "notwithstanding any otherwise applicable nonbankruptcy law, a plan shall"

(1) designate, subject to section 1122, ... classes of claims ... and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation ... ;

(6) provide for ... a provision prohibiting the issuance of nonvoting equity securities and [provide an appropriate distribution of voting power among the classes of securities]...; and

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of [the reorganized company's officers and directors].

11 U.S.C. § 1123(a). The Canadian Elevator Industry Pension Trust Fund (the "**Pension Trust**") argues that the Plan does not satisfy Section 1123(a)(4) because it authorizes a settlement with one subset of Class 13 claimholders but deprives others the same opportunity to recover on their

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claims, thereby failing to treat all holders of claims in Class 13 equally.

Courts have interpreted Section 1123(a)(4) as requiring that "all claimants in a class must have 'the same opportunity' for recovery." *In re W.R. Grace & Co.*, 729 F.3d 311, 327 (3d Cir. 2013) (quoting *In re Dana Corp.*, 412 B.R. 53, 62 (S.D.N.Y. 2008)). "What matters, then, is not that claimants recover the same amount but that they have equal opportunity to recover on their claims." *Id.*

***8** The Pension Trust's claims were classified in Class 13 Subordinated Claims. The Pension Trust filed its objection in its capacity as court-appointed lead plaintiff in a putative securities class action in the District of New Jersey captioned *Strougo v. Mallinckrodt Public Limited Company*, et al., No. 20-cv-10100 (the "**Strougo Action**").[47] Other Class 13 claimholders are plaintiffs in another putative securities class action captioned *Shenk v. Mallinckrodt plc*, No. 1:17-cv-00145-DLF (D.D.C), pending in the District of Columbia (the "**Shenk Action**").[48] Debtors have entered into a settlement with the Shenk Plaintiffs that resolves the Shenk Action in exchange for a payment of $65.7 million to be paid from the proceeds of D&O policies held by the individual defendants in the Shenk Action.[49] No settlement has been reached with respect to the Strougo Action.

47 It has filed its objection on behalf of all plaintiffs in the Strougo Action (the "**Strougo Plaintiffs**").

48 The plaintiffs in the Shenk Action will be referred to as the "**Shenk Plaintiffs**".

49 See Shenk Settlement Motion, D.I. 2393 at ¶ 11.

The Pension Trust argues that the Plan violates Section 1123(a)(4) because it authorizes a settlement with one subset of Class 13 claim holders, the Shenk Plaintiffs, but deprives others, such as the Pension Trust and other Strougo Plaintiffs, the same opportunity to recover on their claims, thereby failing to treat all the holders of claims in Class 13 equally. Specifically, the Pension Trust argues that "if the Shenk Settlement is not approved, the plaintiffs in the Shenk Action will not be granting any third-party releases, without regard to whether they submit an Opt-Out Form.[50] This is the very opportunity that the Strougo Plaintiffs are being denied under the Plan."[51] The Pension Trust further argues that the Strougo Plaintiffs should be afforded the same opportunity as the Shenk Plaintiffs to recover damages on their claims against the individual Strougo defendants and any applicable insurance policies.[52]

50 See discussion of Third-Party Releases *infra* at 45-52.

51 D.I. 4090, Pension Trust Objection at 24.

52 *Id.*

Debtors' response is three-fold. First, they argue that the Pension Trust does not have standing to object on behalf of the Strougo Plaintiffs because this Court has not certified the class in the Strougo Action. Second, they argue that the Shenk Settlement does not invoke analysis under Section 1123(a)(4) because no portion of the settlement with the Shenk Plaintiffs is being paid by Debtors. Rather, the settlement will be paid only from the proceeds of the D&O policies that cover the defendants in the Shenk Action and therefore Section 1123(a)(4) does not apply.[53] Third, Debtors argue, even if Section 1123(a)(4) does apply, it is satisfied here because the Pension Trust and the other holders of Class 13 claims receive the same treatment because: 1) the Shenk Plaintiffs and all other holders of Class 13 claims had equal opportunity to opt out of the Plan's Third-Party Releases; 2) the Pension Trust, and any other Strougo Plaintiff who opt out of the Third-Party Releases, will retain the opportunity to litigate its third-party Claims; and 3) the Pension Trust and the Strougo Plaintiffs had the same opportunity as the Shenk Plaintiffs to reach a settlement and their failure to do does not mean Debtors treated them unequally. Therefore, the fact that Debtors settled with some holders of Class 13 claims does not result in unequal treatment in violation of Section 1123(a)(4) of the Bankruptcy Code. I agree.

53 D.I. 2393, Shenk Settlement Motion.

Debtors are correct that the Pension Trust does not have standing to object on behalf of the putative class in the Strougo Action. The purported class proof of claim was filed without permission of the Court, the putative class was not certified prepetition, class certification was not sought in this proceeding, and the purported class proof of claim was expunged without objection from the putative class representative.[54] The Pension Trust argues that "Rule 3001 should be construed to allow class proofs of claims, at least on a tentative basis, until the court rejects the class action process" and that can only happen after Debtors object to the class proof of claim in the context of an adversary proceeding or a contested matter.[55] That argument is without merit.

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54 D.I. 3189 (Omnibus Claims Objection); D.I. 4266 (Order Sustaining Objection).

55 D.I. 5887, Pension Trust Supplemental Objection at 25 (quoting *Gentry v. Siegel,* 668 F.3d 63, 68-69 (4th Cir. 2012).

***9** As I previously noted in connection with my ruling on Debtors' objection to class proofs of claims filed by certain Acthar Claimants, the Third Circuit has expressed, at least in a non-precedential opinion, that the "authority to act for a class under Rule 23 does not imply any authorization to file a class proof of claim for an individual in bankruptcy proceedings." *In re W.R. Grace & Co.*, 316 Fed. App'x 134 (3d Cir. 2009) (citing *In re Standard Metals Corp*., 817 F.2d 625, 631 n.10 (10th Cir. 1987), vacated on other grounds, 839 F. 2d 1383 (10th Cir. 1987)). Thus, as I previously held, a party seeking to file a class proof of claim must first seek permission from the court to do so.[56] The Pension Trust did not.

56 D.I. 3074, Transcript of 6-29-21 Hearing (Bench Ruling); D.I. 3435 (Order).

Even if the Pension Trust was not required to seek prior permission to file a class proof of claim, the putative class lead plaintiff could not act on behalf of the putative class until it obtains class representative status under Rule 7023. *In re Dynegy*, 770 F.3d 1064, 1070 (2d Cir. 2014). Here the putative class representative never sought class certification under Rule 7023, and, therefore, does not have standing to act on behalf of the putative class members.

Finally, the Pension Trust is wrong factually. Debtors did file an objection to the putative class action proof of claim, the Pension Trust failed to respond, and an order was entered expunging that claim.[57] So, even if the Pension Trust is correct that Rule 3001 should be construed to allow class proofs of claims, at least on a tentative basis, there is no class proof of claim for which the putative class representative can act. Debtors' objection to the putative class's standing to object to the Plan is therefore sustained.

57 Order Sustaining Debtors' Second Omnibus Objection to Certain Claims. D.I. 4266.

However, even if the Pension Trust was correct regarding its ability to act at least on a provisional basis for the benefit of the putative class, its arguments under Section 1123(a)(4) fail. As the District Court held in *In re Exide Holdings, Inc.*, "[n]othing in the Bankruptcy Code requires a third party to make settlement payments or provide substantial contributions to similarly situated creditors in equal or prorated amounts." *In re Exide Holdings, Inc.*, 2021 WL 3145612, *15 (D. Del. 2021). The consideration for the Shenk Settlement is being paid from the proceeds of D&O policies, which are not property of the Debtors. Because the Plan treats all Class 13 claimholders equally,[58] Section 1123(a)(4) simply does not apply. However, even if Section 1123(a)(4) is applicable, I find that it is satisfied here.

58 See Plan Art. III.B.13 ("Subordinated Claims shall be discharged, cancelled, and extinguished on the Effective Date. Each Holder of Subordinated Claims shall receive no recovery or distribution on account of such Subordinated Claims.").

Section 1123(a)(4) only requires that creditors in the same class have the same opportunity to recover. It does not mean that all the recoveries received by the creditors in the same class must be exactly the same. *In re Adelphia Communs. Corp.*, 368 B.R. 140, 249-50 (Bankr. S.D.N.Y. 2007) (observing that "courts have held that [Section 1123(a)(4)] does not require identical treatment for all class members in all respects under a plan[.]").

Here, the Plan offers the same treatment to all holders of Class 13 claims: opt out of the Third-Party Releases and litigate the claims at a later date or choose not to opt out and release their claims. While the Shenk Plaintiffs may have their rights to opt out effectuated automatically if the settlement is not approved, the end result is the same – both the Shenk Plaintiffs and the Strougo Plaintiffs had the same opportunity to opt out of the Third-Party Releases.[59] While the Pension Trust argues that the Strougo Plaintiffs should have the same opportunity to recover from applicable insurance policies as the Shenk Plaintiffs, there is no evidence before me that they did not. The settlement by itself is not proof that the Strougo Plaintiffs were denied anything. *See In re Washington Mutual, Inc.*, 442 B.R. 314, 355-56 (Bankr. D. Del. 2011) ("Providing different treatment to a creditor who agrees to settle instead of litigating is permitted by section 1123(a)(4)."); *Energy Future Holdings Corp. v. Del. Tr. Co.*, 648 F. App'x 277, 284 (3d Cir. 2016) ("[M]ere differences in potential final outcomes resulting from choices made by individual creditors do not violate the equal treatment protections of § 1123(a)(4).").

59 Notably, the Pension Trust has already returned an opt out form (see discussion *infra* at 46). Accordingly, the precise harm that the Pension Trust complains of with this argument is unclear.

***10** For these reasons, I find that the Plan satisfies Section 1123(a) of the Code and the Pension Trust's objection is overruled.

III. Section 1123(b)

The Code provides a debtor with flexibility to include provisions in a plan of reorganization that are not required by the Code but are deemed necessary to effectuate a fair and reasonable reorganization. Specifically, Section 1123(b) of the Code provides that a plan may:

> "(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests; (2) subject to section 365... provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtors not previously rejected...; (3) provide for (A) the settlement or adjustment of any claim or interest belonging to the debtor or the estate...; (4) provide for the sale of all or substantially all of the property...; (5) modify the rights of holders of secured claims. . . or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and (6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

11 U.S.C § 1123(b).

Debtors' Plan contains several discretionary provisions, including a structure for the allowance and disallowance of claims, a process for distributions under the Plan, and settlement, release, exculpation, and injunction provisions.[60] Only the settlement, release, exculpation, and injunction provisions are subject to objections.

60 See Plan Art. V, VI, VII, and IX.

A. Settlements

As discussed above, the Plan incorporates numerous settlements of some of Debtors' largest prepetition claims including the Opioid Settlement, the Federal/State Acthar Settlement, and the UCC Settlement (together the "**Plan Settlements**").[61] There are two objections to the Plan Settlements, one made by the U.S. Trustee ("**UST**") and one made by several individuals, acting pro se (the "**Pro Se Objectors**").

61 Plan Art IX; *See* D.I. 4121-1 GUC Settlement Term Sheet, D.I. 4121-2 Global Opioid Settlement Term Sheet; see also discussion supra at 2-6 (discussing claims resolved by each settlement).

The UST argues that Article IX.C of the Plan impermissibly seeks the approval of the Opioid Releases under Rule 9019, which is not the appropriate mechanism for the Court to approve them.[62] While I agree that Rule 9019 is not the correct standard by which to measure the propriety of releases in a plan of reorganization, that is not the standard I am applying here. As discussed at length below, I am evaluating the Releases under the guidelines set forth by the Third Circuit in *Continental* and *Millennium*. Thus, while I find that the Opioid Settlement, which includes the releases, satisfies the Rule 9019 standard, I also find that the releases comply with the requirements of Section 1123(b). Accordingly, this objection is overruled.

62 Article IX.C states that "Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval pursuant to Bankruptcy Rule 9019, of the releases...".

There were also several objections filed by the Pro Se Objectors to the Opioid Settlement.[63] Specifically, they argue that the Opioid Settlement (1) is too costly, causing there to be nothing left for equity holders; and (2) was entered into unnecessarily because Debtors have good defenses to the underlying claims. Debtors counter that the Opioid Settlement meets the Third Circuit's requirements for determining whether a compromise should be approved in the context of a bankruptcy, citing in *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996). The *Martin* court explained that courts should "assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal." *Id.* In striking this balance, the court should consider: "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." *Id.* "In evaluating the fairness of a settlement, the court does not have to be convinced that the settlement is the best possible compromise, but only that the settlement falls within a reasonable range of litigation possibilities. Therefore, the settlement need only be above the 'lowest point in the range of reasonableness.' " *In re Tribune Co.*, 464 B.R. 126, 158 (Bankr. D. Del. 2011) (quoting *Washington Mut.*, 442 B.R. at 328). In applying the *Martin* factors to the Opioid Settlement, it becomes clear that it should be approved.

63 There was no express objection to the other settlements incorporated into the Plan and there was ample evidence presented at Confirmation regarding the necessity of

> each of the Settlements to the reorganization and the fact that they built upon one another and were intertwined in several respects. Having considered the totality of the evidence, I find the Settlements to be reasonable and an appropriate exercise of Debtors' business judgment.

***11** First, regarding the probability of success in litigation, Debtors argue that while they believe they have meritorious defenses to the opioid lawsuits, the sheer volume of them was more than could be handled simultaneously. As Mr. Welch testified, though Debtors believed they could successfully defend some of the cases, it was unlikely that they would win all of them, and because the damages claimed in each case were so high, the loss of even a few would quickly impact Debtors' operations.[64] When all of these factors are taken into consideration, it is clear that Debtors' probability of success with respect to all of the opioid lawsuits was very low. This factor weighs in favor of approving the settlement.

64 12-6-21 Tr. at 61-69.

The second *Martin* factor requires consideration of the likely difficulties of collecting a recovery. This factor is neutral here as Debtors are defending the lawsuits, not asserting them.

The third *Martin* factor, the complexity of the litigation, weighs in favor of approving the Plan Settlements. As Mr. Welch testified, defending against thousands of lawsuits simultaneously is inherently complicated. It is also prohibitively expensive, costing Debtors $100 million in legal fees and expenses pre-petition and $30 million in cash and products to settle just two cases. The lingering potential liability also affected Debtors' ability to obtain sufficient funding and retain the necessary employees, and defending the cases was both time consuming and extremely expensive. This factor also weighs in favor of settlement.

The fourth *Martin* factor requires consideration of the effect that the Plan Settlements would have on the Debtors' creditors. *Id.* A plan settlement satisfies this factor when the settlement was the result of arm's length and good-faith negotiations and where the settlement provides tangible and intangible benefits. *See In re Capmark Fin. Grp. Inc.*, 438 B.R. 471, 520 (Bankr. D. Del. 2010).

Here, the Opioid Settlement allows Debtors to maximize enterprise value to the benefit of all creditors. Without the settlement, Debtors would be unable to effectuate the reorganization and would need to conduct a Section 363 sale, which would result in a lower valuation for the business.[65] Additionally, without the Opioid Settlement Debtors would be forced to litigate the opioid claims which would result in a long, drawn-out bankruptcy, during which the business would suffer.[66] Moreover, the testimony reflects that the Opioid Settlement was the product of extensive negotiations, is supported by roughly 97% of voting opioid creditors, and is on the low end of the range of similar opioid settlements reached by other pharmaceutical companies.[67] This factor also weighs in favor of settlement.

65 11-1-21 Tr. at 36-38 (Mehta).

66 12-10-21 Tr. at 7-13, 16, 18 (Eisenberg).

67 12-13-21 Tr. at 21 (Mullin); 12-7-21 Tr. at 150-51 (Welch).

On balance, consideration of the record before me demonstrates that the Opioid Settlement should be approved because it is fair, reasonable, and in the best interest of the estate. The extensive record highlights the complex nature of the litigation faced by Debtors prior to filing their Chapter 11 petition and the threat of even more extensive litigation during the course of these proceedings. I am satisfied that, without the Plan Settlements, Debtors would face great expense, inconvenience and delay attending to this litigation. The Pro Se Objections are overruled.

B. Releases

The Plan contains four types of releases: 1) releases made by Debtors contained in Article IX.B (the "**Debtors' Release**"); 2) releases made by non-debtor third parties contained in Article IX.C (the "**Third Party Releases**"); 3) the releases by the opioid claimants in Article IX.D (the "**Opioid Release**"); and 4) the releases by Debtors and related parties of the opioid claimants in Article IX.E (the "**Debtors Release of Opioid Claimants**") (together with Debtors' Release, the "**Debtors' Releases**").

1. Debtors' Releases

***12** Article IX.B and IX.E of the Plan include releases by Debtors of non-debtor third parties. There are no objections to Debtors' Releases and Debtors introduced evidence at the Confirmation Hearing to show that the potential claims being released were fully and independently investigated (including potential derivative claims against current and former officers and directors and claims arising from

intercompany transactions) and the investigation determined that Debtors' Releases would not extinguish any viable claims.[68] This evidence was uncontroverted and I found it to be credible and persuasive. Accordingly, I find Debtors' Releases to be fair and a reasonable exercise of Debtors' business judgment.

68 12-8-21 Tr. at 40-45 (describing independent investigation regarding potential claims held by the entities on the Specialty Brands side of the business); 12-9-21 Tr. at 17-25 (describing independent investigation of potential claims held by the Specialty Generics side of the business).

2. Opioid Releases

Article IX.D of the Plan provides for releases by holders of opioid claims against certain "Protected Parties," which include a vast number of persons and entities beyond Debtors.[69] The Opioid Releases are referred to as non-consensual because the opioid claimants were not given the opportunity to opt out but are nonetheless bound. Debtors, as well as the plan support parties, argue that the Opioid Releases are appropriate under controlling Third Circuit law because they are fair and necessary to the reorganization. The UST and Rhode Island disagree. Both the UST and Rhode Island argue that the releases are vastly overbroad, releasing persons and entities that did not contribute anything of value to the reorganization. The UST additionally argues that the Court lacks authority to approve the releases, and that approving them would be a violation of the opioid claimants' due process rights.

69 "***Protected Party***" means (a) the Debtors, (b) the Reorganized Debtors, (c) the Non-Debtor Affiliates, (d) with respect to each of the foregoing Persons in clauses (a) through (c), such Persons' predecessors, successors, permitted assigns, subsidiaries, and controlled Affiliates, respective heirs, executors, Estates, and nominees, in each case solely in their capacity as such, and (e) with respect to each of the foregoing Persons in clauses (a) through (d), such Person's respective current and former officers and directors, managers, principals, members, partners, employees, agents, advisors (including financial advisors), attorneys (including attorneys retained by any director in his or her capacity as a director or manager of a Person), accountants, investment bankers (including investment bankers retained by any director in his or her capacity as a director or manager of a Person), consultants, experts and other professionals (including any professional advisor retained by any director in his or her capacity as a director or manager of a Person) or other representatives of the Persons described in clauses (a) through (d), *provided* that consultants and experts in this clause (e) shall not include those retained to provide strategic advice for sales and marketing of opioid products who have received a civil investigative demand or other subpoena related to sales and marketing of opioid products from any State Attorney General on or after January 1, 2019 through the Petition Date. "Protected Party" shall also include each Settling Opioid Insurer, but shall not include the Opioid MDT II or any Opioid Creditor Trust. Notwithstanding anything to the contrary herein, none of the following Persons, in their respective following capacities, shall be Protected Parties: (1) Medtronic plc or Covidien plc, (2) any subsidiaries or Affiliates of Medtronic plc or Covidien plc that existed as a subsidiary or Affiliate of Medtronic plc or Covidien plc after July 1, 2013, (3) any successors or assigns of any Entity described in clause (1) or clause (2) that became such a successor or assign after July 1, 2013 (excluding, for the avoidance of doubt, the Debtors, the Reorganized Debtors, and the Non-Debtor Affiliates), (4) any former subsidiaries or Affiliates of Covidien plc that ceased being such a subsidiary or Affiliate before July 1, 2013, and any successor or assign to such subsidiary or Affiliate of Covidien plc, (5) current or former shareholders of Mallinckrodt plc to the extent that they are subject to Share Repurchase Claims, other than any of the Debtors' current and former officers, directors, or employees, and (6) any Representative of any Entity described in the foregoing clauses (1) through (5) except to the extent such Representative is described in clause (d) and (e) of this definition of "Protected Party," and (7) any Released Co-Defendant. D.I. 6067 at 39 (Fourth Amended Plan).

***13** For the reasons discussed below, I find that because the Opioid Releases are integral to the success of Debtors' Plan, I have the jurisdictional authority to approve them as both fair and reasonable.

i. Jurisdiction to Approve Non-Consensual Third-Party Releases in the Context of Plan Confirmation

The Third Circuit recently addressed the authority of bankruptcy courts to approve plans of reorganization that contain non-consensual third-party releases and related injunctions. *In re Millennium Lab Holdings II, LLC*, 945

F.3d 126 (3d Cir. 2019). In *Millennium*, the bankruptcy court approved a plan that included releases for equity holders that had agreed to make a significant monetary contribution to the debtor in return for third-party releases. A creditor whose claims were being released objected and argued that the bankruptcy court lacked constitutional authority to grant the releases over its objection. The Third Circuit found that "the Bankruptcy Court indisputably had 'core' statutory authority to confirm the plan" under 28 U.S.C. § 157(b)(2)(L). The Court recognized, however, that "even in cases where a bankruptcy court exercises its 'core' statutory authority, it may be necessary to consider whether that exercise of authority comports with the Constitution." 945 F.3d at 135. To answer that question, a bankruptcy court must look to the content of the plan and determine whether the matter is "integral to the debtor-creditor relationship." *Id.* at 137. The bankruptcy court in *Millennium* concluded, based on the record, that the releases were critical to the success of the plan because without them there would not be a contribution from the equity holders and without that contribution the debtor would be unable to confirm a plan. Based on those findings, the Third Circuit concluded that in approving the plan, the bankruptcy court was resolving a matter "integral to the restructuring of the debtor-creditor relationship, and, therefore, acting within its statutory and constitutional authority." *Id.*

The objecting creditor in *Millennium* argued that this conclusion was contrary to the Supreme Court's ruling in *Stern v. Marshall*. Because its claims against the released parties could only be determined by an Article III court, it argued, those claims did not stem from the bankruptcy itself and would not be resolved in the claims-allowance process. The Court disagreed finding that the *Stern* Court did not limit what constitutes "integral to the debtor-creditor relationship" to matters arising only in the claims-allowance process. Rather, as the Court noted, "bankruptcy courts may adjudicate matters arising in the claims-allowance process because those matters are integral to the debtor-creditor relationship, not the other way around." *Id.* (relying on the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011)).

The Court also dismissed the objecting creditors concerns that the Court's "integral to the restructuring rule" would mean that bankruptcy courts could approve releases simply because parties demanded they be included in a plan of reorganization. The Court was clear that it was "not broadly sanctioning the permissibility of non-consensual third-party releases" and that those releases must meet "exacting standards" for approval. *Millennium,* 945 F.3d at 139 (citing *In re Global Indus. Techs., Inc.*, 645 F.3d 201, 206 (3d Cir. 2011) (explaining that suit injunctions must be "both necessary to the reorganization and fair") and *In re Continental Airlines*, 203 F.3d 203, 214 (3d Cir. 2000) ("The hallmarks of permissible non-consensual releases [are] fairness, necessity to the reorganization, and specific factual findings to support these conclusions[.]").

***14** In *Continental*, the Third Circuit considered the validity of a provision in Continental Airlines' plan of reorganization that released and permanently enjoined shareholder lawsuits against certain of the Airline's present and former directors and officers who were not themselves debtors. Plaintiffs, members of a shareholder class action that held claims against the directors and officers, objected to the release because it enjoined their claims without notice to individual class members and without consent or consideration. *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000).

Acknowledging the absence of a rule regarding the permissibility of such releases in this Circuit, the Court analyzed the cases from other circuits on both sides of the issue. It noted that while some courts (such as the Ninth and Tenth Circuits) have drawn a hard line and held that non-debtor releases and permanent injunctions are impermissible in all cases, others (such as the Second and Fourth Circuits) "have adopted a more flexible approach, albeit in the context of extraordinary cases." *Id.* at 212 (citing *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992); *In re Johns-Manville Corp.*, 843 F.2d 636, 640, 649 (2d Cir. 1988), and *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989). With respect to these "extraordinary cases," the Court observed that "[a] central focus of these three reorganizations was the global settlement of massive liabilities against the debtors and co-liable parties. Substantial debtor co-liable parties provided compensation to claimants in exchange for the release of their liabilities and made these reorganizations feasible." *Id.* at 212-13. The Court further observed that its review of cases indicated that courts have held that fairness dictates that "it is necessary to provide adequate consideration to a claimholder being forced to release claims against non-debtors." *Continental*, 203 at 212-13.

While the *Continental* Court ultimately declined to set its own rule because the release before it "[did] not pass muster under the most flexible tests for the validity of

non-debtor releases[,]" it did identify the "hallmarks of permissible non-consensual releases" as "fairness, necessity to the reorganization, and specific factual findings to support these conclusions[.]" *Id.* at 214. The Court was careful to note, however, that "Courts generally have not construed the more permissive view of the Second and Fourth Circuits to give them 'unfettered discretion to discharge non-debtors from liability.' " *Id.* at n.9 (quoting *Chateaugay*, 167 B.R. 776, 780 (S.D.N.Y. 1994) (observing that the *Chateaugay* court noted "that bankruptcy courts have permanently enjoined future lawsuits against non-debtors only when essential to plan confirmation."); and *In re Master Mortgage Investment Fund, Inc.*, 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994) (explaining that such injunctions are rare and should not be considered absent "a showing of exceptional circumstances" as demonstrated by the presence of several key factors). The *Millennium* Court cautioned that courts should "approach the inclusion of nonconsensual third-party releases or injunctions in a plan of reorganization with the utmost care and [ ] thoroughly explain the justification for any such inclusion." *Millennium*, 945 F.3d at 139. With these principles in mind, I consider the proposed releases.[70]

[70] While I am cognizant of the objection by the U.S. Trustee that Section 524(e) of the Code should be read to preclude non-debtor releases, I disagree with the notion that releases are the equivalent of a discharge. *See In re Millennium Lab Holdings II, LLC*, 575 B.R. 252, 273 (Bankr. D. Del. 2017) ("An order confirming the plan with releases does not rule on the merits of the state law claims being released."), *aff'd* 591 B.R. 559 (D. Del. 2018), *aff'd* 945 F.3d 126 (3d Cir. 2019), *cert. denied*, *s*, ––– U.S. ––––, 140 S. Ct. 2805, 207 L.Ed.2d 142 (2020). I am also aware of the recent rulings from courts in the Second Circuit and the Fourth Circuit that hold otherwise. See *In re Purdue Pharma L.P.*, 633 B.R. 53, 66 (Bankr. S.D.N.Y. 2021) overruled on other grounds by 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021) (concluding that "the Bankruptcy Code does not authorize a bankruptcy court to order the nonconsensual release of third-party claims against non-debtors in connection with the confirmation of a chapter 11 bankruptcy plan.") and *Patterson v. Mahwah Bergen Retail Grp., Inc.*, No. 3:21cv167 (DJN), ––– B.R. ––––, 2022 WL 135398, 2022 U.S. Dist. LEXIS 7431 (E.D. Va. Jan. 13, 2022) (same). In this case, however, I am applying the law of the Third Circuit which has recognized that bankruptcy courts do have statutory and constitutional authority to approve a plan of reorganization that contains non-consensual third-party releases, *albeit*, only in extraordinary cases.

ii. Analysis

***15** As stated above, to be approved, the Opioid Releases must be both necessary and fair. At the Confirmation Hearing, Debtors offered extensive evidence to demonstrate that the releases were necessary to the reorganization. Specifically, Debtors' position is that without the releases, the Settlements could not have been achieved and that, without the Settlements, the Plan falls apart and Debtors would be forced to sell off the company in pieces. In other words, Debtors argue the Releases, the Settlements, and the Plan are all inextricably intertwined such that the Releases are essential to Plan confirmation.

In support of this position, Debtors offered the testimony of their Chief Transformation Officer, Stephen Welch. Mr. Welch testified that the opioid litigation Debtors faced was "enterprise-threatening," especially in light of the other issues Debtors were battling.[71] As of the Petition Date, the Debtors were named in more than 3,000 opioid related lawsuits alleging potentially trillions of dollars in damages. While they believed they had meritorious defenses to those claims, there were simply too many to litigate. The company was spending approximately $1 million a week on legal expenses, and the amount of time required of management to spend on the litigation was distracting from business operations. Additionally, the possibility of large judgments was impacting the company's ability to obtain sufficient credit and the reputational harm of the mass litigation also led to difficulties in attracting and keeping the necessary employees. The company quickly concluded that a bankruptcy filing was the most viable path toward preserving the company.[72]

[71] 12-6-21 Tr. at 57-62 (discussing reasons Debtors filed for chapter 11 protection, which included concerns about Debtors' ability to manage their debt load in addition to the litigation burden they faced).

[72] 12-6-21 Tr. at 62, 68-69.

Mr. Welch testified that the releases are integral to the company's reorganization. But for the inclusion of these releases, the underlying deals that are embodied in the Plan would not have been done. He stated that the releases were negotiated at arm's length over many months by very competent parties. The releases protect the interests of

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the reorganized debtors going forward by giving them the fresh start intended under the Bankruptcy Code. Without the releases, Debtors and their directors, officers, and other employees would be pulled into lawsuits which would once again lead to all the problems that led Debtors into bankruptcy in the first place. He testified that the Opioid Settlement brought peace with a significant estate fiduciary (the OCC) and led to private opioid claimants supporting the plan. Without that support the reorganization would likely not be successful.[73]

73 12-6-21 Tr. at 99-100 (Welch).

One of Debtors' independent directors also testified on these points. Mr. Sherman Edmiston, independent director at nine of the Specialty Generics debtors, was tasked with assessing both the necessity as well as the fairness and reasonableness of the releases contained in the Plan on behalf of the creditors and stakeholders of the Specialty Generics entities.[74] Mr. Edmiston testified that he believed the releases were an essential part of the Opioid settlement and that a settlement would not have been reached if the releases were not included.[75] Mr. Edmiston additionally testified that without the releases the directors, officers, and employees would be distracted by having to defend themselves in lawsuits, which would impair their ability to manage the company. He stated that continued litigation would also subject the company to reputational uncertainty and overhang which would impair the company's access to capital markets and hinder the company's ability to attract and maintain management talent.[76] He further stated that even if the litigation only involved the individual directors and officers, it would nevertheless pull the company in and require a financial commitment from the company. In addition to indemnification obligations, the company would lose significant employee time as members of management prepared and defended against the litigation, as well as significant costs associated with locating and producing documents.[77] Additionally, Mr. Edmiston testified that continued litigation could impact the company's ability to attract necessary funding due to the specter of potential billion-dollar judgments in Debtors' future.[78]

74 12-9-21 Tr. at 9-10 (Edmiston).

75 12-9-21 Tr. at 21-22 (Edmiston) ("[B]ased on our team's interviews [ ] with the legal and financial advisors and the management team [ ] of the debtor ... it was made very clear to us that, without those releases, there would be no settlement.").

76 12-9-21 Tr. at 22-23.

77 12-9-21 Tr. at 23-24.

78 12-9-21 Tr. at 24-25.

***16** Debtors also offered the testimony of Punit Mehta, Senior Managing Director at Guggenheim Securities, Debtors' financial advisor. Mr. Mehta provided an expert opinion on the enterprise value of Debtors and testified that based on his experience as an investment banker, the absence of the settlements would adversely impact Debtors' ability to maximize value because, as he noted, with prolonged litigation comes a prolonged bankruptcy, which would negatively impacts the business of the company, employee retention, and result in a prolonged period where the company is unable to make the appropriate investments.[79] In that scenario, Mr. Mehta testified, the business would likely be sold off in pieces, some as going concerns and others in a liquidation, which would result in a much lower value being achieved for creditors than is estimated through the Plan.[80]

79 11-1-21 Tr. at 35-37.

80 11-1-21 Tr. at 37-39 (Mehta).

Debtors also presented Randall Eisenberg of Alix Partners, Debtors' Chief Restructuring Officer ("**CRO**"), who likewise testified that if the Opioid Settlement were not approved, Debtors would be forced to litigate all of the lawsuits against them, which would result in a lengthy chapter 11 process and would present great risk to the all of Debtors.[81] Mr. Eisenberg stated that the financial impact of not settling would be "value destructive" because it would be very difficult for the company to operate effectively in that type of environment.[82]

81 12-10-21 at 10 (Eisenberg).

82 12-10-21 Tr. at 11 (Eisenberg).

I find these witnesses to be credible and their testimony on this issue to be persuasive. None of the objecting parties argue that the releases are not necessary to Debtors' reorganization, and there is no evidence in the record that would refute Debtors' position that they are. I am satisfied that the evidence here supports the conclusion that Debtors' reorganization is simply not possible without the releases and therefore find that they are necessary. *Cf.* *Continental*, 203 F.3d 203, 215 (finding "nothing in the record to even imply that the success of

the Continental Debtors' reorganization bore any relationship to the release and permanent injunction of Plaintiffs' class actions.").

Debtors next presented evidence to support their position that the Opioid Releases are fair to claimants. Debtors point again to the testimony of Mr. Welch, who stated that while he believed the original OCC Settlement to be fair, the ultimate settlement incorporated into the Plan provides significantly more benefits for claimants. The final settlement includes the addition of several large constituencies to the RSA, including the MSGE group which represented a significant number of public litigants, and also incorporated the appointment of the Future Claims Representative to ensure that the interests of future claimants were adequately represented.[83] Additionally, the final settlement generated an additional $125 million, taking the settlement from $1.6 billion to $1.725 billion in cash contributed by Debtors.[84] Mr. Welch explained that under the final settlement Debtors also agreed to contribute a portion of their interest in claims that might arise from Debtors' share repurchase agreement and gave the opioid claimants additional time to exercise the opioid warrants that were a part of the consideration (which additional time, in turn could potentially increase the value of the warrants).[85]

83 12-6-21 Tr. at 90-95.

84 12-6-21 Tr. at 95-97.

85 12-6-21 Tr. at 97-98 (Welch).

Mr. Welch also stated that the additional $125 million that Debtors contributed as part of the final Opioid Settlement was in part reflective of the additional agreement on the part of the opioid claimants to forego making claims on Debtors' D&O insurance.[86] Debtors in turn provided mutual releases to the claimants.

86 12-6-21 Tr. at 96-97.

***17** Mr. Welch testified that he believed the releases were fair because they do provide exclusions for certain types of conduct such as criminal conduct, fraud, and gross negligence.[87] He also concluded that, based on the voting results, the overwhelming number of the opioid classes voted in very high percentages to support the Plan and only one unresolved individual objection to the releases remains.

87 12-6-21 Tr. at 135.

Debtors also pointed again to the testimony of Mr. Edmiston, the independent director who investigated the fairness of the Opioid Releases. Mr. Edmiston stated that one of the first things that struck him about the Opioid Settlement was that there was such a large and diverse group conducting the negotiations[88] because with so many different parties-in-interest involved he believed there is a certain implicit fairness about any settlement that is ultimately reached. Indeed, following a thorough investigation of the claims asserted, Mr. Edmiston concluded that the Opioid Releases were fair to both the estate and the releasing parties because the financial consideration being offered was significant and the settlement was well supported by the various creditor constituencies.[89]

88 Including the first lien creditors, second lien noteholders, unsecured noteholders, the OCC, the UCC, Plaintiffs' Executive Committee that represented the 50 states and territories, and the MSGE group that represented 1300 municipalities and tribal nations. 12-9-21 Tr. at 11.

89 12-9-21 Tr. at 17-18 (Edmiston)

With respect to the consideration being offered to the claimants, Mr. Edmiston concluded that it was likely greater than the opioid claimants would receive in the other alternative scenarios. For example, he testified that with the opioid cases filed against Debtors asserting an average of more than a billion dollars each, just a few adverse rulings could force Debtors into a "free fall Chapter 7 kind of death spiral of the specialty generics debtors," in which case the claimants would recover significantly less than the $1.7 billion being offered through the Plan.[90]

90 12-9-21 Tr. at 18-19 (Edmiston). Mr. Edmiston further testified that the Specialty Brands Debtors were also named in about a thousand lawsuits and contributed to the settlement as well to ensure their extrication from the litigation. *Id.* at 19-20.

With respect to the releases of the directors and officers specifically, Mr. Edmiston testified that he found it notable that, to date, only two lawsuits include claims against a director, officer, or employee of Debtors. Given the thousands of lawsuits filed, this led him to conclude that there must not be very strong claims against the individuals.[91] Mr. Edmiston further testified that although the individual directors and officers are not making a financial contribution directly in exchange for the release, the debtors paid additional money to obtain those releases, as reflected in the fact that the value

of the settlement exceeds the value of the Specialty Generics entities.[92]

91 12-9-21 Transcript at 15, 20 (Edmiston Testimony).

92 12-9-21 Tr. at 20-21 (Edmiston). Mr. Edmiston also testified that he reached this conclusion because he specifically instructed his investigation team to confirm directly with representatives of the Debtors who conducted the negotiations that more money was paid for the individual releases, which they did.

***18** The OCC also offered evidence in support of the Opioid Releases through the testimony of Michael Atkinson, a Principal at Province, LLC, financial advisor to the OCC. Mr. Atkinson testified about the Opioid Settlement negotiations. Specifically he stated that through the OCC Allocation Mediation[93] it was agreed that all value other than what goes directly to claimants would be utilized for the abatement of the opioid epidemic.[94] He further testified that, following the mediation, "the OCC's advisors continued to engage in multi-party negotiations ... in an effort to ensure that opioid claimants would receive additional, appropriate value under the Debtors' proposed Plan."[95] Those negotiations resulted in the following additional compromises:

A. An additional $125 million in cash consideration to be provided to Opioid Claimants on the 8th anniversary of the Effective Date of the Plan, bringing the total cash consideration to Opioid Claimants to $1.725 billion over 8 years;

B. Transfer to the Opioid MDT II control over, and 50% of the proceeds from, any litigation brought against the Debtors' shareholders, as a result of the Debtors' share repurchase program from 2015 to 2018;

C. Relinquishment of Opioid Claimants' rights in respect of both (a) Directors/Officers liability insurance and (b) estate claims against co-defendants;

D. Modifying the exercise period of the New Opioid Warrants from (i) seven years from the Plan Effective Date, or five years if Mallinckrodt opts to prepay the Deferred Cash Payments to (ii) six years from the Plan Effective Date;

E. Tightening of the financial and other covenants that the Debtors will need to abide by during the period in which payments to Opioid Claimants are outstanding; and

F. An extension of Mallinckrodt's right to exercise the "prepayment option" to prepay all cash amounts owing to Opioid Claimants from 12 to 18 months.[96]

93 In February 2021, Kenneth Feinberg, one of the nation's foremost mediators, was appointed to assist the parties in reaching an agreed allocation of any distribution to opioid claimants under the Plan (the "**OCC Allocation Mediation**"). Following approximately three months of mediation, an agreement regarding allocation was reached, which is reflected in the Opioid Settlement and incorporated into the Plan.

94 Atkinson Declaration, D.I. 5319 at 8.

95 *Id.*

96 *Id.* at 9.

The OCC also submitted into evidence its Supplemental Plan Position Letter, which was sent out to opioid claimants, recommending that they vote in favor of the plan. In it, the OCC likewise stated that the additional negotiations following the mediation were "centered on obtaining more value for Opioid Claimants. . ." and it described the above-listed additional compromises as "*new value* in addition to the consideration already being provided to Opioid Claimants under the Plan. ..."[97] The OCC then advised claimants that,

> [I]n light of all of the facts and circumstances of these Chapter 11 Cases—including a recognition by the OCC that funds must start to be distributed to abate the Opioid epidemic and compensate victims ***now***—the OCC believes that the consideration being provided to Opioid Claimants is fair and reasonable.[98]

97 Supplemental OCC Plan Position Letter, D.I. 4535-1, Covidien P2 Ex. 4 (emphasis in original); D.I. 4587, Affidavit of Service (served on 31,495 pro se opioid creditors with claims against Purdue); D.I. 4607, Affidavit of Service (Core/2002 Service List).

98 *Id.* (emphasis in original)**.**

Lastly, the Future Claimants' Representative, Roger Frankel, also testified that he believed the Plan's injunctions and releases were fair to future opioid claimants in light of the consideration that is being given, particularly the ability to file claims against the Opioid Trust which, if allowed, will result in compensation to claimants.[99]

99 12-8-21 Tr. at 69-70, 78-79.

***19** Once again, I find the testimony of these witnesses to be both credible and persuasive. While the Objecting Parties cross-examined Debtors' witnesses and made arguments at Confirmation that Debtors failed to carry their burden of proof, no one put on any evidence to contradict Debtors on the issue of the fairness of the Opioid Releases. Having considered all the evidence presented and the arguments made by the objecting parties, I conclude based on the specific facts and circumstances of this case, that the Opioid Releases are fair.

The decision to approve the Opioid Releases here is not one that I make lightly, and it is informed by several considerations. First and foremost is the extraordinary nature of this case. As previously noted, Debtors were sued in over 3000 cases around the country by both governmental entities seeking to abate the opioid crisis they allege Debtors contributed to, as well as private organizations and individuals who were affected by Debtors' opioid products. The settlement of those claims, of which the releases are a necessary and integral part, will remove an existential threat to Debtors' business while at the same time ensuring that Opioid Claimants receive recoveries far in excess of what they could obtain through continued litigation. This is particularly true given that the opioid claims are only one of several potentially massive litigation liabilities faced by Debtors.[100]

100 See 2-6 *supra* (discussing all the types of litigation Debtors presently face).

This is also a notorious and sensitive case because it involves opioids at the height of a national opioid epidemic. The nature of the claims at issue here – personal injury claims arising out of the use of opioid medications – makes time of the essence. While the parties here could spend decades litigating who is right and who is liable for what, the need for funds to manage and abate this crisis is real and immediate.

The confluence of these factors here makes this case exactly the type of extraordinary case the Third Circuit alluded to in *Continental*, where nonconsensual releases might be appropriate.

Second, to the extent it was not already apparent, it has become abundantly clear through several weeks of confirmation hearings that the massive number of lawsuits the Debtors face are the primary reason they are in bankruptcy and, more importantly, the settlements incorporated into the Plan are their only way out. Here, like in the *Manville, Robins,* and *Drexel* cases referred to in *Continental*, the "central focus of these [cases] has been the global settlement of massive liabilities against the debtors and co-liable parties." *Continental*, 203 at 212-13. The Opioid Releases are an integral part of the Settlements here, and therefore necessary for Plan confirmation.

Third, the Opioid Releases are a fair result for opioid claimants. The settlement was negotiated at arm's length with a large group of sophisticated parties representing diverse interests. Substantial consideration is being given in exchange for the releases in the form of a well-funded trust to which opioid claimants can turn for potential compensation. Additionally, with respect to the non-debtors being released, the evidence shows that the Opioid Releases are both necessary and fair. They are necessary because the entities and individuals are involved to such a degree with Debtors' business that a suit against them is likely to be a drain on Debtors in some respect. They are fair both because Debtors provided additional compensation in exchange for the releases of these non-debtors and because the record suggests it is unlikely that there are any material claims for liability against these non-debtors that are being waived. The alternative to the Opioid Settlement is protracted and expensive litigation, which would not help the victims of the opioid crisis but would instead generate significant litigation costs that would drastically reduce the funds available to opioid creditors. This Opioid Settlement and the Plan's provisions with respect to opioid claims puts money into the hands of opioid claimants and abatement programs for the good of the public.

***20** Finally, the weight of the evidence before me suggests that these releases are not only necessary and fair, but overwhelmingly supported by the creditor body. And while "nearly consensual" is certainly not sufficient under the law, it does provide some reassurance that this is the right result. While I appreciate the thoughtful arguments regarding jurisdiction and authority for the releases made by the UST on behalf of all claimants, the fact is that only one single creditor out of hundreds of thousands actually objected to these releases. To apply a blanket prohibition on non-consensual releases in this case would simply not make sense.

Here we have a very large body of creditors in support of a complex reorganization plan and only one individual creditor opposing it. The single creditor that does object, Rhode Island, has a claim against Debtors' CEO, Mark Trudeau, that

the record shows is likely worth at most, $1 million.[101] Rhode Island argues that because it is not receiving compensation for its claims directly from Mr. Trudeau the Opioid Release should be rejected, but the result of doing so would be absurd. If I were to sustain Rhode Island's objection, it would certainly be a case of the tail wagging the dog. Excepting one creditor in the manner Rhode Island proposes would effectively enable a single creditor with a relatively small claim to hold up a $5 billion bankruptcy; a result that surely cannot be what the law intends.[102] On the contrary, the use of nonconsensual non-debtor releases in this circumstance seems to be precisely the situation envisioned by Section 105(a). *See e.g. In re Johns-Manville Corp.*, 801 F.2d 60, 64 (2d Cir. 1986) ("[I]f the bankruptcy court may ever use its equitable powers under section 105(a) to enjoin actions pursued in other courts as 'concerning the administration of the estate' under section 157(b)(2)(A), it may exercise that power where there is a basis for concluding that rehabilitation, the very purpose for the bankruptcy proceedings, might be undone by the other action."); *see also In re Ionosphere Clubs Inc.,* 98 Bankr. 174, 176-77 (Bankr. S.D.N.Y. 1989) ("The paramount policy and goal of Chapter 11, to which all other bankruptcy policies are subordinated, is the rehabilitation of the debtor.").

101 See *infra* at 66 (discussing evidence regarding value of Rhode Island's claim).

102 Such a result would also affect the CEO's ability to run the company and would lead to other claimants seeking similar treatment which would threaten to unravel the settlement entirely. See 12-9-21 Tr at 26-27 (Edmiston) (testifying that excepting the CEO, Mr. Trudeau, from the releases would impair his ability to lead the organization and lead to additional demands for litigation carve outs).

For all these reasons, I find that the Opioid Releases satisfy the requirements set forth by the Third Circuit in *Continental*.[103] The objections are therefore overruled.

103 I also conclude, although it is unnecessary for this ruling, that for the reasons stated throughout this section, the factors set forth in the *Master Mortgage* case are also satisfied here. *In re Master Mortgage Inv. Fund,* 168 B.R. 930, 937 (Bankr. W.D.Mo. 1994). As discussed above, the evidence shows that 1) there is an identity of interest between the debtor and the third party; 2) substantial contribution is being made on behalf of the non-debtor to the reorganization; 3) the injunction is essential to the reorganization; 4) a substantial majority of creditors support the injunction; and 5) the plan provides for payment substantially all the claims of the affected class.

iii. Due Process

The UST argues that the Opioid Releases violate the Due Process Clause of the Fifth Amendment to the U.S. Constitution.[104] Specifically, he argues that the notice that was provided was insufficient because the Plan's "impenetrable" release provisions did not clearly convey the required information regarding the rights that are being extinguished.

104 D.I. 4718, UST Objection to Confirmation; See U.S. Const. amend. V.

***21** Due process requirements apply equally in bankruptcy cases as in all others, *In re Johns-Manville Corp.*, 551 B.R. 104, 113 (S.D.N.Y. 2016), and a cause of action for damages is among the property interests that due process protects. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Notice and a meaningful opportunity to be heard are essential conditions of constitutional due process. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (stating, "[t]he notice must be of such nature as reasonably to convey the required information..."). In evaluating whether due process requirements have been met in a particular case, the proper inquiry is whether the notice was reasonably calculated under the circumstances to apprise interested parties of action being taken and afford them an opportunity to present their objection. *Mullane*, 339 U.S. at 314, 70 S.Ct. 652.[105] In addition, "[t]he proper inquiry in evaluating notice is whether a party acted reasonably in selecting means likely to inform persons affected, not whether each person actually received notice." *In re New Century TRS Holdings, Inc.*, 465 B.R. 38, 48–49 (Bankr. D. Del. 2012) (quoting *In re Charter Co.*, 113 B.R. 725, 728 (M.D. Fla. 1990) (citing *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988)). Here, I find the notice provided to opioid claimants satisfies these requirements.

105 This requirement also applies to bankruptcy proceedings. *In Matter of Motors Liquidation Co.*, 829 F.3d 135, 159 (2d Cir. 2016) (citing *Martin v. Wilks*, 490 U.S. 755, 762 n.2, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071).

Because no bar date was set for opioid claims, Debtors undertook a broad opioid noticing program to reach both known and unknown opioid claimants.[106] This included both a direct notice strategy and a media and community outreach strategy. As one of Debtors' noticing agents, Ms. Jeanne Finegan, testified, notice to opioid claimants here reached about 91% of all adults in the United States and about 82% of all Canadian adults with an average frequency of six times.[107] The noticing campaign was comprised of advertising on network broadcast and cable television, in newspapers, magazines, on social media and other online locations including a dedicated website, as well as terrestrial radio.[108]

106 12-6-21 Tr. at 93-94 (Welch).

107 Finegan Supplemental Declaration, D.I. 5274-1 at 2; *See* Finegan Declaration, D.I. 2889-2 at 2-3 and 29. The estimated cost of Debtors' Opioid Noticing Program was $8,250,000. Ms. Finegan states that the Additional Opioid Notice Plan, which was the basis of Debtors' Opioid Noticing Program, was formulated using syndicated media research data, often used by advertising agencies nationwide to select the most appropriate media to reach specific target audiences, create target audience characteristics, and select the best media communication methods to reach them. In addition, Ms. Finegan wrote that her team studied various data sources to ensure that Debtors' Additional Opioid Notice Plan was appropriately targeted and optimized.

108 Finegan Declaration, D.I. 2889-2 1-3, 26-29. *See* D.I. 2917, Disclosure Statement.

Ms. Finegan testified that the opioid noticing program accounted for regional differences in opioid misuse and abuse by increasing media efforts in eleven states through hyper-local channels.[109] Additionally, Debtors' community outreach strategy involved sending a simplified version of the print notice to third-party organizations that could help expand awareness of Debtors' Plan, voting deadline, and solicitation procedures.[110] Lastly, Debtors sent a direct, mailed notice, along with a solicitation package to: all plaintiffs with pending opioid lawsuits against Debtors, all persons that have filed opioid-related proofs of claims in these cases, all persons that have appeared in these cases on opioid-related issues, all co-defendants to the Debtors in opioid lawsuits, and all putative representatives of various opioid claim classes.[111] A direct, mailed notice was also sent to all opioid claimants who filed proofs of claim in the *Purdue* Chapter 11 Cases as well as related consolidated third party payors who filed proofs of claim in this case relating to Acthar Gel and asserted generics price fixing claims.[112]

109 Finegan Declaration, D.I. 2889-2 at 15. Hyper-local channels include local newspaper advertising, online display, and social media.

110 Finegan Declaration, D.I. 2889-2 at 25-26.

111 Finegan Declaration, D.I. 2889-2 at 8-9; Disclosure Statement Order, Debtor P2 Ex. 89 at 1358-59.

112 *Id.* That notice did not include a solicitation package, but it did include information on how to retrieve a solicitation package from the Notice and Claims Agent.

***22** The evidence regarding the opioid noticing program is uncontroverted and there is no suggestion that it was inadequate in any particular way. Rather, the UST argues that even a thorough reading of the Plan "would generally leave claimants unable to determine and to understand who is releasing claims, who is being released from claims, and what claims are being released."[113] I appreciate the UST's concern that individual opioid claimants might not understand the dense language of the Opioid Releases. However, concerns about whether due process has been met are ameliorated in several ways. First, Debtors' noticing program was extensive and encouraged potential claimants to file proofs of claim. Second, the interests of opioid claimants were being overseen by the OCC, which was represented by competent counsel who clearly understood the Opioid Releases and supported including them in the Opioid Settlement as a means of maximizing value for all creditors. Third, opioid claims are being channeled to Opioid Trusts that will give all opioid claimants the opportunity to recover on their claims. Because no bar date was set, this would include any future claimants or claimants who did not receive notice. Those potential future claimants are also represented by an experienced Future Claimants Representative who also supports Plan confirmation. Finally, the UST's objection to the propriety of the Opioid Releases ensured that I had the opportunity to consider the interests of any creditors who may not have received or understood the proposed releases. For all these reasons, I am satisfied that the notice provided to opioid claimants regarding both the nature of the Opioid Releases as well as the process for objecting was fair and reasonable and meets constitutional requirements for due process. The UST's objection on these grounds is overruled.

113 D.I. 4718, UST Objection at 15.

3. Third-Party Releases (Non-Opioid)

Article IX.C of the Plan includes releases (the "**Third-Party Releases**") by certain non-debtors other than opioid claimants, including: "(a) Holders of all Claims who vote to accept the Plan, (b) the Holders of all Claims that are Unimpaired under the Plan, (c) the Holders of all Claims whose vote to accept or reject the Plan is solicited but who (i) abstain from voting on the Plan and (ii) do not opt out of granting the releases ..., (d) the Holders of all Claims or Equity Interests who vote, or are deemed to reject the Plan but do not opt out of granting the releases ..., (e) all Holders of Claims or Equity Interests to the maximum extent permitted by law, and (f) the Released Co-Defendants and each of their Co-Defendant Related Parties...." (the "**Non-Debtor Releasing Parties**"). The definition of Released Parties is extensive and includes, among others, the Debtors, the Reorganized Debtors, Non-Debtor Affiliates, their respective officers, directors, employees and representative, as well as parties that support the Plan and Plan Settlements and their respective employees, agents, and advisors (the "**Released Parties**"). The Third-Party Releases are also quite broad including any actions arising out of Debtors' business (other than claims held by opioid claimants), Debtors' restructuring efforts and the purchase, sale or rescission of any security or indebtedness of the Debtors prior to the Effective Date of the Plan. The Third-Party Releases also specifically exclude certain types of claims, including any cause of action that is determined to constitute actual fraud, gross negligence or intentional misconduct.[114] Debtors contend that the Third-Party Releases (unlike the Opioid Releases) are consensual because the Plan provided Non-Debtor Releasing Parties with the opportunity to opt out.

114 D.I. 6067 at 141 (Fourth Amended Plan)

Three parties object to the Third-Party Releases: the UST, the Securities and Exchange Commission (the "**SEC**"), and the Pension Trust (collectively, the "**Release Objectors**"). As a threshold matter, I find that the Pension Trust does not have standing to object to the Third-Party Releases because it has opted out and is therefore not bound by them.[115] See *In re Indianapolis Downs, LLC*, 486 B.R. 286, 304 (Bankr. D. Del. 2013) ("In the context of a confirmation hearing, creditors 'have standing only to challenge those parts of a reorganization plan that affect their direct interests.' ") (quoting *In re Orlando Investors, L.P.*, 103 B.R. 593, 596-97 (Bankr. E.D. Pa. 1989)). The remaining Release Objectors argue that the opt out procedure for shareholders and general unsecured creditors does not result in consensual releases because it releases claims held by shareholders deemed to reject the plan and by unsecured creditors who are unimpaired or who did not return a ballot with the opt out box checked or otherwise submit an opt out form.[116] Further, they contend that the releases are not consensual and therefore must satisfy the Third Circuit's requirements set forth in *Continental* for non-consensual releases, which the objectors argue they do not.

115 Additionally, while the Pension Trust argues it has opted out on behalf of all of the Strougo Plaintiffs, as discussed *supra* at 16-19, because the putative class in the Strougo Action was never certified, the Pension Trust could not have opted out on its behalf. The Pension Trust could have filed a motion in this Court seeking class certification, but it failed to do so. Accordingly, the Pension Trust's opt out form is valid only with respect to the Pension Trust. To the extent any of the Strougo Plaintiffs did not receive notice of their rights to opt out or were otherwise unaware of that option, they are free to file a motion seeking relief from the Third-Party Releases and they will have the opportunity to be heard.

116 D.I. 4718, UST Objection at ¶ 71.

***23** Debtors argue that these releases are consensual because all Non-Debtor Releasing Parties had an opportunity to opt out and to the extent they chose not to opt out, their consent is manifested by their silence. In support of this argument, Debtors point to the evidence that they sent comprehensive solicitation packages to holders of claims and interests against Debtors (including those not entitled to vote on the Plan) that provided those holders with both sufficiently detailed and easily understandable information about the releases and the opportunity to opt out.

Specifically, they point to the testimony of James Daloia, one of Debtors' claims and noticing agents. Mr. Daloia testified that Prime Clerk, adhering to the solicitation procedures contained in the Disclosure Statement Order,[117] distributed solicitation packages including ballots to parties entitled to vote on the Plan.[118] The ballots included instructions on how to opt out of the releases contained in the Plan.[119] For beneficial holders of securities and nominees who held claims on behalf of beneficial holders of funded debt or other debt claims, Prime Clerk either mailed the relevant documents

directly to the holders or their proxy agents, or sent out master ballots.[120] For those who were entitled to receive notice of non-voting status, such as the Class 14 shareholders, Prime Clerk sent the confirmation hearing notice, notice of non-voting status, and an opt out form. Though not required by the solicitation procedures, Prime Clerk also served former shareholders (those who held interests between January 1, 2019 and June 8, 2021).[121] Prime Clerk also posted the solicitation materials on a website created for the Debtors, where opt out forms could also be completed and submitted,[122] and posted the notices with the relevant repositories in the U.S., Canada, and Europe.[123] Finally, Prime Clerk published the approved form of publication notice in the *New York Times,* the *Wall Street Journal,* and *USA Today*.[124]

117 D.I. 2911.

118 Supplemental Daloia Declaration, D.I. 4955, Covidien P2 Ex. 10 at 2-3. The solicitation packages included the confirmation hearing notice, the plan, the Disclosure Statement and the Disclosure Statement Order. 1-4-21 Tr. at 26-27.

119 *Id.* at 7.

120 11-4-21 Tr. at 24-25.

121 Daloia Declaration at ¶ 9.

122 *Id.* at 26, 36.

123 *Id.* at 36.

124 D.I. 3072, Debtor P2 Ex 87.

The opt out forms contained text that was in various parts capitalized, bolded, and/or underlined, which among other things, informed recipients that "unless [they] check the box on this opt-out form below and follow all instructions, [they] will be held to forever release the Released Parties in accordance with the Plan."[125] By the close of the voting period, Debtors had received 2,200 opt out forms.[126] This, they argue, demonstrates that their noticing efforts successfully informed claimants of their rights and that the releases are therefore consensual. I agree.

125 Disclosure Statement order, D.I. 2911, Debtor P2 Ex 89.

126 11-4-21 Tr. at 37.

The use of the opt out mechanism as a valid means of obtaining consent is not without controversy. Many courts are divided on the issue, including this one. The determination regarding when an opt out can be used to manifest consent is fact specific and, to be sure, the use of opt outs is not appropriate in every case. Here, however, I am satisfied that they are appropriate.

There can be no debate over the proposition that a bankruptcy court can approve a plan that includes third-party releases. The question is, what constitutes consent and can consent be inferred from failure to respond to a notice including an opt out? In other words, can consent be inferred from silence or more accurately, the failure to act?

***24** The notion that an individual or entity is in some instances deemed to consent to something by their failure to act is one that is utilized throughout the judicial system. When a party to a lawsuit is served with a complaint or a motion, they need to file an answer or otherwise respond, or a judgment is automatically entered against them. Within the bankruptcy system, Debtors send out bar date notices and if claimants fail to file a proof of claim by a certain time, they lose the right to assert a claim. Additionally, if a claim objection is filed and the claimant fails to respond, the claim is disallowed. There is no reason why this principle should not be applied in the same manner to properly noticed releases within a plan of reorganization.[127] Judge Sontchi discussed this in his ruling in *Extraction*, where similar third-party releases with opt out provisions were included in the plan before him:

> Very importantly, these are consensual releases, these are not nonconsensual releases. I have repeatedly ruled that you can imply consent by failing to opt out or respond to a plan, either through a ballot or on the docket, that calls for a release. I don't believe this is necessarily a contractual point ...as much as it is a point of notice under the Bankruptcy Code and the Bankruptcy Rules, because it's the plan that serves as the mechanism to have the release take effect and, thus, it's really the rules, the Federal Rules of Bankruptcy Procedure that figure out whether someone has achieved proper notice and has, by not responding, given their implied consent. Importantly, the Supreme Court recently, in the context of whether someone is consenting to the Article III jurisdiction of an Article I court, specifically held that you could imply consent by failure to preserve the right to argue that I don't have Article III powers. This is no different. This is

> a court who set up a mechanism to confirm a plan that contains releases and has provided a noticing mechanism under which, if it's complied with, consent can be implied.

Extraction Oil & Gas, Inc., Confirmation Hearing Tr., 12-23-20 at 80-81.

127 And as is the case in each of these situations, the party who is bound by their failure to act may, if notice was not actually received or in the presence of other similar circumstances, later approach the court and demonstrate why they think the consequence should be unwound. *See In re Insys Therapeutics, Inc.,* No. 19-11292 (KG), Confirmation Hr'g Tr. (Jan. 16, 2020), D.I. 1121 at 110. ("[I]f a party that is -- that is determined to have given a release comes into court and says, We didn't receive the document. We didn't notice the document, I can't imagine a Court that would not exercise relief in that circumstance and allow the released party to proceed.").

The result might be quite different if the notice regarding the ability to opt out was insufficient. Here, however, there is ample evidence in the record that the releasing parties were sent notices in a variety of ways that explained in no uncertain terms that action was required to preserve claims. As this Court has previously stated, shareholders and creditors have an obligation to read their mail. *In re EV Energy Partners*, No. 18-10814, Confirmation Hr'g (May 16, 2018) Tr. at 214 (Bankr. D. Del. May 25, 2018) ("[S]hareholders and creditors have to read legal notices; that's just the way it is. And if you don't know that, then you're proceeding at your own risk when you invest in stocks and credit and bonds.").

Moreover, this is a very well-known case with a very active body of creditors and stakeholders. This case has generated over 6000 docket entries, twelve adversary proceedings, and more than 85 hearings (most of which were contested at least in part) over fifteen months. The issues involved have generated significant public interest and this case has been frequently reported on in a variety of business publications. Importantly, the public was made aware on the very first day of this case that it was precipitated by the massive litigation burden Debtors faced and that the primary purpose of this bankruptcy was to resolve that litigation.[128] All this is simply to say that the fact that the Plan here contained releases with respect to third parties was well-known and parties-in-interest (who have, on the whole been very vocal throughout this case) had countless opportunities to object and yet only one did.[129] This is also persuasive evidence that those who did not opt out intended for their silence to indicate their consent. For all these reasons, I find that the Third-Party Releases are consensual.

128 DI 128, Welch Declaration in Support of Chapter 11 Petitions and First Day Motions, AICX P2 Ex. - 1685, at ¶ 11 ("[E]nterprise-threatening litigation on multiple fronts has left Mallinckrodt with no choice but to seek to restructure the claims against it to survive .... The Debtors commence these cases with a path to just that result—a restructuring transaction that will resolve all the major litigation against them ....").

129 Setting aside the objections made by the SEC and the UST who were made on behalf of the creditors and shareholders generally.

***25** Judge Gross reached a similar conclusion in *Insys*, which was the first mass tort bankruptcy involving opioids. There, like here, both the SEC and the UST objected to the use of an opt-out mechanism to effectuate third-party releases. Also like here, the shareholders in *Insys* received no recovery under the plan, were not entitled to vote, and were deemed to give a third-party release unless they opted out. In approving the releases, Judge Gross stated that:

> Insys is a case of great notoriety. People knew about the existence of the bankruptcy case and they knew they would have to act because there was a bankruptcy case. There was clear notice of the opt-out requirement in both, mailed and published notices, and, here, the released parties helped to resolve problems and issues and guided debtors through bankruptcy and were very instrumental in the settlement that we have here today. And as a consequence, the releases are essential to the plan[.]

In re Insys Therapeutics, Inc., No. 19-11292 (KG), Confirmation Hr'g Tr. (Jan. 16, 2020), D.I. 1121 at 110;[130] *see also VER Technologies Holdco, LLC*, 18-10834 (KG), 7/26/18 Tr. at 54 ("But this is, I think, an unusual situation, and the Court will approve the releases and the exculpation provisions, given the fact that the plan does represent, to a very large extent, a settlement among parties who are insisting on that language.").

130 Judge Gross further observed that in all the years that releases of this type have been incorporated into reorganization plans, he was aware of no instance of a claimant later returning to argue that their rights were taken unlawfully. *Insys*, Confirmation Hr'g Tr. at 111 ('And I just have never seen in 14 years, a released party come into court and say, Judge, please, we didn't know about this case -- we didn't know about the releases

-- please lift the release."). While that may not be a sufficient legal justification for such releases in the first instance, it does perhaps validate the approach.

I am aware, of course, that this ruling conflicts with those of some of my colleagues who have suggested that consensual releases obtained through an opt out process may never be appropriate.[131] However, neither of those cases involve mass tort bankruptcies like this one. Although the Third Circuit has not explicitly commented on the propriety of non-debtor releases in these circumstances, it has suggested that if they are appropriate anywhere, it would be in a mass tort case like this one. *See Continental*, 203 F.3d 203, 214 n.11 (citing cases in the Third Circuit that have stated that non-debtor releases are permissible only if consensual and observing that "[n]one of these cases, of course, involved the mass litigation found in *Robins, Manville,* or *Drexel*."). This makes sense because the sheer volume and complexity of the issues presented in cases like these require creative solutions which often build upon each other or depend on the success of each other in a way that unraveling one will cause all to fall apart. Bankruptcy policy often requires flexibility rather than adherence to a strict inflexible model because the goal is to get the debtors through to the other side. Here, I have a plan before me that is supported by every estate fiduciary, almost every organized creditor group, and 88% of voting creditors. The settlements of which these releases are a part reflect the consensus of many and that too, is persuasive.

131 *See In re Emerge Energy Servs. LP*, , 2019 WL 7634308, 2019 Bankr. LEXIS 3717 (Bankr. D. Del. Dec. 5, 2019) and *In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. Jan. 7, 2011).

***26** For all these reasons, I find the Third-Party Releases contained in the Plan to be appropriate. The objections made by the Release Objectors are therefore overruled. However, to be absolutely clear, any creditor that claims they did not receive notice of their right to opt out will have the opportunity to seek relief from the Court to exercise their rights.

C. Exculpation

Debtors' Plan contains an exculpation provision, which is the result of negotiations and a global settlement embodied by the RSA.[132] The UST argues that the provision is inconsistent with controlling case law because it is not limited to estate fiduciaries in that it includes the reorganized debtors and indenture trustees, and because it extends temporally back to the prepetition period. Debtors respond that the indenture trustees are only being exculpated in their capacity as distribution agents and that the scope of the exculpation is targeted and has no effect on liability that is determined to have resulted from actual fraud, gross negligence, or willful misconduct. For the reasons set forth below, I agree with the UST.

132 *See* Plan Art. IX.F.

In *PWS Holding*, the Third Circuit held that "a plan may exculpate a creditor's committee, its members, and estate professionals for their actions in the bankruptcy case, except where those actions amount to willful misconduct or gross negligence." *In re PTL Holdings LLC*, 2011 WL 5509031, *12, 2011 Bankr. LEXIS 4436, *37-38 (Bankr. D. Del. 2011) (citing *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000)). In reaching its conclusion, the *PWS* court examined Section 1103(c) and noted that the section "has been interpreted to imply both a fiduciary duty to committee constituents and a limited grant of immunity to committee members." *PWS,* 228 F.3d at 246. "This immunity," the court found, "covers committee members for actions within the scope of their duties." *Id.*

This Court has interpreted *PWS* as implying that "a party's exculpation is based upon its role or status as a fiduciary." *In re PTL Holdings LLC*, 2011 WL 5509031, *12, 2011 Bankr. LEXIS 4436, *37-38 (Bankr. D. Del. 2011). Accordingly, "courts have permitted exculpation clauses insofar as they 'merely state[ ] the standard to which ... estate fiduciaries [a]re held in a chapter 11 case.' " *Id.* (quoting *In re Washington Mutual, Inc.*, 442 B.R. 314, 350 (Bankr. D. Del. 2011). "That fiduciary standard, however, applies only to estate fiduciaries." *Washington Mutual*, 442 B.R. at 350. *See also In re Tribune Co.*, 464 B.R. 126, 189 (Bankr. D. Del. 2011) (holding that exculpation provision must "exclude non-fiduciaries").

The exculpation provision contained in the Plan states that:

> Effective as of the Effective Date, to the fullest extent permitted by law, the Exculpated Parties shall neither have nor incur any liability to any person for any Claims or Causes of Action arising on or after the Petition Date and prior to or on the Effective Date for any act taken or omitted to be taken in connection with, related to, or arising out of, the Chapter 11 Cases, formulating, negotiating, preparing, disseminating, implementing, filing, administering, confirming or effecting the confirmation or consummation of the Plan, the

Disclosure Statement, the Opioid Settlement (as defined in the Restructuring Support Agreement), the Opioid MDT II Documents, the Opioid Creditor Trust Documents, the "agreement in principle for global opioid settlement and associated debt refinancing activities" announced by the Parent on February 25, 2020, the Restructuring Support Agreement (including any amendments and/or joinders thereto) **and related prepetition transactions**, or any contract, instrument, release or other agreement or document created or entered into in connection with any of the foregoing, **or any other prepetition or postpetition act** taken or omitted to be taken in connection with or in contemplation of the restructuring of the Debtors ....[133]

133 *See* Plan Art. IX.F (emphasis added).

***27** First, I agree with the UST that this provision is temporally overbroad in that it improperly sweeps in prepetition conduct. The inclusion of the language highlighted above would allow one to be exculpated for conduct that occurred prepetition, which exceeds the bounds of what the Code allows. The exculpation of estate fiduciaries is afforded by Section 1103(c) of the Code, which relates to the powers and duties of committees appointed pursuant to Section 1102, which occurs only once the bankruptcy estate has been created by the filing of a bankruptcy petition. 11 U.S.C. § 1103, 1102. It therefore only extends to conduct that occurs between the Petition Date and the effective date. The highlighted language must therefore be stricken.

For the same reason, I also agree with the UST's second argument, that the inclusion of the reorganized debtor and distribution agents is also improper here. The Plan defines Exculpated Parties as including:

"(a) the Debtors (and their Representatives); (b) **the Reorganized Debtors (and their Representatives)**; (c) the Official Committee of Unsecured Creditors (and its Representatives and the members thereto and their Representatives); (d) the Official Committee of Opioid-Related Claimants (and its Representatives and the members thereto and their Representatives); (e) the Future Claimants Representative (and its Representatives); and (f) **the Guaranteed Unsecured Notes Indenture Trustee, the 4.75% Unsecured Notes Indenture Trustee, the Legacy Unsecured Notes Indenture Trustee and (g) the Second Lien Notes Indenture Trustee (hereinafter "Indenture Trustees"), each solely in its capacity and to the extent it serves as a Distribution Agent.**"[134]

134 Plan at I. A. 118 (emphasis added).

Neither the reorganized debtor nor the distribution agents have any role in the bankruptcy prior to the effective date. The reorganized debtor does not even exist until the effective date, and the indenture trustees will not distribute anything until after the effective date, meaning they cannot act as distribution agents prior to that time.[135] Accordingly, the exculpation provision's inclusion of either is improper here and must also be removed.[136]

135 The inclusion of provisions like this one in orders previously entered by this Court does not persuade me otherwise. Orders containing provisions to which there was no objection do not generally have precedential value.

136 It may, however, be proper for the reorganized debtor and the distribution agents to be included in an exculpation clause contained in the final decree.

For these reasons, the UST objection to the exculpation provision is sustained. Debtors will need to provide a revised form of the Confirmation Order consistent with this ruling.

IV. Section 1129(a)

A. Section 1129(a)(1)

Section 1129(a)(1) requires that the Plan comply with the applicable provisions of the Code. The determination of whether the Plan complies with this section requires an analysis of the Plan's compliance with Sections 1122 and 1123 of the Code. *In re S & W Enter.*, 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984) ("An examination of the Legislative History of this Section reveals that although its scope is certainly broad, the provisions it was most directly aimed at were Sections 1122 and 1123."). As discussed above, I have found that Sections 1122 and 1123 of the Code are satisfied.

B. Section 1129(a)(2)

Section 1129(a)(2) requires that a proponent of a plan of reorganization comply with the applicable provisions of the Code. The case law and legislative history relevant to this section indicate that its primary concern is the disclosure and solicitation requirements of Sections 1125 and 1126 of the

Code. See *In re WorldCom, Inc.*, 2003 WL 23861928, at *49 (Bankr. S.D.N.Y. Oct. 31, 2003) ("The legislative history to section 1129(a)(2) reflects that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code.) (citing H.R.Rep. No. 95–595, at 412 (1977); S.Rep. No. 95–989, at 126 (1978)). There are no objections to confirmation of the Plan for failure to meet the requirements of Section 1129(a)(2) and following my review of the Plan and the evidence and testimony submitted in support, I am satisfied that its requirements have been met.

C. Section 1129(a)(3) (Good Faith)

***28** Section 1129(a)(3) of the Code requires that "the plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The Third Circuit has held that this section is satisfied where a plan "fairly achieve[s] a result consistent with the objectives and purposes of the Bankruptcy Code." *In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir. 2000). Accordingly, determining whether a plan has been proposed in good faith requires an inquiry into the totality of the circumstances surrounding the plan's proposal. *See W.R. Grace II*, 475 B.R. at 87 (citing *Brite v. Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985)).

Courts will examine good faith on a case-by-case basis, and the court is given "considerable discretion in finding good faith." *Id.* (citing *In re Coram Healthcare Corp.*, 271 B.R. 228, 234 (Bankr. D. Del. 2001)). To satisfy the good faith standard, a plan must establish that it: "(1) fosters a result consistent with the Code's objectives; (2) [ ] has been proposed with honesty and good intentions and with a basis for expecting that reorganization can be [a]ffected; and (3) there was fundamental fairness in dealing with the creditors." *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 609 (Bankr. D. Del. 2001) (internal citations omitted).

Debtors argue that these requirements are met here for several reasons. First, the Plan fosters a result consistent with the objectives of the Code. Second, the Plan was negotiated at arm's-length among representatives of the Debtors, the supporting parties, the OCC, the UCC, the Future Claimants Representative, and their respective professionals to satisfy the Code's primary objectives. Third, the significant support from Debtors' major creditor constituencies demonstrates that the Plan is fundamentally fair to creditors.

In support of their position, Debtors point to the testimony of their Chief Transformation Officer. Mr. Welch explained that Debtors filed bankruptcy with the intention of resolving the "enterprise-threatening litigation in the face of near-term debt maturities,"[137] that he believed the RSA was in the best interests of Debtors' estates,[138] that the Plan is a reasonable compromise of all claims, that all the parties that negotiated the Plan made concessions in good faith and that the Plan is the best available alternative for Debtors.[139] He further testified that even after Debtors' initial plan was proposed, the parties continued negotiating to resolve as many objections as possible and try to achieve a plan that is both fair and equitable.[140]

137 12-6-21 Tr. at 57

138 *Id.* at 90.

139 *Id.* at 112-13.

140 *Id.* at 118.

There are several parties making good faith objections. Sanofi, Mr. Darrel Edelman (acting *pro se*), and several additional *pro se* shareholders (the "**Pro Se Shareholders**").[141]

141 Tilo Bernhardt, Manan Salvi, Antonio Hidalgo Pedraza, Fahad Ali Mosaed, Shachar Rachmani, Arman R. Khosravi [Docket No. 302]; Antonio Hidalgo Pedraza [Docket No. 367]; Israel Perez Larrrcoudo, Jesus Maria Sani Ramirez [Docket No. 368]; Jesus Maria Sani Ramirez [Docket No. 369]; Humoud Sulaiman M Alqahtani [Docket No. 370]; Alex Wounlund [Docket No. 400]; John Deery [Docket No. 401]; Christopher Wooten [Docket No. 416]; Alexander Koch [Docket No. 472]; Giuliano Carnevali [Docket No. 494]; Dunin Aleksandroviah [Docket No. 527]; and Sean Vo [Docket No. 614].

Sanofi argues that Debtors intentionally tried to prevent Sanofi from voting on the Plan because although Sanofi holds claims valued in the millions of dollars, Debtors sent Sanofi a ballot in the amount of only $1.00.[142] Debtors respond that Sanofi's unliquidated claim vote was set at $1.00 consistent with the requirements set forth in the Disclosure Statement Order.[143] Additionally, Debtors assert that they provided notice that Sanofi's claim was voting at $1.00 and received no response.[144] Accordingly, they argue, Sanofi's objection should be overruled. I agree.

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142 Sanofi also argues in its objection that the Plan's treatment of its claims constitutes a violation of the Takings Clause of the Fifth Amendment because it allows Debtors to continue to sell Acthar without compensating Sanofi. D.I. 4702. However, this argument is moot following my ruling that Debtors' APA with Sanofi is not an executory contract subject to rejection and that Debtors' breach of the APA only results in a prepetition unsecured claim for damages subject to discharge upon confirmation. See Sanofi's Motion at D.I. 4675 and Bench Ruling at D.I. 5186. Sanofi also made a different good faith argument during closings at the Confirmation Hearing (that Debtors intentionally misled the UCC about the value of Sanofi's claim thereby causing the UCC to settle for less than it should have), but because that argument was made for the first time during closing arguments, it will not be considered. *MZM Constr. Co., Inc. v. New Jersey Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 406 n.13 (3d Cir. 2020) (concluding that when a party first raised an issue at oral argument, it is too late for the court to consider it, and the argument must be forfeited); *see also L-3 Commc'ns Corp. v. Sony Corp.*, 2014 WL 4674815, at *3 (D. Del. Sept. 12, 2014) (stating that an argument raised for the first time during oral argument is waived).

143 D.I. 2911, Attachment 1, § D (providing that "[i]f a Claim for which a Proof of Claim has been timely filed is wholly contingent, unliquidated, or disputed (based on the face of such Proof of Claim or as determined upon the review of the Debtors), such Claim is accorded one (1) vote and valued at One Dollar ($1.00) for voting purposes only, and not for purposes of allowance or distribution, unless such Claim is disputed as set forth in subparagraph j below[.]").

144 See D.I. No. 3196, Notice of Contingent, Unliquidated, or Disputed Claims for Voting Purposes ("**Notice of One Dollar Claims**").

***29** As the Notice of One Dollar Claims clearly states, any objection Sanofi may have had to the inclusion of its claims among the "one dollar contingent, unliquidated, and disputed claims" should have been filed by July 26, 2021.[145] No objection was made and therefore any objection Sanofi had was waived. Additionally, Sanofi points to absolutely no evidence that would support the conclusion that Debtors assigned Sanofi's claim a $1.00 voting value with the intent to suppress Sanofi's vote. Sanofi's objection is therefore overruled.

145 *Id.*

Mr. Edelman and the Pro Se Shareholders argue that the Plan was proposed solely to benefit the Guaranteed Unsecured Noteholders and management. Having considered the totality of the circumstances surrounding Debtors' proposal of the Plan, I conclude that it was proposed in good faith. In *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, the Supreme Court held that the two purposes of Chapter 11 are: (1) preserving going concerns; and (2) maximizing property available to satisfy creditors. 526 U.S. 434, 453, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999). I find that that Plan satisfies these objectives. The Plan resolves the morass of litigation brought against Debtors, restructures their funded indebtedness of over $5 billion, recapitalizes their businesses, and maximizes the returns available to creditors. Additionally, there is no evidence or allegations of "misconduct in bankruptcy proceedings, such as fraudulent misrepresentations or serious nondisclosures of material facts to the court" that would give me cause to conclude the Plan was not proposed with honesty and good intentions. *In re River Vill. Assocs.*, 161 B.R. 127, 140 (Bankr. E.D. Pa. 1993), *aff'd*, 181 B.R. 795 (E.D. Pa. 1995); see also *W.R. Grace II*, 475 B.R. 34, 88 (D. Del. 2012) ("In analyzing whether a plan has been proposed for honest and good reasons, courts routinely consider whether the debtor intended to abuse the judicial process, whether the plan was proposed for ulterior motives, or if no realistic probability for effective reorganization exists."). Lastly, I find that the record demonstrates that Debtors were fundamentally fair in dealing with creditors. Negotiations were conducted at arm's length and the Plan has the overwhelming support of Debtors' creditors. While the Plan provides for different recoveries for different creditors (the propriety of which is discussed throughout this Opinion) there is simply nothing in the record to support the conclusion that it was proposed solely to benefit the Guaranteed Unsecured Noteholders or Debtors' management. *See W.R. Grace II*, 475 B.R. at 90 ("courts have found that different treatment of a creditor, by itself, does not necessarily run afoul of the good faith standard."). For these reasons, I find that the Plan satisfies Section 1129(a)(3) of the Code.

D. Section 1129(a)(4)

The UST argues that the Plan's Indenture Trustee fee payment provision violates Section 1129(a)(4) of the Code. Section 1129(a)(4) provides that:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

11 U.S.C. § 1129(a)(4).

The UST argues that Article IV.S of the Plan and similar provisions,[146] seek to give Indenture Trustees[147] priority payment without complying with Section 503 of the Code.[148] Article IV.S provides that:

> ***30** On the Effective Date or as soon as reasonably practicable thereafter and upon the presentment of invoices in customary form (which may be redacted to preserve any confidential or privileged information), the Reorganized Debtors shall pay in Cash the Indenture Trustee Fees (whether accrued prepetition or postpetition, whether before or after the Effective Date of this Plan and to the extent not otherwise paid during the Chapter 11 Cases), without the need for application by any party to the Bankruptcy Court, and without notice and a hearing pursuant to section 1129(a)(4) of the Bankruptcy Code or otherwise. From and after the Effective Date, the Reorganized Debtors will pay any Indenture Trustee Fees in full in Cash without further court approval.[149]

146 Plan Article IV.JJ (4.75% Unsecured Notes Indenture Trustee and Legacy Unsecured Notes Indenture Trustee).

147 "**Indenture Trustees**" means the Guaranteed Unsecured Notes Indenture Trustee, the 4.75% Unsecured Notes Indenture Trustee, and the Legacy Unsecured Notes Indenture Trustee.

148 The UST also objects to the Plan's provision for payment of fees of other non-estate professionals, which is addressed infra at 92.

149 Plan Article IV.S.

The UST argues that each of these provisions is improper because they provide for the payment of fees without requiring those seeking payment to meet the requirements of Section 503 of the Code, *i.e.*, (a) timely submission of a fee application, (b) notice and hearing before the Court, (c) showing the fees are actual and necessary; and (d) showing a substantial contribution to the Chapter 11 cases. 11 U.S.C. § 503.

Debtors assert that the payment of Indenture Trustee Fees is integral to the Plan because assuming the RSA requires Debtors to cure any defaults, including the payment of Indenture Trustee fees. Debtors also argue that they have satisfied Section 503(b) of the Code because the Indenture Trustees have made an invaluable contribution to this bankruptcy case and Debtors would not have been able to obtain substantial support for the Plan without agreeing to pay the Indenture Trustee fees.[150] Additionally, counsel representing the Indenture Trustees have argued that, in exchange for the payment of their reasonable fees, the Indenture Trustees have agreed to limit the payment to fees incurred as of the effective date, to forego their right to exercise a charging lien over distributions made to the general unsecured noteholders, and to serve as distribution agents.[151]

150 12-6-21 at 123-26.

151 *See* D.I. 5007, 12-6-21 Tr. at 124-126 (Welch); *See also* 1-03-22 Tr. 98-101, D.I. 4121-1, GUC Settlement Term Sheet.

In support of their position, Debtors offered the testimony of Mr. Welch. Mr. Welch stated that Debtors believe that paying the Indenture Trustee fees is in the best interest of Debtors' estates based on the contributions of the Indenture Trustees to the Plan.[152] Mr. Welch testified that the Indenture Trustees worked with Debtors on the RSA, the UCC settlement, and on other hard fought negotiations that helped create a value-maximizing plan.[153] Moreover, the Indenture Trustees have agreed to serve as distribution agents and the Indenture Trustee fee amounts are reasonable.[154]

152 12-6-21 Tr. at 124 (Welch).

153 12-6-21 Tr. at 124-126 (Welch).

154 12-6-21 Tr. at 124-125 (Welch).

Debtors' arguments on this point are persuasive. I am satisfied that the Indenture Trustees have made a substantial contribution to the bankruptcy case and find that the payment of Indenture Trustee fees under the Plan is reasonable and appropriate.

E. Section 1129(a)(5)

Section 1129(a)(5) provides that the court may only confirm a plan if the plan proponent discloses "the identify and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan." 11 U.S.C. § 1129(a)(5). There is one objection to confirmation of the Plan based on this section.[155]

155 D.I. 4701, Glenridge Objection.

31** Glenridge argues that the Plan fails to satisfy the requirements of Section 1129(a)(5) because it fails to identify each individual member of the Reorganized Board and the nature of compensation for insiders. Debtors respond that Glenridge's argument fails for three reasons. First, Section 1129(a)(5) only requires that Debtors disclose "the identity and affiliations of any individual ***proposed to serve, after confirmation of the plan, as a director." 11 U.S.C. § 1129(a)(5)(A)(i) (emphasis added). Second, Debtors state that they have identified the proposed member(s) of the Reorganized Board in multiple filings.[156] Third, Debtors note that they did disclose the compensation of directors and officers in their 10-K for the fiscal year ended December 25, 2020.[157] I agree with Debtors.

156 *See* D.I. 3606, Exhibit B (Members of Reorganized Board); D.I. 5716 Plan Supplement, Exhibit A (Identity of Proposed Member(s) of the Reorganized Board; D.I. 6075 Plan Supplement, Exhibit A (Identity of Proposed Member(s) of the Reorganized Board.

157 Mallinckrodt plc, Annual Report (Form 10-K/A (Amendment No. 1)), at 12-24, 27 (Apr. 19, 2021).

Article IV.M of the Plan sets forth the process for the appointment of the directors for the Reorganized Board, a process which is already underway.[158] Debtors have continuously disclosed the proposed members of the Reorganized Board throughout this bankruptcy. At the same time, Debtors have published the compensation of the directors and officers. No affirmative evidence was brought forth by Glenridge from which the court might conclude that Section 1129(a)(5)'s requirements were not met. Therefore, Glenridge's objection is overruled.

158 1-03-22 Tr. at 81-82.

F. Section 1129(a)(7) (Best Interests of Creditors)[159]

159 Section 1129(a)(6) is not applicable to **these** Chapter 11 cases and is therefore not discussed herein.

Section 1129(a)(7) of the Code requires that, with respect to each impaired class, each holder of a claim or an equity interest in such class either: "(i) has accepted the plan; or (ii) will receive or retain under the plan ... property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of the [Code]." 11 U.S.C. § 1129(a)(7)(A). Commonly referred to as the "best interests" test, the requirements of Section 1129(a)(7) apply to individual dissenters rather than classes of creditors. *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle II*, 526 U.S. 434, 441 n.13, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."). "In determining whether the best interests standard is met, the court must measure what is to be received by rejecting creditors in the impaired classes under the plan against what would be received by them in the event of liquidation under chapter 7." *In re Adelphia Communs. Corp.*, 368 B.R. 140, 252 (Bankr. S.D.N.Y. 2007). "In doing so, the court must take into consideration the applicable rules of distribution of the estate under chapter 7, as well as the probable costs incident to such liquidation." *Id.*

To demonstrate the Plan's compliance with the best interests test, Debtors prepared a hypothetical liquidation analysis (the **"Liquidation Analysis**"),[160] which estimates what claimholders would likely recover in a liquidation under chapter 7. Debtors presented two witnesses on this issue from their restructuring advisor, AlixPartners, LLC.

160 Disclosure Statement, Joint P1 Ex. 2, at pdf 750.

First, Debtors offered Marc Brown of AlixPartners, the Debtors' financial advisor and an expert in conducting liquidation valuations of assets including pharmaceutical assets.[161] Mr. Brown looked at the value of certain of Debtors' assets in the context of a chapter 7, excepting the assets related to the opioid side of the business. Mr. Brown testified that, using both the discounted cash flow and market approaches, he determined that the value of these assets in a liquidation would be between $2.4 and $2.9 billion.

161 11-1-21 Tr. at 123.

***32** Debtors then offered testimony from Mr. Eisenberg, their Chief Restructuring Officer and an expert in chapter 11 restructurings, liquidation analyses, waterfall analyses of expected recoveries, and the analysis of projections and business plans.[162] Mr. Eisenberg walked through Debtors' Liquidation Analysis which shows, on a debtor-by-debtor basis, what recoveries the various creditor groups would receive in a liquidation under chapter 7.[163] He testified that the Liquidation Analysis demonstrates that the Plan meets the best interests test because no creditor would receive or retain an amount under the Plan on account of a claim that is less than the amount that such holder would receive or retain if Debtors were liquidated.[164]

162 12-9-21 Tr. at 188-89 (Eisenberg).

163 12-9-21 Tr. at 211-212; Debtors Ex 34 at pdf page 166, 181

164 12-9-21 Tr. at 195 (Eisenberg).

Mr. Eisenberg acknowledged that in the months since the Liquidation Analysis was prepared there were some developments that would impact his original calculations. First, Debtors updated their Financial Projections[165] to reflect lower than anticipated revenues for certain products. Second, the First Amended Plan (and all versions of the Plan after the Original Plan) include additional recoveries to both the opioid claimants and the general unsecured creditors.[166] He explained that the combined effect of these two developments on the best interest analysis is that overall creditor recoveries under a liquidation would go down, and overall recoveries to creditors under the Plan will go up.[167] Accordingly, the change in Debtors' projections do not alter the conclusion that all creditors do better under the Plan than they would in a liquidation scenario.

165 See discussion of Refreshed Projections, *infra* at 73.

166 12-9-21 Tr. at 212-213 (Eisenberg).

167 12-9-21 Tr. at 214.

Three creditors, Rhode Island, Sanofi, and Glenridge argue that Debtors have failed to meet the best interests standard as it relates to their claims.[168]

168 D.I. 4235, 4690, 4702, 4701, and 5104.

Glenridge argues that the best interests test is not satisfied here because the Liquidation Analysis is based on overly conservative assumptions and does not accurately assess creditors' recovery in a liquidation scenario. However, Glenridge did not offer any evidence to contradict that offered by Debtors, which established that the approaches and methodologies used to create the Liquidation Analysis are actually creditor-favorable. As Mr. Eisenberg testified, the Liquidation Analysis assumes several facts for purposes of the hypothetical that would likely bear out differently in real life. For example, though the Liquidation Analysis assumes that a chapter 7 trustee would continue to operate the business for a full 90 days, that is unlikely. Similarly, the assumption that Debtors would easily be able to repatriate international cash and assets in a chapter 7 is also unrealistic. Likewise, the analysis does not assume the need for any foreign insolvency proceedings, which would likely need to occur in a chapter 7 and would impact both the timing and realization of recoveries.[169] Mr. Eisenberg testified that these, among other creditor-favorable assumptions, resulted in a liquidation analysis that provides for a more generous picture of the assets that would be realized and the recoveries creditors would receive than is likely to happen in an actual chapter 7 liquidation. I find Mr. Eisenberg's testimony on these issues to be credible and his methodologies and conclusions to be sound. Glenridge's objection is therefore overruled.

169 12-9-21 Tr. at 221-22.

Rhode Island argues that the Plan fails the best interests test because the Liquidation Analysis does not account for the fact that the claims held by Rhode Island that are being released by the Plan would survive in a chapter 7 liquidation. *See In re Washington Mutual, Inc.*, 442 B.R. 314, 359-60 (Bankr. D. Del. 2011) ("In a case where claims are being released under the chapter 11 plan but would be available for recovery in a chapter 7 case, the released claims must be considered as part of the analysis in deciding whether creditors fare at least as well under the chapter 11 plan as they would in a chapter 7 liquidation."). Without assigning any value to its claims, Rhode Island contends, Debtors cannot meet their burden of showing that it would receive more under the Plan than in a liquidation.

***33** While Debtors concede that the Liquidation Analysis assigns no value to any litigation-based claims against them, they argue that it would make no difference if they did. This, they argue, is because even if a value were assigned to the claims, Rhode Island would still recover less in a

hypothetical liquidation than they do under the Plan because its ability to recover from Debtors would be limited by both the availability of funds and by the number of other claims against Debtors that would cause the funds to be diluted. I agree.

Rhode Island has offered no evidence of the value of its claim, estimated or otherwise, nor any evidence regarding the likelihood of a recovery on such claim. The record before me shows only that Rhode Island's claim is one of thousands of opioid-related claims that Debtors would be facing in a chapter 7 liquidation and that there would be a finite amount of money available to opioid creditors in that scenario. While Rhode Island points to the existence of a $200 million D&O insurance policy that would be available for recovery, the evidence suggests that any recovery from that policy is not likely to be meaningful to Rhode Island. As Mr. Eisenberg testified, Rhode Island is not the only creditor that is or could bring claims against that policy. Accordingly, any recovery that Rhode Island might receive under the policy would likely be diluted by the claims held by other creditors. Furthermore, the cost of litigating would come out of those policies prior to any distribution.[170]

170 12-9-21 Tr. at 225-226.

Additionally, the evidence shows that even if a recovery was assumed, the best interests test would still be satisfied because it is still likely to recover more through the Plan. Under the Plan, Rhode Island should receive approximately $5 million, which is .45% of the total funds available to states and municipalities. Under the Liquidation Analysis, where there is, at most, $54 million available to opioid creditors, Rhode Island's share would only be a few hundred thousand dollars. If it recovered under the policy as well, its share would only be approximately $900,000. So even if the two recoveries were combined, Rhode Island would still receive far less than the $5 million it is projected to receive under the Plan.[171] While Rhode Island disagrees with this conclusion, it has not put any evidence into the record that would support a different one. Rhode Island's objection is therefore overruled.

171 12-9-21 Tr. at 226-28.

Sanofi makes several arguments as to why Debtors' Plan does not comply with Section 1129(a)(7). First, Sanofi argues that it would receive a greater recovery under a Chapter 7 liquidation because a Chapter 7 trustee would be required to sell the APA subject to Sanofi's royalty payments. That argument was mooted, however, by my ruling on Sanofi's Motion seeking an order determining that Debtors could not reject or discharge their obligations under the APA.[172] As I previously ruled, Sanofi did not retain any property interest the Acthar intellectual property ("**IP**") when it sold those assets to Questcor. Instead, the property interests in the Acthar IP vested in the Debtors when they purchased the IP from Questcor. Any subsequent purchaser from a Chapter 7 trustee, therefore, would also not be required to make the royalty payments.

172 See D.I. 4675 (Motion) and 5210 (Order).

Second, Sanofi contends that the UCC Waterfall[173] undervalues their claim, and if the full amount of what they claim were included in the analysis, recoveries to creditors in Class 6(f) would be significantly lower at MPIL. While Sanofi couches this argument as one under Section 1129(a)(7), it failed to connect the dots between the lower recoveries to creditors and what its recovery would be under a hypothetical Chapter 7 liquidation. For this reason alone, the argument fails. In addition, Mr. Eisenburg credibly testified that using his estimate of Sanofi's claim, Class 6(f) creditors at MPIL will recover an estimated 43.6% under the Plan compared to 3.3% in a Chapter 7.[174]

173 The UCC prepared its own waterfall analysis for purposes of settlement negotiations with the Debtors as well as for use as a reference point in preparing the UCC Allocation.

174 12-9-21 Tr. at 229.

***34** Third, Sanofi argues that the Liquidation Analysis undervalues Debtors' IP associated with Acthar. If valued properly, Sanofi contends, creditors would receive far more in a liquidation than what is projected by Debtors. Specifically, they argue that Debtors' valuation relied on a discounted cash flow analysis that included a 15.5% present value factor without a terminal value which is inappropriate because Acthar is a proven commodity and Debtors' projections include annual revenue from Acthar in excess of $550 million through at least 2030. Additionally, Debtors apply a "liquidation discount" of 20-30%, which Sanofi claims cannot be justified. Finally, Sanofi argues, the Liquidation Analysis deducts the value of inventory from the IP value, which is inappropriate because the projected cash flows already include all relevant Acthar costs and expenses. Sanofi suggests that correcting these "errors" would increase the value of the IP in a liquidation setting from $400-$500 million

to $1.4-$1.5 billion, thereby significantly increasing the net recovery that would flow to unsecured creditors.

Debtors disagree and point to the testimony of Mr. Brown who testified that a liquidation discount of between 10-40% or even above 50% is standard and that he did not apply a terminal value as part of the DCF analysis because he did not believe a buyer would under-write the business in perpetuity.[175] Second, Debtors point to Mr. Eisenberg's statements that the value of the IP actually increases if there is inventory on hand for a buyer. If the Acthar assets were sold without the inventory, it could prevent Debtors from being able to obtain the full going-concern value that is included in the Liquidation Analysis because it would take too long (up to a year) for a new buyer to bring the product to market.[176] These conclusions are uncontroverted. Accordingly, Debtors argue, there is nothing in the record to support Sanofi's arguments regarding the impropriety of the present value factor or the liquidation discount. I agree.

175 11-1-21 Tr. at 132-33.

176 12-9-21 Tr. at 229-30.

While Sanofi intended to present evidence in support of its position regarding the best interests test through its own expert, that evidence was excluded.[177] Accordingly, the only evidence in the record is that put forth by Debtors, which I find to be well-reasoned and persuasive. Sanofi's objection is therefore be overruled.[178]

177 12-8-21 Tr. at 29 (Bench ruling granting Debtors' Motion in Limine to Preclude Sanofi from Submitting Certain Expert Opinions, D.I. 5575).

178 While Sanofi's counsel made additional arguments on the best interests issue during closings at the Confirmation Hearing, including that its claim should be valued at the amount set forth in its allegedly undisputed amended proof of claim, these arguments were not included in Sanofi's objections and therefore do not need to be considered. *MZM Constr. Co., Inc. v. New Jersey Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 406 n.13 (3d Cir. 2020) (concluding that when a party first raised an issue at oral argument, it is too late for the court to consider it, and the argument must be forfeited); *see also L-3 Commc'ns Corp. v. Sony Corp.*, 2014 WL 4674815, at *3 (D. Del. Sept. 12, 2014) (stating that an argument raised for the first time during oral argument is waived). Nonetheless, to ensure that the record is perfectly clear on this point, I will note that the only valid proof of claim on file by Sanofi is its original proof of claim stating a claim for $45 million. Its purported amended proof of claim in which it states a claim for $189 million is invalid, as it was filed long after the bar date (and after confirmation proceedings had begun) without leave of court. Debtors therefore properly valued Sanofi's claim at $45 million. Moreover, the record reflects that even if Debtors had valued Sanofi's claim at something much closer to the amount Sanofi says is appropriate ($176 million), it is still receiving more under the Plan that it would in a liquidation. See 12-9-21 Tr. at 228-29.

***35** For all the reasons set forth above, I find that the record reflects that no creditor will recover more in a liquidation than under the Plan and that the Plan therefore satisfies the best interests test and meets the requirements of Section 1129(a)(7).

G. Section 1129(a)(8)

Section 1129(a)(8) of the Code provides that a court shall confirm a plan only if "with respect to each class of claims or interests—(A) such class has accepted the plan; or (B) such class is not impaired under the plan." 11 U.S.C. § 1129(a)(8). A class that receives full payment on its claims under the plan is deemed to have accepted the plan. 11 U.S.C. § 1126(f). Conversely, a class that receives nothing under the plan is deemed to have rejected the plan. 11 U.S.C. § 1126(g). A class of impaired claims accepts a plan if holders of at least two-thirds in dollar amount and more than one-half in number of the allowed claims in that class submit ballots to vote to accept the plan. 11 U.S.C. § 1126(c).

Here, the Voting Report establishes that several classes voted to reject the Plan.[179] Accordingly, section 1129(a)(8) is not satisfied. However, a debtor may fail to satisfy section 1129(a)(8) and nonetheless have its plan confirmed where it satisfies the 'cramdown" provisions of section 1129(b) (discussed below).

179 Debtors P1 Ex 23; Debtors P2 Ex 67.

H. Section 1129(a)(9)

Section 1129(a)(9) generally provides that holders of claims entitled to priority under Section 507(a) of the Code receive payment in full in cash unless the holder of a particular claim agrees to different treatment. See 11 U.S.C. § 1129(a)(9).

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There are no objections to confirmation that relate to this subsection, and I am satisfied, following my review of the Plan and related evidence and testimony, that its requirements are met.

I. Section 1129(a)(10)

Section 1129(a)(10) requires that "if a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan. ..." 11 U.S.C. § 1129(a)(10). To demonstrate compliance with this section, Debtors point to the Voting Report[180] and the testimony of Mr. Welch, who stated that there is certainly more than one impaired class that has voted to accept the Plan.[181]

180 The "**Voting Report**" is defined *supra* at note **30**.

181 12-6-21 Tr. at 126-27; see also Debtors P2 Ex 67.

Sanofi objects and argues that "the Voting Report is inadequate to prove compliance with the 'per debtor' requirement of Section 1129(a)(10) of the Bankruptcy Code."[182] However, Sanofi cites to nothing in support of this argument. Having reviewed the Voting Report, I conclude that it satisfies the requirements of section 1129(a)(10). Sanofi's objection is therefore overruled.[183]

182 Sanofi's Supplemental Objection, D.I. 5101 at 7.

183 In its Supplemental Objection, Sanofi also argues that "The Voting Report also indicates that certain classes have been 'deemed to accept the Plan in accordance with Article III of the Plan'.... Article III(G) of the Plan provides that 'any Class of Claims that is occupied as of the commencement of the Confirmation Hearing by an Allowed Claim or a Claim temporarily Allowed under Bankruptcy Rule 3018, but as to which no vote is cast, shall be deemed to accept the Plan pursuant to section 1129(a)(8) of the Bankruptcy Code' " but that Section 1129(a)(8) provides no support for the requirement that if no vote is cast, then a class is presumed to accept. However, as Sanofi did not present any evidence on this issue or otherwise raise it in its argument at the Confirmation Hearing, I consider it to be waived. In any event, as Sanofi does not hold claims against either of the entities to which this provision of the Plan applied (Mallinckrodt Canada ULC and Mallinckrodt Group S.a.r.l), Sanofi has no standing to object.

J. Section 1129(a)(11) (Feasibility)

***36** Section 1129(a)(11) provides that confirmation of the plan must not be "likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). Frequently referred to as the "feasibility" requirement, "the purpose of § 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more than the reorganized debtor is capable of delivering after confirmation." *In re Trigona*, No. 08-70806 BM, 2009 WL 8556810, at *4, 2009 Bankr. LEXIS 5545, at *9 (Bankr. W.D. Pa. July 24, 2009) (quoting *Pizza of Hawaii, inc. v. Shakey's, Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985)).

"The phrase 'not likely to be followed' appearing in § 1129(a)(11) is critical in determining whether a chapter 11 plan is feasible. It indicates that success in carrying out the plan need not be guaranteed." *In re Trigona*, 2009 WL 8556810, at *4, 2009 Bankr. LEXIS 5545, at *9 (quoting *In re Danny Thomas Properties II, LLC*, 241 F.3d 959, 963 (8th Cir. 2001)). "The bare possibility that a plan might fail is not fatal to its feasibility. All that is required for purposes of feasibility is a reasonable prospect of success." *Id.* 241 F.3d at 963. Thus, the court "only must find that 'the plan present[s] a workable scheme or organization and operation from which there may be reasonable expectation of success.' " *In re W.R. Grace & Co.*, 475 B.R. 34, 115 (D. Del. 2012) (internal citations omitted).

"Relevant factors for determining whether a plan is feasible may include: (1) the adequacy of a debtor's capital structure; (2) the earning power of the business; (3) economic conditions; (4) the ability of management; (5) the probability of the continuation of the same management; and (6) any other related matters which bear on the prospect of a sufficiently successful operation to enable performance under the provisions of the plan." *In re Trigona*, 2009 WL 8556810, at *4, 2009 Bankr. LEXIS 5545, at *9 (quoting *In re U.S. Truck Co.*, 800 F.2d 581, 589 (6th Cir. 1986)). The plan proponent bears the burden of proving that the plan is feasible, within the meaning of Section 1129(a)(11) by a preponderance of the evidence. *In re Trigona*, 2009 WL 8556810, at *4, 2009 Bankr. LEXIS 5545, at *10 (Bankr. W.D. Pa. July 24, 2009).

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To address the feasibility of their Plan, Debtors offered the expert testimony of their CRO, Mr. Eisenberg. Mr. Eisenberg stated that the Plan will maximize value for stakeholders receiving distributions, is not likely to be followed by liquidation or a need for further reorganization, and post-restructuring, the reorganized debtor will not be left with an unreasonably small amount of capital to operate.[184]

184 12-9-21 Tr. at 194 (Eisenberg).

In reaching these conclusions, Mr. Eisenberg relied on the financial projections contained in the disclosure statement and the Refreshed Projections issued in September of 2021, which cover the years 2022 to 2025.[185] The Refreshed Projections show that over the next four years, net sales are projected to increase from $2.2 billion to $2.4 billion and adjusted EBITDA is anticipated to grow from $791 million to $820 million. Compared with the previously issued projections contained in the Disclosure Statement, the adjusted EBITDA numbers in the refresh have decreased 5-7% per year.[186] This change did not cause Mr. Eisenberg to alter his opinion regarding feasibility.

185 12-9-21 Tr. at 197 (Eisenberg); Debtors Ex. 15 (Financial Projections); Debtors Ex. 42 (Refresh); Debtors' Ex 8 (summary of refresh).

186 12-9-21 Tr. at 200 (Eisenberg).

***37** In connection with his review of the projections and in preparing his opinion, Mr. Eisenberg also ran a series of sensitivity analyses on the EBITDA projections contained in the original Financial Projections. Those sensitivity analyses demonstrated that Debtors' EBITDA could drop more than 25% per year in each of the years included in the Disclosure Statement and they would still have sufficient liquidity to meet all their obligations and be able to operate.[187] Accordingly, even when taking into account the reduction in adjusted EBITDA reflected in the Refreshed Projections, the adjusted amount is still well within the allowed range of the sensitivity analysis and, therefore, it does not impact feasibility.[188] For all these reasons, Mr. Eisenberg concluded that, assuming emergence on December 31, 2021, the Plan is not likely to be followed by liquidation or the need for further reorganization.

187 12-9-21 Tr. at 205 (Eisenberg).

188 12-9-21 Tr. at 206 (Eisenberg).

Only Glenridge has objected to the Plan's feasibility.[189] Glenridge asserts that the Plan does not provide an estimate of the relevant administrative claims. Further, Glenridge contends that the Debtors have failed to provide evidence of sufficient cash on hand, the sources and uses of such cash, and the amount of cash that will be used to fund administrative claims on the Effective Date.[190]

189 While both Sanofi and the AICs also make arguments regarding the Plan's feasibility in their objections, those arguments were dependent upon rulings in their favor on various motions that have since been denied. Accordingly, they are moot. See D.I. 4675 (Sanofi Motion) and 5210 (Order); D.I. 2159 (the AICs' Motion for Allowance of Administrative Claims), D.I. 5886 (Opinion and Final Order).

190 D.I. 4701, Glenridge Objection

In response, Debtors point to the testimony of Mr. Eisenberg, who stated that Debtors will have sufficient cash on hand to pay the projected administrative expenses.[191] Mr. Eisenberg testified that Debtors are expected to generate between $37 million and $240 million of levered free cash flow over the projected period. In aggregate over the four-year period, Debtors are expected to generate $597 million of excess cash flow after satisfying their obligations.[192] This should leave Debtors with the ability to voluntarily repay approximately $770 million of debt over the projected period. Further, at the end of each fiscal year, Debtors are anticipated to have $400 million of liquidity, which Mr. Eisenberg testified was a conservative estimate. Debtors' credit metrics are also expected to improve during the projection period.[193]

191 12-9-21 Tr. at 210 (Eisenberg).

192 12-9-21 Tr. at 201 (Eisenberg).

193 12-9-21 Tr. at 202-03 (Eisenberg).

Mr. Eisenberg also testified about the sources and uses of cash on emergence, stating that Debtors are expected to make $853 million in cash payments at emergence. This will leave $373 million in liquidity. Additionally, Debtors expect to have a $200 million accounts receivable facility and access to a revolver facility so Debtors' total liquidity at emergence will be $573 million.[194] Mr. Eisenberg concluded that the Plan is unlikely to be followed by liquidation or a need for further reorganization.

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194 12-9-21 Tr. at 204-05 (Eisenberg).

Having considered the evidence in the record, I am satisfied that the Plan is feasible. Mr. Eisenberg's testimony on this issue was persuasive and as I stated above, I find him to be a credible witness. I therefore find that the requirements of this subsection have been met. Glenridge's objection is overruled.

K. Section 1129(a)(12)

Section 1129(a)(12) of the Code requires the payment of all fees payable under 28 U.S.C. § 1930. As Article XII.C of the Plan provides for the payment of such fees, and there are no objections based on this provision of the Code, I find that the requirements of this subsection have been met.

L. Section 1129(a)(13)[195]

195 Sections 1129(a)(14), (15), and (16) are not applicable in chapter 11 cases and therefore not discussed.

***38** Section 1129(a)(13) of the Code requires that the Plan provide for continued, post-confirmation payments of all retiree benefits at the levels established in accordance with Section 1114 of the Code. As Article V.H of the Plan provides that the Reorganized Debtors shall honor all Debtors' compensation and benefits programs, including retiree benefit programs, and there are no objections based on this provision of the Code, I find that the requirements of this subsection have been met.

V. Section 1129(b)(1) (Unfair Discrimination)

Because not all classes of creditors voted to accept the Plan or were otherwise deemed to have rejected the Plan because they are receiving no recovery,[196] Debtors cannot comply with the requirements of Section 1129(a)(8) of the Code, which mandates that all classes of creditors must either vote to accept the Plan or receive payment in full. Therefore, to have the Plan approved, Debtors must show that the Plan "does not discriminate unfairly and is fair and equitable with respect to each class of claims or interests that is impaired under and has not accepted the [P]lan." 11 U.S.C. § 1129(b)(1). In bankruptcy parlance, this is referred to as a cramdown plan. The Third Circuit has recognized that cramdown plans "are an antidote to one or more classes of claims holding up confirmation of an otherwise consensual plan." *In re Tribune Co.*, 972 F.3d 228, 237 (3d Cir. 2020).

196 Classes 6(a), 6(b), 6(e), 6(f), and 9(h) voted to reject the Plan and Classes 9(i), 13, 14, and to the extent impaired Classes 11 and 12, were deemed to reject the Plan. Classes 6(a), 6(b), and 6(e) voted to reject solely as to Debtors Mallinckrodt Brand Pharmaceuticals LLC, Mallinckrodt LLC, Mallinckrodt plc, Mallinckrodt US Holdings LLC, and MNK 2011 LLC, and Class 6(f) voted to reject solely as to Debtors Mallinckrodt ARD LLC, Mallinckrodt Hospital Products, Inc., Mallinckrodt LLC, Mallinckrodt Pharmaceuticals Ireland Limited, Mallinckrodt Pharmaceuticals Limited, Mallinckrodt plc, and ST Shared Services LLC.

Three unsecured creditors assert that the Plan unfairly discriminates against them and cannot be confirmed: 1) the AIC, which holds claims in Class 6(a), a class that voted to reject the Plan; 2) Mr. Koppenhafer, a holder of 4.75% notes in Class 6(g),[197] and Sanofi, which holds claims in Class 6(f), a class that also rejected the Plan.[198]

197 Class 6(g) voted to accept the Plan, and therefore, Mr. Koppenhafer does not have standing to argue that the Plan discriminates against him unfairly. See *Tribune*, 972 F.3d at 242 ("unfair discrimination applies only to classes of creditors (not the individual creditors that comprise them) and then only to classes that dissent.") I will address his arguments, however, which were well presented by Mr. Koppenhafer.

198 The Pro Se Shareholders also allege that the Plan improperly benefits the Guaranteed Unsecured Noteholders while discriminating against them. This argument is misplaced. While I appreciate the Pro Se Shareholders feeling that they are being discriminated against because the Guaranteed Unsecured Notes will receive the majority of the equity of the Reorganized Debtors, that is a function of the absolute priority rule. The Pro Se Shareholders are not entitled to a recovery because all creditors are not being paid in full under the Plan. *See In re Insilco Tech., Inc.*, 480 F.3d 212, 218 n.10 (3d Cir. 2007) (citing *Bank of Am. Nat'l Tr. & Sav. Ass'n v. N. LaSalle St. P'ship*, 526 U.S. 434, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999). Therefore, their objection must be overruled.

***39** The AIC and Mr. Koppenhafer argue that the Plan discriminates against them unfairly because the opioid claimants in Classes 8 and 9 are receiving a greater recovery than Class 6. They also argue that Class 5 claimants, the Guaranteed Unsecured Noteholders, are receiving a greater percentage recovery than Class 6. Sanofi argues that Class

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6(f) is receiving less that Class 7 Trade Creditors, and therefore, the Plan unfairly discriminates against them.[199] This requires an analysis of the recoveries between Class 6 and other classes of unsecured creditors. Debtors argue that the Plan does not discriminate unfairly against any of the dissenting classes because they are all receiving a recovery under the Plan that exceeds what they would otherwise be entitled to. According to Debtors, the dissenting classes would receive nothing, or far less in the case of Sanofi, but for the willingness of Class 5 to reallocate some of its recovery to Class 6.[200]

199 While Sanofi made the argument during the Confirmation Hearing that its claims should be compared with Class 6(g), that argument was not included in Sanofi's objections and therefore need not be considered.

200 Class 5's "gift" to Classes 6 and 7 is discussed below.

The AIC also argues that because the UCC allocated the Class 5 gift among the seven subclasses within Class 6 (the "**UCC Allocation**"), I must also determine whether that allocation unfairly discriminates against the dissenting subclasses. Debtors and the UCC argue that I do not need to consider the UCC Allocation because, again, Debtors' evidence shows that the AIC and the other dissenting classes are receiving far greater recoveries under the Plan than they would otherwise be entitled to in comparison to baseline recoveries to those classes under the absolute priority rule. For the reasons discussed below, I agree.

A. Principles Applicable to Determining Unfair Discrimination

The Code does not define what constitutes unfair discrimination. Generally, the standard "ensures that a dissenting class will receive relative value equal to the value given to all other similarly situated classes." *In re Armstrong World Indus., Inc.* 348 B.R. 111, 121 (D. Del. 2006) (quoting *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986)). As the District Court for the District of Delaware observed, "[v]arious tests have emerged in the caselaw, with the hallmarks being whether there is a reasonable basis for the discrimination, and whether the debtor can confirm and consummate a plan without the proposed discrimination." *In re Nuverra Envtl. Sols. Inc.*, 590 B.R. 75, 90 (D. Del. 2018).

The Third Circuit recently considered the various unfair discrimination tests in *Tribune*, distilling several principles to guide bankruptcy courts in determining whether a plan of reorganization unfairly discriminates. *In re Tribune Co.*, 972 F.3d 228, 237 (3d Cir. 2020). The Court recognized that, as is typical in reorganizations, there is a "need for flexibility over precision.... [and] [t]he test becomes one of reason circumscribed so as to not run rampant over creditors' rights." *Tribune*, 972 F.3d 228 at 242. The Court also stated that unfair discrimination must be "determined from the perspective of the dissenting class" while at the same time recognizing that what that means is "subject to interpretation." *Id.* at 242.

While comparison of the recoveries between a preferred class and a dissenting class may be the preferred method, it is not the only acceptable approach. "Other measures that allow courts to assess the magnitude of harm to the dissenting class may also be appropriate in some cases." *Id.* at 242-43. Indeed, in *Tribune*, the Court endorsed the bankruptcy court's comparing plan recoveries to the dissenting class's baseline entitlement under the absolute priority rule and determined that there was no discrimination because the difference between plan recovery and the dissenting class's baseline recovery was only nine-tenths of one percent. *Id.* at 244-45. As the Third Circuit noted, "[u]nfair discrimination is rough justice...[and] exemplifies the Code's tendency to replace stringent requirements with more flexible tests that increase the likelihood that a plan can be negotiated and confirmed." *Id.* at 245.

***40** Although the *Tribune* Court did not expressly adopt any one approach to evaluating unfair discrimination, it did endorse the bankruptcy court's use of the Markell test, the approach most often utilized in this Circuit. *Tribune*, 972 F.3d 228 at 241 ("Reviewing the Bankruptcy Court's choice of legal test *de novo*, we agree that it was appropriate in these circumstances to take a pragmatic approach to measure the Plan's discrimination.").[201] The Markell test provides that:

> A rebuttable presumption of unfair discrimination exists when there is (1) a dissenting class; (2) another class of the same priority; and (3) a difference in the plan's treatment of the two classes that results in either (a) a materially lower percentage recovery for the dissenting class (measured in terms of the net present value of all payments), or (b) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed distribution."

201 The Third Circuit noted that application of that test was not before it because the dissenting class and the debtors

> had endorsed it, as did the Third Circuit. *Tribune*, 972 F.3d at 241 n.16.

Id. "Under this test, a presumption of unfair discrimination may be overcome if the court finds that a lower recovery for the dissenting class is consistent with the results that would obtain outside of bankruptcy, or that a greater recovery for the other class is offset by contributions from that class to the reorganization. The presumption of unfairness based on differing risks may be overcome by a showing that the risks are allocated in a manner consistent with the prebankruptcy expectations of the parties." *Id.* As Professor Markell explained,

> In either case—disparity of recovery or disparity of risk—the plan proponent can rebut the presumption of unfairness by proving that the difference in treatment is attributable to differences in the prepetition status of the creditors. In the case of a difference in the present value of the recovery, the presumption may also be overcome by a demonstration that contributions will be made by the assenting classes to the reorganization, and that these contributions are commensurate with the different treatment. In such cases, while discrimination exists, it is not unfair.

In re Nuverra Envtl. Solutions, Inc., 590 B.R. 75 (D. Del. 2018) *affirmed on equitable mootness grounds at* 834 Fed. Appx. 729 (3d Cir. 2021) (quoting Markell, *A New Perspective on Unfair Discrimination in Chapter 11*, 72 Am. Bankr. L.J. 227, 250 (1998)).

In *Nuverra*, a case that pre-dates the Third Circuit's ruling in *Tribune*, the District Court approved a plan that provided for a 100% recovery to trade creditors while unsecured noteholders received a *de minimus* recovery. Both classes were out-of-the-money unsecured creditors that were recovering only because an under-secured senior lender was allocating its recoveries to fund the distributions. 590 B.R. 75, 79-80. Because the noteholders were recovering more than they would under a plan that did not include the senior lender gift, the noteholders were not harmed. *Id.* at 90-91. The fact that another out-of-the-money unsecured creditor class did far better was irrelevant. *Id.* at 91.

Similarly, in *Genesis Health* general unsecured creditors received a recovery of between 7-8% while unsecured punitive damage claimants received nothing. *In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001). The court acknowledged that the claims were of equal priority, but because recoveries were based on an agreement of senior lenders to allocate a portion of their recoveries, any presumption of unfairness was rebutted. *Id.* at 612.

***41** As these cases demonstrate, a plan can discriminate without being unfair. *Tribune*, 972 F.3d 228 at 242 (" 'Discriminate unfairly' is simple and direct: you can treat differently (discriminate) but not so much as to be unfair."). However, the determination of what is fair discrimination and what is unfair discrimination is highly dependent on the facts and circumstances of each individual case. See, e.g. *In re Dow Corning Corp.*, 244 B.R. 634, 647 (Bankr. E.D. Mich. 1999), aff'd, 255 B.R. 445 (E.D. Mich. 2000), *aff'd and remanded*, 280 F.3d 648 (6th Cir. 2002) (no unfair discrimination where the nature of the claims between classes of unsecured creditors are different); *In re U.S. Min. Prods. Co.*, No. 01-2471 JKF, 2005 WL 5898300, 2005 Bankr. LEXIS 3259 (Bankr. D. Del. Nov. 29, 2005) (no unfair discrimination where debtor's insurance policy is the source of recovery); *In re Sacred Heart Hosp. of Norristown*, 182 B.R. 413 (Bankr. E.D. Pa. 1995) (no unfair discrimination where sources of recovery are different); *In re Mahoney Hawkes*, LLP, 289 B.R. 285 (Bankr. D. Mass. 2002). Accordingly, a close look at the facts and circumstances surrounding the Plan's distribution scheme here is necessary.

B. Analysis

The Third Circuit instructs that when deciding whether a plan discriminates unfairly, a bankruptcy court should "start by adding up all proposed plan distributions from the debtor's estate and divide by the number of creditors sharing the same priority." *Tribune*, 972 F.3d at 243. The resulting pro rata baseline can then be compared to what happens if the plan is implemented. *Id.* This approach is relatively easy when there is a single debtor, and all similarly situated creditors have claims against that single debtor. The analysis becomes more complicated in a case like this one where there are more than 60 debtor entities with a complex financial structure, creditors that have claims against different debtor entities, and there is no substantive consolidation. For example, in this case while Class 5 Guaranteed Unsecured Noteholders have claims against almost all debtors in the corporate structure, the AIC has claims against only two debtors.[202] To address these complexities, and to assess the fairness of each class's treatment under the Plan, Debtors developed a "waterfall" model (the "**Debtors' Waterfall**"), "designed to show the natural recoveries that would flow to each class of creditors at each Debtor entity, i.e., the recoveries that would result from allocating Debtors' value to each Debtor and applying the

absolute priority rule to that value at each Debtor, with classes of equal priority receiving pro rata distributions from that Debtor."[203] The distributions contained in Debtors' Waterfall (the "**Entitled Recoveries**") can then be compared to each group's proposed recovery under the Plan to ensure fairness between similarly situated classes at each Debtor.[204]

202 In my ruling sustaining Debtors' Omnibus Objection to Unsubstantiated and Duplicative Claims, I held that while the AIC filed proofs of claim against all or nearly all Debtors, they only asserted facts sufficient to support claims against Mallinckrodt PLC and Mallinckrodt ARD. All other proofs of claim were therefore dismissed. D.I. 3414 at 142.

203 D.I. 5016, Debtors' Confirmation Brief at 124.

204 *Id.*

Debtors' Waterfall runs three alternative scenarios: (1) the Waterfall Reorganization Scenario; (2) the Alternative Waterfall Scenario; and (3) the Second Alternative Waterfall Scenario.[205] The first scenario is what Debtors believe most closely reflects the reality of Debtors' plan. The second and third scenarios were done to address creditor objections and to demonstrate that even under the alternative scenarios, the creditors are still receiving more under the Plan than their Entitled Recoveries.[206] Debtors' CRO, Mr. Eisenberg, explained the three scenarios in detail.

205 12-9-21 Tr. at 233 (Eisenberg); Debtors' P2 Ex 9. The Debtors' Waterfalls are attached hereto as Appendix 1.

206 12-9-21 Tr. at 233.

***42** The first scenario, the Waterfall Reorganization Scenario, shows Debtors' view as to creditors' baseline entitlements. It starts by accounting for the Opioid Settlement and the Federal/State Acthar Settlement, which the evidence shows are value accretive and add to the Debtors' total enterprise value ("**TEV**") which, in turn, increases recoveries to unsecured creditors.[207] Under this scenario, Class 6 General Unsecured Creditors would be entitled to a total of just over $22.5 million, but only three of the seven subclasses within Class 6 (Class 6(b) Generic Price Fixing Claims, Class 6(e) Environmental Claims, and Class 6(f) Other GUC Claims) receive any recovery. Class 6(a) Acthar Claims and Class 6(g) 4.75% Notes are entitled to nothing under this scenario. Class 5 Guaranteed Unsecured Note Claimants, by comparison, would be entitled to a nearly $1.4 billion recovery. In sum, this scenario shows that under the Plan all creditors are receiving an amount that is equal to or greater than their baseline entitlements, except for the Class 5 creditors, who are receiving less.[208]

207 11-1-21 Tr. at 36-38.

208 12-9-21 Tr. at 233-34, 238; Debtors P2 Ex 10.

Because the Plan's treatment of Class 5 is important to the unfair discrimination analysis below, it is worth a digression here to explain why Class 5 is receiving less under the Plan than its Entitled Recovery. Class 5, the Guaranteed Unsecured Noteholders, has an Entitled Recovery of $1.37 billion, which is an 89% recovery on its claims, because the notes held by the claimants in that Class are guaranteed by almost every one of the 60 entities in Debtors' corporate structure. While Class 6, the General Unsecured Creditors, have a larger estimated claim amount ($5.5 billion in claims as compared to Class 5's $1.54 billion), most of the claims within Class 6 are only held at one or two debtor entities. Accordingly, most subclasses within Class 6 are not entitled to any recovery. To avoid litigation with constituents in the other unsecured classes and facilitate settlements, the holders of Class 5 claims agreed to reallocate or "gift" $228.5 million of their Entitled Recovery to Class 6 and Class 7.[209] With that gift, Class 6 and Class 7 do far better under the Plan. Class 7's recovery goes from 1% to 100% (just over $41 million). Class 6 recoveries go from zero to 4% and allows for all Class 6 subclasses to receive some recovery, where only three of the seven subclasses were otherwise entitled to anything. The gift from Class 5 provides recoveries to Class 6(a) of slightly over $34 million, Class 6(g) of nearly $57 million, and takes recoveries to Classes 6(e) and 6(f) from under $22 million to slightly over $52 million.

209 12-9-21 Tr. at 240; Debtors P2 Ex 10.

The second scenario, the Alternative Waterfall Scenario, was prepared by Debtors to show how things would change if the Settlements did not exist.[210] When offering this analysis, Debtors presented credible evidence to show that removing the settlements would have an adverse effect on Debtors' TEV reducing it from $5.45 billion to $4.0 billion.[211] Under this Alternative Waterfall Scenario, total recoveries for Class 6 would be slightly reduced to approximately $21.8 million with recoveries once again limited to the same three subclasses. Unsurprisingly, this scenario also shows that Class 6 recoveries increase under the Plan due to the Class 5 gift.

210 12-9-21 Tr. at 216-17.

211 12-9-21 Tr. at 235.

Debtors' third scenario, the Second Alternative Waterfall Scenario, again assumes no Opioid Settlement or Federal/ State Acthar Settlement, but also assumes that the lack of those settlements would have no impact on Debtors' TEV, leaving it at $5.45 billion. Debtors believe that this scenario is wholly unrealistic. However, they created it to demonstrate that even if one assumes Debtors could achieve full value without the Settlements, no rejecting classes are harmed and each rejecting class still does at least as well under the Plan as compared to baseline entitlements.[212] While Classes 6(a) and 6(g) receive some recovery under this unrealistic scenario, their individual recoveries are still greater under the Plan.

212 12-9-21 Tr. at 235-236.

***43** Debtors assert that under all the Waterfall Scenarios, the dissenting classes here recover far more under the Plan than they are entitled to under the baseline and therefore no rebuttable presumption of unfair discrimination arises as to Class 6 when compared to the other classes.

The AIC and Mr. Koppenhafer argue that unfair discrimination exists and cannot be rebutted for several reasons. First, they argue that the Settlement with Class 8 and Class 9 opioid claimants improperly transfers assets from the Specialty Brands entities (where Opioid Claimants would not have any claims) to the Specialty Generics entities.[213] Debtors counter that opioid claims were, in fact, asserted against both sides of the business. Therefore, opioid claimants would have pursued those claims, which presented an existential threat to the entire enterprise.[214] Moreover, and most importantly, as discussed above, Debtors presented evidence to show that the Opioid Settlement and the Federal/ State Settlement are inextricably intertwined, and together, as demonstrated by Debtors' Waterfall, they actually enhance recoveries to all unsecured creditors. As Debtors' Alternative Waterfall analysis shows, in the absence of the Settlements, Debtors TEV would drop from $5.45 billion to $4 billion because Debtors would be forced to sell off their assets. In that scenario, opioid claimants would receive a small fraction of the $1.725 billion they will receive under the Plan and the Federal/State Acthar Claimants would receive nothing. Additionally, Class 6 claimants would also receive little or nothing under this scenario as compared to their Plan recoveries. Accordingly, any unfair discrimination that arises from the Settlements is rebutted by the increased recoveries to all classes of creditors that results from the Debtors retaining the ability to continue as a going concern while making payments to the Opioid Trust over time.

213 While the AICs made this argument in their initial objection to the Plan, during oral argument AICs' counsel stated that they were not objecting to the Opioid Settlement.

214 12-9-21 Tr. at 19-20 (Edmiston) Mr. Edmiston testified that the branded side of Debtors' business named in about a thousand of the opioid lawsuits.

Second, Mr. Koppenhafer argues that there is unfair discrimination because the Plan provides Class 5 Guaranteed Unsecured Notes with a greater recovery than the 4.75% Noteholders in Class 6(g). As Mr. Eisenberg testified, however, Class 5's greater recovery is attributable to the fact that their claims exceed $1.5 billion (excluding potential post-petition interest) at more than 60 debtor entities while the 4.75% Notes' claims lie against only two. No evidence was submitted to rebut Mr. Eisenberg's testimony and I find it to be credible. Therefore, I conclude that while the differences in the recoveries of the two classes may give rise to a presumption of unfair discrimination, any presumption is rebutted because the "lower recovery for the dissenting class is consistent with the results that would obtain outside of bankruptcy[.]" *Tribune*, 972.F.3d 228, 241 (describing ways in which the presumption of unfair discrimination may be overcome).

Similarly, Sanofi's argument that it suffers unfair discrimination because Class 7 Trade Creditors are receiving a 100% recovery while Class 6(f) is receiving far less also fails. Sanofi's argument that Debtors cannot rely on *Nuverra* and *Genesis Health* because the gift is coming from Debtors, not Class 5 is plainly contradicted by the record.[215] Both Class 6 and Class 7 are only receiving more than the *de minimus* recovery to which they are entitled because another creditor group is allocating its recoveries to fund the distributions. Without the gift from Class 5, Class 6 gets next to nothing. The fact that Class 7 gets a greater gift than Class 6 does no harm to Class 6 claimants. The District Court in *Nuverra*, a case with very similar facts, explains:

> ***44** [D]istributions to holders of Trade and Business-Related Claims have no impact on the distributions to holders of unsecured claims in Class A6. The record is clear that unsecured creditors are entitled to nothing under the Bankruptcy Code's priority scheme, and an increased

> distribution to unsecured creditors holding Trade and Business-Related Claims does not diminish the distribution to holders of claims in Class A6. If holders of Trade and Business-Related Claims did not receive this increased recovery, the surplus distribution would revert to secured creditors, not holders of claims in Class A6. As Appellant and his class were not entitled to a distribution in the first place, providing a greater distribution to a different class of unsecured creditors does not alter the distribution to which Appellant is entitled.

In re Nuverra Envtl. Solutions, Inc., 590 B.R. 75 (D. Del. 2018) *affirmed on equitable mootness grounds at* 834 Fed. Appx. 729 (3d Cir. 2021). *See also* *In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001) ("The disparate treatment between [classes] is a permissible allocation by the secured creditors of a portion of the distribution to which they would otherwise be entitled, rather than unfair discrimination against [the dissenting classes] by the proponents of the plan.").

215 While Sanofi argues that Debtors' Waterfall does not show what the various classes would be entitled to under the absolute priority rule on a debtor-by-debtor basis, as Mr. Eisenberg explained, the data regarding distributions by debtor can be found in the Liquidation Analysis, Debtor P2, Ex 14; 12-9-21 Tr. at 212 (Eisenberg).

For this reason, any presumption of unfair discrimination that may arise due to the disparity between the Plan's distributions to Class 6 and Class 7 is rebutted by the fact that Class 6's distribution is no less than the *de minimus* distribution to which it is entitled in the first place. That Class 7's distribution is more than its entitlement is irrelevant. Sanofi's objection on this issue is overruled.

C. The UCC Allocation

Debtors' Original Plan provided for $100 million in cash (a gift from Class 5) to be divided among the Class 6 Claimants on a pro rata basis. The UCC believed that the consideration provided was inadequate and that pro rata recoveries to all Class 6 creditors did not comply with Section 1129 because subclasses held claims against different Debtor entities, each with distinct assets and liabilities. Through a mediation process, Debtors agreed to increase the total consideration to $135 million in cash plus additional non-cash assets bringing the total consideration to between $180 million and $220 million depending on the value received from liquidation of the non-cash assets. The UCC then allocated the total consideration among the various subclasses within Class 6. The UCC conditioned entry into the UCC Settlement on reaching internal agreement on allocation. The UCC Settlement, including the UCC Allocation was then included in Debtors' Plan.[216]

216 Plan, Exhibit 6.

The AIC argues that inclusion of the UCC Allocation into the Plan was inappropriate, and that it unfairly discriminates against them because: 1) the methodology used to determine the allocation was flawed; and 2) certain subclasses within Class 6 will receive more of the available cash on the effective date while Class 6(a) is required to wait until the non-cash assets are liquidated to receive their full distribution. Debtors and the UCC counter that the UCC Allocation is irrelevant to determining the confirmability of Debtors' Plan because, as described above, the AIC's baseline recoveries under the absolute priority rule are zero, and whether the distribution to the AIC was done through a pot plan without allocation or through the UCC Allocation as part of the Plan, the AIC is receiving a recovery they would otherwise not be entitled to. I agree.

***45** The question before me is whether Debtors' Plan as presented is confirmable. As that relates to Section 1129(b)(1), the question is, does the Plan as presented create an unrebutted presumption of unfair discrimination? As discussed at length above, the answer to that question is no. Under either the UCC Allocation or a pro rata distribution of the Class 5 gift, Class 6(a) is receiving a distribution whereas otherwise it would recover nothing. As the *Nuverra* court recognized, the fact that another out of the money unsecured creditor class is doing better is irrelevant.

The AIC claims that the UCC was merely "paying lip service to the fiduciary duties owed to general unsecured creditors" in determining the UCC Allocation, and members of the UCC were "blatant[ly] self-interested in approving the Allocation which benefitted their creditor constituencies at the expense of the AIC.[217] Therefore, the AIC asserts, inclusion of the UCC Allocation into the Plan is improper. The issue of whether the UCC acted consistent with its fiduciary duties, however, is distinct from whether Debtors' Plan as proposed is confirmable.[218] The AIC does not allege that Debtors acted in bad faith by including the UCC Settlement into the Plan, or that the Plan is being proposed by the Debtors for some improper purpose. Debtors maintain that the allocation is a necessary part of the UCC Settlement and the UCC Settlement is integral to the ability of Debtors to reach

consensus with various creditor constituencies and confirm a plan that provides recoveries to all classes of creditors. I agree and find that it is well within the bounds of Debtors' business judgment to agree to the UCC Settlement and its inclusion in the Plan.[219]

217 AIC Supp Brief at 43.

218 It is important to note that the UCC denies that it acted inappropriately in connection with determining the UCC Allocation and presented extensive evidence to support the bases for its decision to provide different allocations among the various subclasses. 12-13-21 Tr. at. 199-202, 219-22, & 224-34 (Greenberg).

219 The AIC requested that if I was inclined to confirm the Plan, I require that an appropriate portion of the Class 5 distribution to Class 5 attributable to Debtors' Acthar business be withheld pending final judicial or consensual resolution of the AIC's claims against Debtors other than Mallinckrodt ARD LLC (ARD) and Mallinckrodt plc (PLC) until the AIC's appeal of my dismissal of their claims against Debtor entities other than ARD and PLC is resolved. That request is denied. The AIC did not seek and have not been granted a stay pending appeal of that decision and there is no reason to hold up distributions to Class 5 while that appeal plays out – perhaps over months or years.

For all these reasons, I find the Plan satisfies the requirements of Section 1129(b)(1) and the objections regarding unfair discrimination are therefore overruled.

VI. Section 1129(b)(2)

Section 1129(b)(2) of the Bankruptcy Code provides that a plan is fair and equitable to a dissenting class of unsecured claims if either (i) the dissenting class is paid in full ... or (ii) no class junior to the dissenting class receives anything under the plan on account of their junior claims or interest. *See* 11 U.S.C. §§ 1129(b)(2)(B)(i) and 1129(b)(2)(B)(ii).[220] This rule is also called the "absolute priority rule," and it requires that, if the holders of claims or interests in a class that votes to reject a plan receive less than full value for their interests, then no holder of claims or interests in a junior class may receive property under the plan. *Bank of Am. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441-42, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999); *see also Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988) (concluding that "the absolute priority rule provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan.") (citations omitted); *see also In re Armstrong World Indus., Inc. II*, 432 F.3d 507, 512 (3d Cir. 2005). Under the absolute priority rule, equity holders cannot receive a distribution unless dissenting unsecured creditors receive payment in full or consent to such treatment. *See Czyzewski v. Jevic Holding Corp.*, ––– U.S. ––––, 137 S. Ct. 973, 978, 197 L.Ed.2d 398 (2017).

220 Section 1129(b)(2)(B) applies to impaired unsecured claims, while § 1129(b)(2)(C) applies to interests.

***46** Sanofi alleges that the Plan's distribution scheme violates the absolute priority rule.[221] Specifically, Sanofi argues that the Plan provides for an equity roll up from MPIL to MIFSA (an obligor on the 4.75% Unsecured Notes) without first providing payment in full to MPIL's creditors, including Sanofi. Sanofi argues that the Class 6(g) 4.75% Unsecured Noteholders will receive an improper $57 million payment based on this equity distribution from MPIL to MIFSA while Sanofi will only receive pennies on the dollar for its claims.

221 D.I. 5101, Supplemental Sanofi Objection.

In response, Debtors contend that Sanofi's argument revolves around the incorrect assumption that the only way Class 6(g) can receive a recovery is if MIFSA gets an equity distribution from MPIL.[222] However, Debtors point out that the Plan does not provide for any equity distribution to MIFSA; instead, holders of Class 5 claims are making a gift directly to the Class 6(g).[223] I agree.

222 D.I. 5660, Debtors' Omnibus Reply to Supplemental Plan Objections; *see also* 1-6-22 Tr. at 96.

223 12-9-21 Tr. at 239-41. Mr. Eisenberg said, "[t]he Class 6 and 7 are being trued up by contributions that are being made by the guaranteed unsecured notes, Class 5..... [T]here's $228 million of the guaranteed unsecured notes' recovery that is being provided to Class 6 and Class 7, so that Class 6 and 7 do receive the amount of recovery that's contemplated under the plan."

Debtors' Waterfall scenarios show that MPIL is not providing any recovery to MIFSA. As discussed above, Entitled Recoveries to Class 6 against all Debtors is approximately $25 million on an absolute priority basis. The increased recovery to Class 6(f), which includes Sanofi, is a result of the Guaranteed Unsecured Notes in Class 5 agreeing to redistribute a portion of their recoveries to Class 6. Moreover, that gift is not dependent on any recoveries from MPIL.

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Rather, as Mr. Eisenberg testified, recoveries from entities other than MPIL are more than sufficient to cover the Class 5 gift to MIFSA creditors.[224] Sanofi's expert witness, Mr. Madden, did not present an analysis sufficient to rebut that conclusion.[225] Because the Class 5 gift is not dependent on any recoveries from MPIL, the absolute priority rule is not implicated.

224 12-10-21 Tr. at 30-32 (Eisenberg); see also Debtor P2 Ex 34 at 42 (Table 4).

225 12-15-21 Tr. at 157.

Accordingly, I conclude that the Plan does not violate the absolute priority rule and that the requirements of Section 1129(b)(2) are satisfied. Sanofi's objection is overruled.

VII. Section 1129(d)

Section 1129(d) of the Code specifies that a court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. *In re Aleris Int'l, Inc.*, 2010 WL 3492664, at *31 (Bankr. D. Del. May 13, 2010); *see* 11 U.S.C. § 1129(d). There are no objections related to this subsection. Having reviewed the Plan and the record, I find that the principal purpose of this Plan is not the avoidance of taxes or avoidance of the application of section 5 of the Securities Act of 1933. Accordingly, the Plan complies with Section 1129(d).

VIII. Non-Estate Professionals' Fees

The Plan proposes to pay the attorneys' fees for certain non-estate professionals.[226] The UST objects arguing that the fee provisions cannot be approved because Section 503 provides the "sole source" of authority to pay post-petition professional fees on an administrative basis.[227]

226 Plan Article IV.X.8 and 9. (providing for the establishment of the Hospital Attorney Fee Fund for the payment of attorneys' fees and costs of the Ad Hoc Group of Hospitals with respect to Hospital Opioid Claims, the NAS Monitoring Attorney Fee Fund for the payment of attorneys' fees and costs of the NAS Committee with respect to the NAS Monitoring Opioid Claimants, the Ratepayer Attorney Fee Fund for the payment of attorneys' fees and costs of the Emergency Room Physicians Opioid Claimants, the Opioid Attorneys' Fee Fund for the payment of costs and expenses (including attorneys' fees) of the Opioid Claimants, the Municipal and Tribe Opioid Attorneys' Fee Fund for the payment of costs and expenses (including attorneys' fees) of Holders of Municipal Opioid Claims and Tribe Opioid Claims other than any amounts paid to counsel to the Governmental Plaintiff Ad Hoc Committee and the MSGE Group in accordance with the Plan and the Restructuring Support Agreement,458 and the State Opioid Attorneys' Fee Fund for the payment of costs and expenses (including attorneys' fees) of the States (including any ad hoc group thereof) other than any amounts paid to counsel to the Governmental Plaintiff Ad Hoc Committee in accordance with the Plan and the Restructuring Support Agreement).

227 D.I. 4718, UST Objection at 34.

***47** Debtors respond that the payment of non-estate professional fees is authorized by other provisions of the Code, including Section 363(b), 365, 1123(b)(6), 1129(a)(4) and Bankruptcy Rule 9019. They argue that "under the 'broad grant of authority' provided by Section 1123(b)(6) of the Code to 'include any ... appropriate provision not inconsistent with the applicable provisions of' chapter 11, 'reorganization plans, after they get the requisite assent, may allocate and distribute the value of the debtors' estates by a broad variety of means."[228] Section 1129(a)(4), for example, "endorses the notion that a debtor will sometimes need to negotiate certain payments to stakeholders in order to come to a consensual resolution and get a plan approved." *In re AMR Corp.*, 497 B.R. 690, 695 (Bankr. S.D.N.Y. 2013). Debtors further contend that the payment of the non-estate professional fees is in the best interests of Debtors' business and restructuring efforts because absent the commitment of these attorneys and other representatives, Debtors would not have been able to secure the settlements and allocations that form the heart of the reorganization, and they would be forced to litigate thousands of lawsuits. I agree.

228 Debtors' Confirmation Brief at 178 (citing 11. U.S.C. § 1123(b)(6) and *In re Adelphia Commc'ns Corp.*, 441 B.R. 6, 18 (Bankr. S.D.N.Y. 2010).

"Section 503(b) does not provide, in words or substance, that it is the *only* way by which fees of this character may be absorbed by an estate." *In re Adelphia Commc'ns Corp.,* 441 B.R. 10, 11-12 (Bankr. S.D.N.Y. 2010) (emphasis in original).[229] Article IV.X.8 and 9 is a provision that is a part of the heavily negotiated Opioid Settlement, which is the result of the Opioid Mediation. That settlement is subject to this Court's review under both Rule 9019 and section 1129(a)(4).

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In re Purdue, 633 B.R. at 66 ("The settlements provided for in section 5.8 that resulted from the mediation are subject to this Court's review both under Bankruptcy Rule 9019 and ... under section 1129(a)(4)[.]"). The mediation report submitted by Mr. Feinberg[230] demonstrates that the non-estate professional fees are both reasonable and necessary. He states:

> All parties have informed the Mediator that these various fee resolutions are an integral and non-severable part of the overall settlements regarding allocation among public and private Opioid Claimants, and that the settlements reached regarding allocation indeed are dependent on the various agreements reached pertaining to contingency fees and common benefit funding. I am not aware of any facts that would make me doubt the veracity of such representations.
>
> [ ] In my opinion, based on my decades of experience and involvement in mediating mass tort litigations and settlements, I believe that the contingency fee resolutions, as well as the common benefit assessments, reached in this Mediation are consistent with fee awards, arrangements and assessments agreed upon in other similar mass tort situations, and properly reflect a fair and reasonable settlement based on the work engaged in by all Mediation participants.[231]

This testimony is unrefuted, and I find it to be persuasive evidence of the reasonableness of these provisions. The UST's objection is overruled.

229 I agree with Judge Drain that the UST's reliance on *In re Lehman Bros. Holdings, Inc.*, 508 B.R. 283 (S.D.N.Y. 2014) is misplaced. As Judge Drain explained, in *Lehman Bros.*, "the district court noted that Congress specifically precluded in Bankruptcy Code section 503(b)(3)(D) recovery by official creditors' committee members of their postpetition fees and expenses, and therefore any settlement of those expenses would have been an improper workaround of that provision." *In re Purdue Pharma L.P.*, 633 B.R. 53, 66 (Bankr. S.D.N.Y. 2021), overruled on other grounds by 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021). That is not the situation here.

230 Mediator's Report, D.I. 4946, Debtor P2 Ex 88.

231 *Id.* at ¶ 13-14.

IX. Substantive Consolidation

Sanofi contends that the Plan is unconfirmable because it improperly consolidates Debtors' estates without meeting the requirements for substantive consolidation set by the Third Circuit.[232] Specifically, Sanofi claims that Debtors do not breakdown the administrative, priority, and unsecured claims for each Debtor. Debtors' counter that this is simply untrue, citing to the testimony of Mr. Eisenberg, who explained how both Debtors' Liquidation Analysis and Debtors' Waterfall were done on a debtor-by-debtor basis.[233] I agree. While Sanofi made this substantive consolidation argument in its objection, it presented no evidence on the issue and there is nothing in the record to support the conclusion that the Plan assumes a *de facto* substantive consolidation of the Debtors. Sanofi's objection is therefore overruled.

232 D.I. 5101, Supplemental Objection of Sanofi-Aventis U.S. LLC

233 12-9-21 Tr. at 212, 240; see also Debtors P2 Ex 14 (Liquidation Analysis) and Debtors P2 Ex 10 (Debtors' Waterfall).

X. Constructive Trust:

***48** Glenridge argues that because it asserts a claim for the imposition of a constructive trust in an adversary proceeding against the Debtors that its claim must be separately classified and that Debtors must reserve funds to satisfy its claims.[234] I disagree. As I stated in my November 4th bench ruling, the Royalty Agreement between Debtors and Glenridge transferred all rights, title, and interest, if any, that Glenridge had in Acthar to the Debtors.[235] Accordingly, Glenridge has no property interest in Acthar, as would be required to impose a constructive trust. Glenridge's objection is therefore overruled.

234 D.I. 4701 (Glenridge Objection) at 15; Adv. Pro. No. 21-51178 (JTD).

235 D.I. 5186.

XI. Pro Se Objections

There are a few remaining objections to the Plan asserted by *pro se* parties that need to be addressed separately. First, Mr. Edelman argues that the Opioid Settlement cannot be approved because he has objected to the opioid claims and that objection must be resolved before the settlement can be approved. Second, the Pro Se Shareholders and Mr. Koppenhafer argue that the Management Incentive Plan ("**MIP**") included in the Plan is an unwarranted attempt to benefit management and key employees who are responsible for the bankruptcy filing. And finally, Mr. Koppenhafer asserts that the RSA Parties interests should be subordinated

to the interests of the 4.75% Noteholders because the RSA Parties are non-statutory insiders.

A. Edelman Objection

Mr. Edelman argues that because he objects to the Opioid Claims under Section 502, that objection must be resolved first before the Opioid Settlement can be approved. Specifically, he argues that if a party-in-interest objects to a claim, Section 502 provides that the court "shall determine" the amount of the claim and "shall allow" the claim in the determined amount. Even if Mr. Edelman had filed a claim objection under Section 502, which he has not,[236] there is no direct conflict between Section 502 and Rule 9019 that would require a resolution of the claim objection before approving the Opioid Settlement. *In re Kaiser Aluminium Corp.* 339 B.R. 91, 94 (D. Del. 2006). Indeed, such a requirement would undermine the important policy of promoting settlements in bankruptcies as it would require parties to litigate the very issues the settlement seeks to resolve. *Id.* Holding otherwise would allow a party-in-interest unfettered power and allow them to derail settlements, which would slow down the bankruptcy proceedings. Mr. Edelman's objection on these grounds is therefore overruled.

236 While Mr. Edelman raises an objection to the Opioid Settlement, he did not specifically file any objection to the Opioid Claims under Section 502.

B. MIP Objection

The Pro Se Shareholders and Mr. Koppenhafer object to the inclusion of the proposed MIP in Debtors' Plan. They argue the MIP is an improper attempt to reward management and other key employees of Debtors when they are the ones responsible for Debtors' bankruptcy filing. Debtors assert that the MIP is justified, proposed in good faith, and does not violate the absolute priority rule because any payments under the MIP will come from what would otherwise go to the Class 5 Guaranteed Unsecured Noteholders. They argue that MIPs are customary for similarly situated companies and will maximize the enterprise value of the Reorganized Debtors by aligning the post-emergence interests of the MIP Participants and the Reorganized Debtors. I agree.

In support of the MIP, Debtors offered the testimony of Douglas Friske, a compensation consultant at Willis Towers Watson.[237] Mr. Friske explained that MIPs, which are a standard part of compensation packages offered by companies like Mallinckrodt, are incentive plans that provide stock or equity compensation to participants either for achieving certain performance metrics or for staying employed with the company. MIPs have several purposes, including aligning the interests of the participants with those of the shareholders, ensuring continued retention of employees, and attracting new employees.[238]

237 12-8-21 Tr. at 83.

238 *Id.* at 84-86. Debtors P2 Ex 3 (MIP Summary).

***49** Mr. Friske evaluated the MIP contained in the Plan and explained that it sets aside 10% of Debtors' post-emergence equity for "grants" or awards of equity to MIP participants, which is in line with similar MIPs offered by comparable companies. Mr. Friske stated that the initial grant of no less than 50% of reserve contained in Debtors' MIP is also standard in the market. He explained that the purpose of a sizeable grant is to get the new company off to a good start by creating immediate alignment of interests and incentives for moving forward. The initial MIP grant here will be some combination of stock options, restricted stock, and shares of performance vesting stock, but the decisions regarding what will be granted and how it will be allocated will be determined by the new board of the new entity.[239] Debtors' MIP does not commit the reorganized debtors to any issuance beyond the initial grant and does not include a commitment to any specific employee. He further testified that the Plan's proposed MIP was the product of arm's length negotiations with bondholders and creditors and that the post-emergence owners approve of it.[240] Lastly, Mr. Friske testified that not having a MIP would be detrimental in terms of recruiting and the general engagement of participants.[241]

239 *Id.*at 87-93.

240 *Id.* at 96.

241 *Id.* at 96-97.

I find this testimony to be persuasive evidence that the MIP included in the Plan is reasonable and was proposed in good faith. There is no evidence before me that would support a contrary conclusion. This Court has previously approved plans of reorganization that contains MIPs similar to that proposed here. *See In re Global Home Products, LLC*, 369 B.R. 778, 786 (Bankr. D. Del. 2007) (holding that the management incentive plan is in the ordinary course of the debtors' businesses, and thus, is approved); *see also In re Nellson Nutraceutical, Inc.*, 369 B.R. 787 (Bankr. D.

Del. 2007) (concluding the ordinary course employee bonus compensation program, which included management, is in the ordinary course of the debtors' business); see also *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 618 (Bankr. D. Del. 2001) (stating the management incentive plan is proper. "The Senior Lenders are free to allocate such value without violating the 'fair and equitable' requirement. The objections to the New Management Incentive Plan are overruled."). I find the MIP to likewise be appropriate here. For these reasons, the objections of the Pro Se Shareholders and Mr. Koppenhafer are overruled.

C. Koppenhafer Objection

Mr. Koppenhafer argues that the RSA parties should be subordinated to the interests of the 4.75% Noteholders because the RSA parties are non-statutory insiders.[242] Debtors counter that the RSA parties are not insiders because they negotiated at arm's length with Debtors and nothing in the record would suggest otherwise. There is therefore no basis to conclude that the RSA parties are insiders. *See In re Winstar Commc'n, Inc.*, 554 F.3d 382, 399 (3d Cir. 2009) ("An arm's-length transaction is a transaction in good faith in the ordinary course of business by parties with independent interests ... [that] each acting in his or her own best interest[ ]would carry out ....") (quotation omitted) (quoting *Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1277 n.4 (10th Cir. 2008)). I agree and overrule this objection.

242 D.I. 3797 Koppenhafer Objection.

CONCLUSION

In sum, having considered all the testimony and evidence submitted in support of and in opposition to confirmation of Debtors' Fourth Amended Plan of Reorganization, I find the Plan satisfies the statutory requirements of the Code, with the one exception noted above. All objections, including any not specifically addressed in this Opinion, other than to the Exculpation Provision, are overruled. Debtors should submit a revised form of order.

APPENDIX 1

In re: MALLINCKRODT PLC, et al.

Debtors-in-Possession

Table 2 to Eisenberg Declaration: Comparison of Waterfall Entitled Recovery Scenarios to Plan Recovery

Entitled Recovery Classification of Claims Waterfall Reorganization Alternative Waterfall Second Alternative Plan Recovery Scenario Scenario Waterfall Scenario $ 000s % $ 000s % $ 000s Class 2 & 3 - First Lien Claims1 % $ 000s % $3,172,712 100% $3,211,094 100% $3,172,712 100% $3,172,712 100% Class 4 - Second Lien Notes Claims2 $329,535 100% $355,973 100% $329,535 100% $329,535 100% Class 5 - Guaranteed Unsecured Notes3,4 $1,376,773 89% $1,330,526 86% $1,647,876 100% $1,148,266 74% Class 6 - General Unsecured Claims5 $22,547 0% $21,793 0% $191,686 Class 7 - Trade Claims6 3% $210,000 4% $295 1% $134 0% $14,521 Class 8 & 9 - Opioid Plaintiff Claims7,8 35% $41,349 100% $1,325,200 5% $132,357 1% $1,032,673 4% Class 10 - Settled Federal/State Acthar Claims9 $1,325,200 5% $177,700 28% $0 0% $10,905 2% $177,700 28%

***50** *(1) Class 2 & Class 3 - First Lien Claims includes the First Lien Credit Agreement Claims (Class 2) and the First Lien Notes Claims (Class 3)*

(2) Class 3 and Class 4 Claims are assumed to have makewhole claims asserted under the Alternative Waterfall sale scenario which differs from Plan treatment.

(3) Class 5 Claims in the Second Alternative Waterfall Scenario include postpetition accrued interest since the principal debt claim is satisfied in full.

(4) Class 5 Guaranteed Unsecured Notes Claims Plan recovery is 44% after adjusting for the net effect of the Refreshed Projections.

(5) Class 6 General Unsecured Claims under the Plan & Reorganization Scenario: $4.3bn for Class 6(a) Acthar Claims, $800m for Class 6(b) Gx Price Fixing, $18m for Class 6(c) Asbestos $15m for Class 6(d) Legacy Notes $215m for Class(e) & (f) Environmental & Other GUCs and $137m for Class 6(g) 4.75% Notes.

(6) Class 7 Trade Claims are not adjusted for estimated contract cure amounts.

(7) Recovery for Class 8 and Class 9 Claims assumes an opioid claim amount of $25 billion. This assumption is

illustrative and the Holders of Class 8 and Class 9 Claims do not agree with such estimate and assert opioid claims far in excess of $25 billion.

(8) The Opioid Settlement of $1.325 billion represents the net present value of the cash payment stream payable under the settlement discounted at 10%. This estimate does not ascribe value to litigation claims, insurance rights, or other contingent assets being contributed as part of the Opioid Settlement.

(9) Class 10 - Settled Federal/State Acthar Claims recovery based on the $640 million CMS judgement claim.

Debtor P2 Ex. 9

C.A. No. 20-12522 (JTD)

MNK PLAN 00243561

In re: MALLINCKRODT PLC, et al.

Debtors-in-Possession

Table 3 to Eisenberg Declaration: Bridge from Waterfall Reorganization Scenario to Plan
Additional Consideration *($000s)* **Estimated Waterfall Reorganization Provided by Guaranteed Pro Forma Plan Claim Amount *% Rec* [1] Scenario Unsec. Notes to Trade & *% Rec* [1] Reorganization Scenario GUCs Total Enterprise Value $ 5,450,000 $** less: Opioid Settlement[2] **- $ 5,450,000** (1,325,200) less: Federal/State Acthar Settlement - (1,325,200) **Total Settlement Claims** (177,700) - (177,700) **$ (1,502,900)** less: Administrative Expense **$ - $ (1,502,900)** less: Non-Dischargeable Liabilities (173,100) - (173,100) **Enterprise Value Available for Distribution** (12,503) - (12,503) **$ 3,761,497 $** add: Estimated Cash & Other Assets **- $ 3,761,497** 1,237,803 **Distributable Value** 1,237,803 **$ 4,999,299 $ -** Class 2 & 3 - First Lien Claims **$ 4,999,299** $ 3,172,712 (3,172,712) *100%* Class 4 - Second Lien Notes Claims - (3,172,712) *100%* 329,535 (329,535) *100%* **Total Secured Claims** - (329,535) *100%* **$ (3,502,247) $ - $ Distributable Value after satisfying Secured Claims (3,502,247) $ 1,497,053 $** Priority Tax **- $ 1,497,053** 114,740 (97,438) *85%* **Value Available to Other Unsecureds** - (97,438) *85%* **$ 1,399,615 $ -** Class 5 - Guaranteed Unsecured Notes **$ 1,399,615** 1,543,810 (1,376,773) *89%* Class 6 - General Unsecured Claims[3] 228,507 (1,148,266) *74%* 5,502,304 (22,547) *0%* Class 7 - Trade Claims[4] (187,453) (210,000) *4%* 41,349 **Total Other Unsecured Recoveries** (295) *1%* (41,054) (41,349) *100%* **$ (1,399,615) $ - $ (1,399,615) Value Available to Subordinate Unsecured Creditors & Equity $ - $ - $ - Class 6 Recoveries** Class 6(a) Acthar Claims $ Class 6(b) Generics Price Fixing Claims - $ 34,090 $ $ 34,090 Class 6(c) Asbestos Claims 561 $ 7,439 $ $ Class 6(d) Legacy Unsecured Notes Claims 8,000 - $ 18,000 $ $ 18,000 Class 6(e) Environmental Claims & Class 6(f) Other GUCs - $ 10,859 $ $ 10,859 Class 6(g) 4.75% Unsecured Notes Claims 21,986 $ 50,073 $ $ **Subtotal** 72,059 - $ 56,991 $ **$** 56,991 GUC Trust Expenses **22,547 $ 177,453 $ Total Class 6 Recovery 200,000** n/a $ 10,000 $ **$** 10,000 **22,547 $ 187,453 $ 210,000**

***51** *(1) Recoveries exclude im act related to dilution from MIP*

(2) The Opioid Settlement of $1.325 billion represents the net present value of the cash payment stream payable under settlement discounted at 10%. This estimate does not ascribe value to litigation claims, insurance rights, or other contingent assets being contributed as part of the Opioid Settlement.

(3) Class 6 Plan recovery of $210 million is based on an estimate provided by the UCC of aggregate GUC Trust Consideration before estimated GUC Trust expenses. Plan recoveries for Class 6 sub-classes are based on the allocation and methodology adopted pursuant to the UCC Settlement using current estimates of the aggregate allowable claims in Class 6(e) and 6(f) at each respective Debtor.

(4) Class 7 Trade Claims are not adjusted for estimated contract cure amounts.

Debtor P2 Ex. 10

C.A. No. 20-12522 (JTD)

MNK_PLAN_00243562

In re: MALLINCKRODT PLC, et al.

Debtors-in-Possession

Table 5 to Eisenberg Declaration: Alternative Waterfall Scenario Compared to Plan

Est Claim *($000s)* **Amount Alternative Waterfall Pro Forma Plan (Alternative** ***% Rec*** [1] **Scenario** ***% Rec*** [1] **Reorganization Scenario Scenario) Total Enterprise Value $ 4,000,000 $** less: Opioid Settlement[2] **5,450,000** less: Federal/State Acthar Settlement *n/a* (1,325,200) **Total Settlement Claims** *n/a* (177,700) **$** less: Administrative Expense **- $ (1,502,900)** less: Non-Dischargeable Liabilities (260,800) (173,100) **Enterprise Value Available for Distribution** (12,503) (12,503) **$ 3,726,697 $** add: Estimated Cash & Other Assets **3,761,497** 1,422,632 **Distributable Value** 1,237,803 **$ 5,149,328 $ 4,999,299** Class 2 & 3 - First Lien Claims[3] $ 3,211,094 (3,211,094) *100%* Class 4 - Second Lien Notes Claims[4] (3,172,712) *100%* 355,973 (355,973) *100%* **Total Secured Claims** (329,535) *100%* **$ (3,567,068) $ (3,502,247) Distributable Value after satisfying Secured Claims $ 1,582,260 $** Priority Tax **1,497,053** 114,740 (97,450) *85%* **Value Available to Other Unsecureds** (97,438) *85%* **$ 1,484,811 $ 1,399,615** Class 5 - Guaranteed Unsecured Notes 1,543,810 (1,330,526) *86%* Class 6 - General Unsecured Claims[5] (1,148,266) *74%* 7,080,788 (21,793) *0%* Class 7 - Trade Claims[6] (210,000) *4%* 41,349 (134) *0%* Class 8 & 9 - Opioid Plaintiff Claims[7] (41,349) *100%* 25,000,000 (132,357) *1%* Class 10 - Settled Federal/State Acthar Claims *n/a n/a* 640,000 **Total Other Unsecured Recoveries** - *0% n/a n/a* **$ (1,484,811) $ (1,399,615) Value Available to Subordinate Unsecured Creditors & Equity $ - $ - Class 6 Recoveries** Class 6(a) Acthar Claims $ Class 6(b) Generics Price Fixing Claims - $ 34,090 $ Class 6(c) Asbestos Claims 49 $ 8,000 $ Class 6(d) Legacy Unsecured Notes Claims - $ 18,000 $ Class 6(e) Environmental Claims & Class 6(f) Other GUCs - $ 10,859 $ Class 6(g) 4.75% Unsecured Notes Claims 21,744 $ 72,059 $ **Subtotal** - $ 56,991 **$** GUC Trust Expenses **21,793 $ 200,000 Total Class 6 Recovery** n/a $ 10,000 **$ 21,793 $ 210,000**

(1) Recoveries exclude impact related to dilution from MIP.

(2) The Opioid Settlement of $1.325 billion represents the net present value of the cash payment stream payable under settlement discounted at 10%. This estimate does not ascribe value to litigation claims, insurance rights, or other contingent assets being contributed as part of the Opioid Settlement.

***52** *(3) 1st Lien Note claims include $38m make-whole claims in the Alternative Waterfall Scenario onl*

(4) 2nd Lien Note claims include $25m make-whole claims in the Alternative Waterfall Scenario onl

(5) Class 6 Plan recovery of $210 million is based on an estimate provided by the UCC of aggregate GUC Trust Consideration before estimated GUC Trust expenses. Plan recoveries for Class 6 sub-classes are based on the allocation and methodology adopted pursuant to the UCC Settlement using current estimates of the aggregate allowable claims in Class 6(e) and 6(f) at each respective Debtor

(6) Class 7 Trade Claims are not adjusted for estimated contract cure amounts.

(7) Recovery for Class 8 and Class 9 Claims assumes an opioid claim amount of $25 billion. This assumption is illustrative and the Holders of Class 8 and Class 9 Claims do not agree with such estimate and assert opioid claims far in excess of $25 billion. Includes recovery on Canadian Opioid Claim.

Debtor P2 Ex. 11

C.A. No. 20-12522 (JTD)

MNK PLAN 00243563

In re: MALLINCKRODT PLC, et al.

Debtors-in-Possession

Table 6 to Eisenberg Declaration: Second Alternative Waterfall Scenario Compared to Plan

($000s) **Estimated Consideration Provided by Second Alternative Pro Forma Plan Claim Amount** ***% Rec*** [1] **Guaranteed Unsecured Notes Waterfall Scenario** ***% Rec*** [1] **Reorganization Scenario to Each Class Total Enterprise Value $ 5,450,000 $** less: Opioid Settlement[2] **- $ 5,450,000** less: Federal/State Acthar Settlement n/a *(1,325,200)* (1,325,200) **Total Settlement Claims** n/a *(177,700)* (177,700) **$** less: Administrative Expense **- $ (1,502,900) $ (1,502,900)** (173,100) less: Non-Dischargeable Liabilities - (173,100) (12,503) **Enterprise Value Available for Distribution** - (12,503) **$ 5,264,397 $ (1,502,900)** add: Estimated Cash & Other Assets **$ 3,761,497** 1,237,803 **Distributable Value** 1,237,803 **$ 6,502,199 $ (1,502,900)** Class 2 & 3 - First Lien Claims **$ 4,999,299** $ 3,172,712 (3,172,712) *100%* Class 4 - Second Lien Notes Claims -

(3,172,712) *100%* 329,535 (329,535) *100%* **Total Secured Claims** - (329,535) *100%* **$ (3,502,247) $ - $ Distributable Value after satisfying Secured Claims (3,502,247) $ 2,999,953 $ (1,502,900)** Priority Tax **$ 1,497,053** 114,740 (102,292) *89%* **Value Available to Other Unsecureds** 4,854 (97,438) *85%* **$ 2,897,660 $ (1,498,046) $** Class 5 - Guaranteed Unsecured Notes **1,399,615** 1,647,876 (1,647,876) *100%* Class 6 - General Unsecured Claims[3] 499,611 (1,148,266) *74%* 7,073,504 (191,686) *3%* Class 7 - Trade Claims[4] (18,314) (210,000) *4%* 41,349 (14,521) *35%* Class 8 & 9 - Opioid Plaintiff Claims[5](26,828) (41,349) *100%* 25,000,000 (1,032,673) *4%* Class 10 - Settled Federal/State Acthar Claims 1,032,673 *n/a* 640,000 *n/a* (10,905) *2%* **Total Other Unsecured Recoveries** 10,905 *n/a* **$** *n/a* **(2,897,660) $ 1,498,046 $ (1,399,615) Value Available to Subordinate Unsecured Creditors & Equity $ - $ - $ -**

(1) Recoveries exclude impact related to dilution from MIP

(2) The Opioid Settlement of $1.325 billion represents the net present value of the cash payment stream payable under settlement discounted at 10%. This estimate does not ascribe value to litigation claims, insurance rights, or other contingent assets being contributed as part of the Opioid Settlement.

***53** *(3) Class 6 Plan recovery of $210 million is based on an estimate provided by the UCC of aggregate GUC Trust Consideration before estimated GUC Trust expenses. Plan recoveries for Class 6 sub-classes are based on h ll d h d l d d h UCC S l h ll bl l Cl 6 d 6 h D b*

(4) Class 7 Trade Claims are not adjusted for estimated contract cure amounts.

(5) Recovery for Class 8 and Class 9 Claims assumes an opioid claim amount of $25 billion. This assumption is illustrative and the Holders of Class 8 and Class 9 Claims do not agree with such estimate and assert opioid claims far in excess of $25 billion. Includes recovery on Canadian Opioid Claim.

Debtor P2 Ex. 12

C.A. No. 20-12522 (JTD)

MNK PLAN 00243564

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judgment against Boyko in the following amounts on behalf of the following Debtors:

Entity	Principal	Prejudgment Interest	Total
BICOM	$700,000	$34,791.73	$734,791.73
ISCOM	$200,000	$9,940.49	$209,940.49
BRAC	$306,250.00	$15,221.38	$321,471.38

The Court also finds that the Trustee is entitled to the entry of judgment against Flom in the following amounts on behalf of the following Debtors:

Entity	Principal	Prejudgment Interest	Total
BICOM	$1,768,550.00	$87,901.30	$1,856,451.30
ISCOM	$141,000.00	$7,008.05	$148,008.05
BRAC	$258,263.87	$12,836.35	$271,100.22

The Court will enter orders directing the Clerk of the Court to enter judgments that reflect the foregoing rulings.

IN RE: PURDUE PHARMA L.P., et al., Debtors.

Case No. 19-23649 (RDD) (Jointly Administered)

United States Bankruptcy Court, S.D. New York.

Signed September 17, 2021

Background: Debtors sought confirmation of Chapter 11 plan, to which objections were filed.

Holdings: The Bankruptcy Court, Robert D. Drain, J., held that:

(1) notice of debtors' request for confirmation was sufficient;

(2) debtors, as part of plan, could transfer liability insurance and liability-insurance rights to trusts or reorganized company established by the plan, notwithstanding any "anti assignment" provision in the applicable policies;

(3) plan's provision for paying certain contingency fees as well as for allocating them among counsel was reasonable;

(4) allowing claims of certain public creditors for voting purposes at $1 was proper;

(5) plan's separate classification of claims of Canadian municipalities and First Nations, as opposed to classifying their claims with those of United States public creditors and Native American tribes, was proper;

(6) plan's civil settlement with "shareholder released parties" was fair and equitable and in the best interests of the estate; and

(7) plan's release and injunction of third-party claims against "shareholder released parties" would be confirmed as modified.

Ordered accordingly.

1. Bankruptcy ⚷3567

Notice of the debtors' request for confirmation of Chapter 11 plan was sufficient; noticing program reached roughly 98% of the adult population of the United States and approximately 86% of Canadian adults, with an average frequency of message exposure in each case of four times, noticing program was extended extensively throughout the world where the debtors'

prescription-opioid products might have caused harm, and debtors had shown a willingness to consider requests to assert and prove claims late based on evidence of prisoners' unique circumstances that may have restricted notice to them.

2. Bankruptcy ⚷3566.1

Plan's proponent has burden of proof on applicable elements that must be met for plan to be confirmed; that burden of proof is satisfied by showing that test in applicable subsection of Bankruptcy Code has been met by preponderance of evidence. 11 U.S.C.A. § 1129(a).

3. Bankruptcy ⚷3553
Insurance ⚷1973, 3441

Debtors, as part of Chapter 11 plan, could transfer liability insurance and liability-insurance rights to trusts or reorganized company established by the plan, notwithstanding any "anti assignment" provision in the applicable policies. 11 U.S.C.A. §§ 1123(a)(5)(B), 1123(b)(2), 1123(b)(6).

4. Bankruptcy ⚷3567

Liability insurers had sufficient notice that debtors would seek findings in confirmation order that Chapter 11 plan could transfer liability insurance and liability-insurance rights to trusts or reorganized company established by the plan, notwithstanding any "anti assignment" provision in the applicable policies; insurers were well represented and are highly sophisticated, as evidenced by their negotiations over the plan's provisions and the proposed confirmation order relating to them, and they had a full opportunity to challenge such findings. 11 U.S.C.A. §§ 1123(a)(5)(B), 1123(b)(2), 1123(b)(6); Fed. R. Bankr. P. 2002(b).

5. Bankruptcy ⚷3555

Proposed Chapter 11 plan's provision for paying certain contingency fees as well as for allocating them among counsel was reasonable; mediated settlement set forth in the plan's provision benefited the estates and creditors by materially reducing the fees and expenses that might otherwise be claimed from the clients and therefore indirectly reduced the claims against the estates. 11 U.S.C.A. § 1129(a)(4).

6. Bankruptcy ⚷3566.1

Individuals objecting to confirmation of Chapter 11 plan lacked standing to assert that debtors gave insufficient notice to those incarcerated in prison of the bar date for filing claims; the individuals had filed a timely proof of claim and timely confirmation objection, which meant that there was no remedy that the court could grant for the alleged wrong. U.S. Const. art. 3, § 2, cl. 1.

7. Bankruptcy ⚷2159.1
Federal Courts ⚷2101

To have standing, and for there to be a case and controversy, the party raising a matter with a federal court must have a personal stake in fact in obtaining a remedy. U.S. Const. art. 3, § 2, cl. 1.

8. Bankruptcy ⚷3558

Chapter 11 plan's failure to provide for a restitution fund under the Mandatory Victims Restitution Act (MVRA) did not preclude confirming plan, assuming that such an objection was properly raised in the bankruptcy court as opposed to the district court as provided by debtors' criminal and civil settlement with the Department of Justice (DOJ); plan was proposed in good faith, and there was no evidence of any attempt at improperly cutting off rights that individual victims would have under the settlement. 11 U.S.C.A. § 1129(a)(3); 18 U.S.C.A. § 3663A.

9. Bankruptcy ⚷3563.1

Bankruptcy Code's cramdown provisions did not apply to Chapter 11 plan

objections by Canadian municipalities and First Nations; objectors conceded that if their votes were counted in the class of creditors in which they alleged their votes should have been counted, then class of creditors would still have overwhelmingly accepted the plan. 11 U.S.C.A. § 1129(b).

10. Bankruptcy ⚷2829, 3541.1

Allowing claims of certain public creditors for voting purposes at $1 was proper, as relevant to confirmation of Chapter 11 plan, where creditors made no request to estimate their claims for voting purposes to have them be temporarily allowed in a different amount. 11 U.S.C.A. § 502(c); Fed. R. Bankr. P. 3018(a).

11. Bankruptcy ⚷3550

Chapter 11 plan's separate classification of claims of Canadian municipalities and First Nations, as opposed to classifying their claims with those of United States public creditors and Native American tribes, was proper; Canadian municipalities and First Nations operated under different regulatory regimes with regard to opioids and abatement, which was the basis for debtors' bankruptcy, and the Canadian municipalities and First Nations did not request to participate in mediation that resulted in the plan's division of debtors' assets and third-party claims. 11 U.S.C.A. §§ 1122, 1123(a)(1), 1129(a)(1).

12. Bankruptcy ⚷3559

Debtors sufficiently demonstrated feasibility of Chapter 11 plan, where uncontested witness declaration showed projections for proposed reorganized company and discussed the assignability of debtors' insurance and insurance rights. 11 U.S.C.A. § 1129(a)(11).

13. Bankruptcy ⚷3550

Chapter 11 plan's classification of certain states and District of Columbia along with their political subdivisions was not improper; states and District of Columbia acknowledged that their claims, which were general and unsecured, had the same rights to debtors' assets as the political subdivisions. 11 U.S.C.A. § 1122(a).

14. Bankruptcy ⚷3550

Chapter 11 plan appropriately classified the United States in a different class than other public creditors; United States had qualitatively different claims to debtors' assets in some respects, mandating its multiple separate classifications from general unsecured creditors. 11 U.S.C.A. § 1123(a)(4).

15. Bankruptcy ⚷3558

Proposed Chapter 11 plan's National Opioid Abatement Trust (NOAT) distribution procedures satisfied statutory good-faith requirement; distribution procedures derived from good faith, arms-length negotiations by the states preceding the mediation, and then continuing to completion during it. 11 U.S.C.A. § 1129(a)(3).

16. Bankruptcy ⚷3558

Good-faith inquiry conducted as part of deciding whether to confirm a plan primarily focuses on whether the proposal of the plan was in good faith, not on whether the plan generally is in good faith. 11 U.S.C.A. § 1129(a)(3).

17. Bankruptcy ⚷3552

Proposed Chapter 11 plan's National Opioid Abatement Trust (NOAT) distribution procedures satisfied statutory "same treatment" requirement; consequences of how and when the class members would be paid under the plan did not produce a substantive difference in a claimant's opportunity to recover and were the result of, among other things, a comprehensive mediation and arms-length negotiations. 11 U.S.C.A. § 1123(a)(4).

18. Bankruptcy ⚷3555

Proposed Chapter 11 plan's civil settlement with "shareholder released parties," which included those parties paying $4.325 billion, agreeing to a resolution on naming rights, and agreeing not to engage in any business with reorganized company, was fair and equitable and in the best interests of the estate; settlement was the product of arms-length bargaining conducted in two separate mediations, discovery produced over 10,000,000 documents, which teams of lawyers for creditors pored through to find suggesting a claim against the "shareholder released parties," the official unsecured creditors committee thoroughly investigated estates' potential claims against the "shareholder released parties," and creditors voted by an overwhelming margin in plan's favor. 11 U.S.C.A. § 1123(a).

19. Bankruptcy ⚷3033

In determining whether to approve a settlement of a debtor's estate's claims, a bankruptcy court must make an informed independent judgment that the settlement is fair and equitable and in the best interests of the estate.

20. Bankruptcy ⚷3033

When determining if a settlement of a debtor's estate's claims is fair and equitable and in the best interests of the estate, the bankruptcy court is not to decide the numerous questions of law and fact raised but rather to canvas the issues and see whether the settlement falls below the lowest point in the range of reasonableness.

21. Bankruptcy ⚷2547

A beneficial interest in a valid spendthrift trust may be excluded from a debtor's bankruptcy estate. 11 U.S.C.A. § 541(c)(2).

22. Bankruptcy ⚷2041.5

Federal courts, including bankruptcy courts, have only the jurisdiction given to them by the Constitution or Congress.

23. Bankruptcy ⚷2043(3)

Civil proceeding is one over which bankruptcy court can exercise "related to" jurisdiction if its outcome might have any conceivable effect on bankruptcy estate. 28 U.S.C.A. § 1334(b).

24. Bankruptcy ⚷2043(3), 2053

While "related to" jurisdiction is not limitless, it is fairly capacious and includes suits between third parties that have an effect on bankruptcy estate. 28 U.S.C.A. § 1334(b).

25. Bankruptcy ⚷2043(3)

Action is one over which bankruptcy court can exercise "related to" jurisdiction if its outcome could alter debtor's rights, liabilities, options, or freedom of action, either positively or negatively, and which in any way impacts upon handling and administration of bankruptcy estate. 28 U.S.C.A. § 1334(b).

26. Bankruptcy ⚷3555

Bankruptcy court had subject-matter jurisdiction to impose a third-party claims release and injunction under proposed Chapter 11 plan; the third-party claims directly affected the res of debtors' estates, including insurance rights, the rights of "shareholder released parties" to indemnification and contribution, and the ability of debtors to pursue the estates' own closely related claims. 28 U.S.C.A. § 1334(b).

27. Constitutional Law ⚷4478

Release of third-party claims under a Chapter 11 plan does not violate the third-party claimants' rights to due process. U.S. Const. Amend. 5; 11 U.S.C.A. § 1123.

28. Constitutional Law ⚷4478

Issue of what process is due in a bankruptcy case requires a court to ask whether the notice was reasonably calculated under the circumstances to apprise interested parties of the pendency of the plan's proposed release and afford them an opportunity to present their objections. U.S. Const. Amend. 5.

29. Constitutional Law ⚷4478

Whether notice satisfies due process in bankruptcy proceedings turns upon what is reasonably known by the debtor of the party who would be affected by the action for which the debtor is seeking permission. U.S. Const. Amend. 5.

30. Bankruptcy ⚷2045, 2123

A proceeding to determine whether a Chapter 11 plan that contains a release of third-party claims should be confirmed is a "core proceeding," and, given that it is a fundamentally central aspect of a Chapter 11 case's adjustment of the debtor/creditor relationship, is permissible under Article III. U.S.C.A. Const. Art. 3, § 1 et seq.; 28 U.S.C.A. § 157(b).

See publication Words and Phrases for other judicial constructions and definitions.

31. Bankruptcy ⚷3555

To properly be subject to a third-party claims release under a Chapter 11 plan, the third-party claim should be premised as a legal matter on a meaningful overlap with the debtor's conduct.

32. Bankruptcy ⚷3555

Chapter 11 plan's release and injunction of third-party claims against "shareholder released parties" would be confirmed as modified to reflect that debtors' conduct or a claim asserted against debtors had to be a legal cause of the released claim or a legally relevant factor to the third-party cause of action against the shareholder released party for the third-party claim to be subject to the release; relationships among the "shareholder released parties" were sufficiently close to lead to the conclusion that the aggregate settlement payment hinged on each being released. 11 U.S.C.A. §§ 105(a), 1123(a)(5), 1123(b)(6), 1129(a)(7).

33. Bankruptcy ⚷3555

That proposed Chapter 11 plan's release and injunction of third-party claims against "shareholder released parties" allegedly infringed on the sovereignty and police power of objecting states and city did not preclude confirming plan; although Congress provided a limited exception to the automatic stay in regard to a governmental unit's action to enforce its police or regulatory power, a governmental unit's action to enforce a monetary judgment or to obtain or enforce a lien against the estate was not excepted from the automatic stay, and the plan only limited the objectors' remedies against the "shareholder released parties" to collect money on account of their past conduct. 11 U.S.C.A. §§ 362(a), 362(b)(4); 28 U.S.C.A. § 1452(a).

George W. Shuster, Jr., Wilmer Cutler Pickering Hale and Dorr, Boston, MA, Paul M. Singer, Reed Smith LLP, Pittsburgh, PA, Chane Buck, Jones Day, San Diego, CA, Julie Elizabeth Cohen, Skadden, Arps, Slate, Meagher & Flom LLP, Paul E. Breene, Reed Smith LLP, Scott I. Davidson, King & Spalding LLP, Jeffrey R. Gleit, Sullivan & Worcester LLP, Timothy E. Graulich, Marshall Scott Huebner, Benjamin S. Kaminetzky, Darren S. Klein, James I. McClammy, Marc Joseph Tobak, Eli J. Vonnegut, Davis Polk & Wardwell LLP, Anna Kordas, Jones Day, Ann Kramer, Reed Smith LLP, Anthony D.

Boccanfuso, Arnold & Porter Kaye Scholer LLP, New York, NY, for Debtor.

Ira S. Dizengoff, Akin, Gump, Strauss, Hauer & Feld, LLP, New York, NY, Clayton Matheson, I, San Antonio, TX, Corey William Roush, Akin Gump Strauss Hauer & Feld LLP, Washington, DC, Elizabeth Scott, Akin Gump Strauss Hauer & Feld LLP, Dallas, TX, Ashley Crawford, Akin Gump Strauss Hauer & Feld, San Francisco, CA, for Creditor Committee.

MODIFIED BENCH RULING ON REQUEST FOR CONFIRMATION OF ELEVENTH AMENDED JOINT CHAPTER 11 PLAN [1]

Hon. Robert D. Drain, United States Bankruptcy Judge

The wrongful use, including marketing and distribution, of opioid products has contributed to a massive public health crisis in this country. The role of the debtors before me (the "Debtors" or "Purdue") and their owners in that crisis makes these bankruptcy cases highly unusual and complex.

This is so primarily because of the nature of the creditor body, given the extraordinarily harmful effects of the Debtors' primary product, the prescription drug OxyContin, and other synthetic opioids on ordinary people as well as on the local governments, Indian tribes, hospitals and other first responders, states and territories, and the United States that confront these effects every day. In a very real sense, every person in the range of the Debtors' opioid products, sold throughout the United States, was a potential creditor.

Bankruptcy cases present a unique and perhaps the only means to resolve the collective problem presented by an insolvent debtor and a large body of creditors competing for its insufficient assets, including especially when there are mass claims premised on products to which, as here, massive harm is attributed.

Bankruptcy cases focus the solution away from individual litigations to a fair collective result subject to the unique ability under bankruptcy law to bind holdouts under well-defined circumstances who could not otherwise be bound under non-bankruptcy law.

Over the years courts and the parties to bankruptcy cases have refined and improved on such solutions, which clearly have been brought to bear in these cases involving likely the largest creditor body ever. And I'm not speaking solely of the roughly 618,000 claims that were filed, although I believe that is a record, but also, as noted, the people who could arguably be said to be represented by their local and state governments and by the United States.

Here, too, the parties have worked in unique and trailblazing ways to address the public health catastrophe that underlies those claims.

These cases are complex also because the Debtors' assets include enormous claims against their controlling shareholders, and in some instances directors and officers, who are members of the Sackler family, whose aggregate net worth, though

1. Because of the importance of promptly delivering a ruling on confirmation of the amended joint chapter 11 plan in these cases, I gave a lengthy bench ruling rather than reading from and issuing a written decision. I informed the parties, however, that after reviewing the transcript of that ruling I might modify it to make it clearer, add information that I inadvertently omitted, and of course correct typographical errors in the transcript. This Modified Bench Ruling, while still more colloquial than a written decision, attempts to do that and is being filed separately from the transcript of my bench ruling.

greater than the Debtors', also may well be insufficient to satisfy the Debtors' claims against them and other very closely related claims that are separately asserted by third parties who are also creditors of the Debtors.

Since the start, then, key issues for these cases have been (a) how can such claims be resolved to best effect for the claimants and (b) is such a resolution authorized under the Bankruptcy Code and law? The primary questions for me now, focusing on the Chapter 11 plan before the Court, are can these issues be resolved by confirmation of the plan, and should they?

It is clear after a lengthy evidentiary hearing that there is now no other reasonably conceivable means to achieve the result that would be accomplished by the Chapter 11 plan in addressing the problems presented by the Debtors' Chapter 11 cases. I believe it is also clear under well-established precedent that, with a sufficient factual record, Congress in the Bankruptcy Code and the courts interpreting it provide the authority for such a resolution. That leaves the question whether the proposed resolution should be implemented.

This ruling explains my findings and conclusions regarding these issues, informed by the record of these cases, the parties' votes on the plan, the parties' briefing, and the record of a six-day trial involving 41 witnesses and a courtroom full of exhibits and two full days of oral argument.

[1] **Notice.** The notice of the Debtors' request for confirmation of the plan was described by Jeanne C. Finegan in her declarations and live testimony, primarily in her third supplemental declaration, which, under my order setting procedures for the confirmation hearing, served as her direct testimony but also referred to prior declarations that she had provided in these cases regarding the notice to claimants and potential claimants.

As established by her testimony, the Debtors' notice of (a) these cases, (b) the right to assert a claim against the Debtors, (c) the Debtors' request for confirmation of the plan, and (d) the proposed release of third parties' claims against the released parties in the plan, primarily of such claims against the Sacklers and their related entities (the "shareholder released parties"), was unprecedentedly broad.

Ms. Finegan's testimony was uncontroverted and credible that the Debtors' noticing program as implemented under her supervision reached roughly 98 percent of the adult population of the United States and approximately 86 percent of Canadian adults, with an average frequency of message exposure in each case of four times, and also was extended extensively throughout the world where the Debtors' products might have caused harm. As testified to by Ms. Finegan, the supplemental confirmation hearing notice plan reached an estimated 87 percent of all U.S. adults, with an average message frequency of five times, and an estimated 82 percent of all Canadian adults, with an average message frequency of six times. It also was expanded to 39 countries not included in the bar date notice, served over 3.6 billion online and social impressions, and resulted in over 3,400 news mentions around the world.

The program was carefully tailored to reach not only known creditors but also the population at large, including through various types of media aimed especially at people who may have been harmed by the Debtors' products. Ms. Finegan's calculations reflect literally billions of hits on the internet and social media as well as reliable estimates of the very wide extent of the other means of notice by TV, radio, various types of publications, billboards,

and outreach to victims' advocates and abatement-centered groups.

The only caveat that I have to the extraordinarily broad scope of the notice of the Debtors' request for confirmation of the plan pertains to notice to those in prison. The notice program was in large part effective in reaching prisons and groups known to work with people who are in prison and suffering from opioid use disorder or other adverse effects of opioids. But it is possible that because of prison regulations and at times the lack of access to TV, radio and other media, prisoners may not have received the same high level of notice of these cases, the bar date, and the Debtors' request to confirm the plan, including of the proposed third-party claim releases in the plan.

On the other hand, the Debtors, including in the plan's personal injury trust procedures, have shown a willingness to consider requests to assert and prove claims late based on evidence of prisoners' unique circumstances that may have restricted notice to them.

The United States Trustee has suggested that references in notices to the plan would have sent people to a lengthy and complex set of release provisions. This is true, as is the observation that it helps to have legal training to parse those provisions, although during the confirmation hearing they have been narrowed and simplified. And as reflected by the record of the parties' responses to my comments during the hearing, those provisions were subject to some potential for differing interpretations, although I believe that is not the case now that they have been revised.

Nevertheless, the most widespread notices of the plan's proposed third-party claims release were simple, in plain English that the plan contemplated a broad release of the Sacklers and their related entities of civil claims pertaining to the Debtors, including claims against them held by third parties. Finegan Decl. at paragraphs 19-22 (describing various ways this notice was disseminated). In addition, extensive media coverage of these cases also hammered home that point. Indeed, wide media coverage exaggerated the extent of the plan's proposed releases of claims against the Sacklers and further noted controversy over its basis in applicable law. And it is these aspects of the plan's third-party claims release — that it is too broad and unfair and that it is not authorized under applicable law — that primarily underly the objections to confirmation of the plan that have been filed, including by the U.S. Trustee, not that the releases are hard to read.

I therefore conclude that the Debtors' notice of the confirmation hearing and the proposed releases in the plan was sufficient and indeed unprecedentedly broad.

Voting on the Plan. I should next note the vote on the plan by the classes of claimants entitled to vote. It is important to address this issue up front because if a plan is not accepted by the vote of an impaired class, the plan proponent must proceed with respect to that class under the so-called cramdown provision of the Bankruptcy Code, section 1129(b). On the other hand, if the impaired classes have voted in favor of the plan's confirmation, the Court analyzes only section 1129(a)'s requirements for confirmation and the incorporated provisions of the Bankruptcy Code related to it, such as sections 1122 and 1123 of the Code.

Based on the ballot declaration and testimony of Christina Pullo, an unprecedented number of votes were cast on the plan, over 120,000. In contrast, votes on most Chapter 11 plans, even in large cases, number between a few and a few thousand.

And of the votes cast, the plan was in fact accepted by every voting class, thus obviating the need to proceed with the "cramdown" provisions of the Bankruptcy Code except as to insider classes where the plan has satisfied section 1129(b).

In addition, and significantly, each voting class voted in favor of confirmation of the plan overwhelmingly. In the aggregate, the vote was over 95 percent in favor of confirmation. That, too, is a remarkable result given the very large number of people who got notice, who were entitled to vote, and who voted.

For the personal-injury claims classes, the vote was 95.7 percent (Class 10(b)) to over 98 percent (Class 10(a)). In each class the percent voting in favor of the plan was above 93 percent with the exception of the class of hospital claims, which was over 88 percent (and no member of that class is pursuing an objection to the plan).

I will address later two objections that allege that this overwhelming acceptance of the plan should be looked at differently. They allege that the plan improperly classified certain claims together with other claims, which, if classified in a separate class, would not have accepted the plan as overwhelmingly. These objectors acknowledge, though, that such a hypothetical class would still have voted in favor of confirmation by well over the 75 percent supermajority threshold that Congress provided for in section 524(g) of the Bankruptcy Code when setting a bar for the release of third-party claims in Chapter 11 plans addressing asbestos liability. Again, I will discuss such classification objections separately.

In addition, and frankly baffling to me, the United States Trustee has argued that I should not look at the votes cast but at the votes that were not cast in determining whether the plan was overwhelmingly accepted. That, of course, is not how elections are conducted. There is no conceivable way to determine the preferences of those who didn't vote other than that they didn't object to confirmation.

But where a vote is as extensive as occurred here, under any measure this plan has been overwhelmingly accepted. And of course it is the actual vote that counts under section 1126 of the Bankruptcy Code, as it does in every election, not a statement by a bureaucrat or his or her sense of where the wind is blowing. That's why we have elections.

[2] **Burden of Proof, Uncontested Subsections of 11 U.S.C. § 1129(a), and Statutory Bases for the Objections to Confirmation of the Plan.** A plan's proponent has the burden of proof on the applicable elements of Bankruptcy Code section 1129(a) that must be met for a plan to be confirmed. That burden of proof is satisfied by showing that the test in the applicable subsection of section 1129(a) has been met by a preponderance of the evidence. In re Ditech Holding Corp., 606 B.R. 544, 554 (Bankr. S.D.N.Y. 2019), and the cases cited therein.

Many of the subsections of section 1129(a) that are applicable to this plan are uncontested. And based on my review of the relevant witness declarations, including those of Jon Lowne, John S. Dubel, and Jesse DelConte, I conclude that with respect to the applicable uncontested subsections of section 1129(a), the Debtors have carried their burden of proof.

The subsections of section 1129(a) that have been contested in objections to the plan include section 1129(a)(1), which states that the plan "must comply with the applicable provisions of this title," i.e., the Bankruptcy Code, and thus incorporates for purposes of these objections sections 1122 and 1123(a)(1) and (4) of the Bank-

ruptcy Code pertaining to the classification and treatment of claims.

In addition, certain objections contend that the Debtors have not satisfied their burden to show under Bankruptcy Code section 1129(a)(3) that the plan has been proposed in good faith and not by any means forbidden by law, including not only as to the proposed settlement of claims against the shareholder released parties but also as to other plan provisions or related acts that, objectors contend, violate other provisions of the Code or were not in good faith.

The United States Trustee has objected that the payment of certain legal fees and expenses under section 5.8 of the plan (x) violates section 1129(a)(4) of the Code, which states that it is a requirement for confirmation that "[a]ny payment made or to be made by the proponent, or by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable," 11 U.S.C. § 1129(a)(4); and (y) can be allowed only if sought and granted under the standard set forth in sections 503(b)(3) and (4) of the Code, which the plan does not propose to meet.

One set of objectors has suggested that the plan does not satisfy section 1129(a)(11) of the Bankruptcy Code's so-called feasibility test, which requires a showing that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11).

The remaining objections to the plan contend that the proposed settlement of the Debtors' and third parties' claims against the shareholder released parties are not sustainable on various theories challenging (x) the merits of the settlement of the Debtors' claims under section 1123(b)(3)(A) of the Bankruptcy Code and Bankruptcy Rule 9019, (y) the Court's jurisdiction and power to approve the plan's third-party claims' release under 28 U.S.C. §§ 157(a)-(b) and 1334(b), Article III of the U.S. Constitution, sections 105(a) and 1123(a)(5) and (b)(6) of the Bankruptcy Code, and (z) the merits of the shareholder released parties settlement and third-party claims release under applicable case law.

In addition, these objections contend that the Debtors have not satisfied the so-called best interests test of section 1129(a)(7) of the Bankruptcy Code, which requires a showing that "[w]ith respect to each impaired class of claims or interests, each holder of a claim or interest of such class has (i) accepted the plan or (ii) will receive or retain under the plan on account of such claim or interest property of a value as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date." 11 U.S.C. § 1129(a)(7).

The objectors who have argued that the Debtors have not satisfied section 1129(a)(7) argue that because their third-party claims against the shareholder released parties are being channeled to the plan trusts or otherwise precluded in return for their distributions under the plan, whereas they would not be so channeled and precluded in a Chapter 7 liquidation, the plan fails the "best interests" comparison of their liquidation recovery to their recovery under the plan.

Each of these objections will be addressed below.

[3] **Insurers' Objections**. Navigators Specialty Insurance Company, American Guaranty and Liability Insurance Company, and Steadfast Insurance Company have pursued a limited objection to confirmation of the plan, joined in by National Union Fire Insurance Company. (Another objection, by the Chubb Insurance USA has been withdrawn.)

The Debtors seek certain findings in the proposed confirmation order regarding the effectiveness of the transfer of the Debtors' insurance or insurance rights to the trusts established under the plan to fund and make distributions to creditors or to NewCo, the public benefit company to be established under the plan to fund distributions and develop and sell at or near cost drugs to combat opioid addiction and overdoses. They also seek a finding regarding the plan's settlement of claims against the Debtors that potentially are covered by such insurance: that the treatment of such claims under the plan does not violate consent rights under any applicable insurance coverage because it is a bona fide settlement on due notice to the objecting insurers, as well as to the other insurers who did not object.

The plan does not otherwise seek findings as to the Debtors' insurance. For example, it does not seek a declaration that any insurance coverage or insurance rights apply to claims that have been asserted to such coverage (this issue is the subject of a separate litigation that will take its own course). Rather, the findings that the Debtors seek are integral to the effectuation of the transfer by the Debtors of insurance and insurance rights to the plan trusts or NewCo, notwithstanding any "anti-assignment" provisions in the applicable policies, and to obviate a defense that the plan itself in providing for a means to pay creditors' claims somehow derogates the insurers' rights to review and consent to the payment of insured claims.

The objectors contend that the plan and confirmation order should not just be largely "insurance neutral," however, but that it be completely so -- that is, that even these findings should be postponed for another day.

But there is no requirement that a Chapter 11 plan be "insurance neutral" in any respect. And where a plan provides for the transfer of a debtor's insurance or insurance rights to a trust or successor, as here, the issue of transferability has been joined in the context of the confirmation hearing and can and should be resolved then. Similarly, the plan's settlement of claims that might be covered by insurance is integral to the plan — indeed, it is a fundamental purpose of a plan — and therefore the bona fides of that settlement are ripe for determination at confirmation. The Court is properly situated to decide those issues without a subset relating to the insurers' consent rights being carved out for a separate, second litigation.

This contrasts with, again, general coverage issues, such as whether any claim against the insurance is subject to a coverage exclusion, which is not something that is inherently raised in the request to confirm the plan and where the plan clearly reserves such rights assertable by the trustees of the trusts that will hold the insurance and insurance rights, on the one hand, and the insurers on the other.

The "insurance-neutral" argument of the objecting insurance companies therefore is not grounded on an underlying principle of bankruptcy law but rather only on a due process concern. The insurers contend that as originally filed the plan was arguably completely "insurance neutral" and did not seek even the foregoing limited determinations in connection with confirmation.

[4] I find, however, that the objecting insurers and all other insurers have had sufficient notice for months that the Debtors were going to seek these limited findings in the confirmation order. The insurers were well represented and are highly sophisticated, as evidenced by their negotiations over the plan's provisions and the proposed confirmation order relating to them. They had a full opportunity to challenge the findings that I've just outlined, first disclosed to them in May 2021, which more than subsumes the applicable notice period under Bankruptcy Rule 2002(b) for the plan and confirmation hearing.

The plan as amended during the confirmation hearing also resolves the remaining due process issue that the insurers had originally raised -- that, as originally drafted, the plan left open the possibility that additional findings could be sought or documents filed that the insurers would not have notice of and might nevertheless be binding on them. As the plan has been amended, this is not going to happen.

As far as the requested finding regarding the bona fides of the plan's resolution of arguably insured claims by providing for the distribution of 100 percent of the value of the Debtors on account of the claims asserted against them in the form of payments between 700 and $750 million through personal injury trusts and at least 5 billion more to abate the opioid crisis in various forms, it is almost impossible to see how an insurer could claim that its consent rights were violated, and in fact the insurers do not give any examples of how those rights might have been violated.

The claims filed in these cases assert at least roughly $40 trillion of liability (excluding a $100 trillion claim that was filed by an individual), which, moreover, covers only roughly 10 percent of the claims filed, the rest asserting wholly unliquidated amounts. As stated in the expert trial declaration of Jessica B. Horewitz, Ph.D., the allowed, fixed claim of the United States under the November 2020 civil and criminal settlement between the Debtors and the Department of Justice will receive less than a one percent recovery.

Under those circumstances, given the plan's wide notice, the lack of any objection to the plan's allocation of value either to personal injury claimants or to abate the opioid crisis, and the fact that insurers' consent rights, like any other contract party's consent rights, are circumscribed by the Bankruptcy Code's separate notice and hearing process, the Debtors' request for a finding that the plan does not violate the policies' applicable consent provisions is justified and appropriate.

In addition, ample case law establishes the authority under sections 1123(a)(5)(B) and (b)(2) and (6) of the Bankruptcy Code to transfer insurance rights and insurance policies as part and in furtherance of a plan to pay mass claims, such as in these cases.

The analysis of this issue in In re Federal–Mogul Global, 684 F.3d 355 (3d. Cir. 2012), cannot be improved on. I will note, though, that although that case was driven by asbestos claims, the logic behind it was based on Bankruptcy Code sections 1123(a)(5) and 1141, not section 524(g) of the Code and, therefore, would apply here. See also In re W.R. Grace & Co., 475 B.R. 34, 139 n.189 (D. Del. 2012), aff'd 729 F.3d 311 (3d Cir. 2013), and the cases cited therein, which show the extensive, and perhaps unanimous, authority for the finding and conclusion that the Debtors seek here that notwithstanding any anti-assignment provision in any applicable insurance policy, under the plan the insurance policies, insurance rights, or rights to insurance proceeds can be lawfully assigned to the trusts created under the plan or New-

Co for administration and distribution under the plan.

I will note that both requested findings are also warranted because it appears that at least at this stage the objecting insurers have either disclaimed coverage or indicated that they are reserving their rights to do so. See J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., 151 A.D.3d 632, 58 N.Y.S.3d 38 (1st Dep't 2017), and the cases cited therein.

I therefore will overrule the insurers' confirmation objection. (And I will note that after the colloquy during oral argument with the insurers' counsel and counsel handling insurance issues in this case for the Debtors, it appeared that most, if not all, of the insurers' objections may have been resolved in any event by the changes to the plan that I've already described.)

U.S. Trustee's Objection to Plan's Treatment of Certain Attorneys Fees and Expenses. In addition to its objection to the plan's settlement of the Debtors' and third parties' claims against the shareholder released parties, to be discussed later, the United States Trustee has objected to section 5.8 of the plan's treatment of certain attorneys fees and expenses.

The plan provides for compensation and reimbursement of "professionals," a defined term comprising professionals for the Debtors and the Official Unsecured Creditors Committee who are retained pursuant an order of the Court and paid out of the estates' assets for their postpetition work under section 330 of the Bankruptcy Code. The compensation and reimbursement of two other groups of professionals -- representing the ad hoc committee of government and other contingent litigation claimants (the "AHC") and the multi-state governmental entities group (the "MSGE") -- are also covered by orders of the Court that subject the estates' payments to them to notice and Court review.

Section 5.8 of the plan sets forth the treatment of fee claims by other counsel, not counsel whose compensation is separately subject to approval by prior order of the Court. Section 5.8 effectuates a settlement regarding the payment from the National Opioid Abatement Trust (the "NOAT") and Tribal Abatement Fund Trust to be established under the Plan of counsel to beneficiaries of those trusts. In addition, section 5.8 provides for the payment of attorneys involved in the pursuit by hospitals of their claims; of the so-called NAS monitoring claimants' attorneys fees and expenses; of rate-payer attorneys' fees and expenses; of personal injury claimants' attorneys fees and expenses; and of payment for the public schools' attorneys fees and expenses.

The U.S. Trustee contends that the only way that the plan can provide for such payments is under section 503(b)(3) and (4) of the Bankruptcy Code. Section 503(b)(4) provides that "[a]fter notice and a hearing, there shall be allowed administrative expenses ... [that is, expenses against the estate for postpetition claims], including the actual necessary expenses ... [comprising] reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph 3 of this subsection based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement of actual necessary expenses incurred by such attorney or accountant." 11 U.S.C. § 503(b)(4). That section refers one back to section 503(b)(3) of the Code, which requires that a creditor show that it made a "substantial contribution in a case under Chapter 11 of the

Bankruptcy Code" to be entitled to the administrative expense.

The U.S. Trustee's objection is misplaced in two respects. First, the bulk of the fees covered by section 5.8 are not for postpetition work (and therefore not an "administrative expense" covered by section 503(b)(3) and (4)) but rather for prepetition work in raising and pursuing claims against the Debtors and to some extent the Sacklers, including in the multidistrict litigation that was pending prepetition in the United States District Court for the Northern District of Ohio. Unsecured creditors' claims for collection of their prepetition costs, including of attorneys' fees and expenses, as well as rights under applicable non-bankruptcy law, such as on a "common benefit" basis, are enforceable in bankruptcy without the need to comply with subsections 503(b)(3) and (4) of the Bankruptcy Code, which, again, apply only to administrative expenses. In re United Merchs. & Mfrs., Inc., 674 F.2d 134, 138 (2d Cir. 1982).

[5] The U.S. Trustee's objection also is misplaced because the remaining fees to be paid under section 5.8 also are not being sought as an administrative expense payable on the plan's effective date (as would be required under section 1129(a)(9)(A) of the Bankruptcy Code if they were being sought as administrative expenses) but rather as part of a heavily negotiated compromise of those fees and the clients' obligation to pay them reached during the mediation in this case conducted by Kenneth R. Feinberg and Hon. Layn R. Phillips (ret.).

The settlements provided for in section 5.8 that resulted from the mediation are subject to this Court's review both under Bankruptcy Rule 9019 and, I believe -- although there are arguments to the contrary -- under section 1129(a)(4) of the Bankruptcy Code, as has been so recognized in this district. See In re Stearns Holdings, LLC, 607 B.R. 781, 793 (Bankr. S.D.N.Y. 2019); In re Sabine Oil & Gas Corp., 555 B.R. 180, 258 (Bankr. S.D.N.Y. 2016).

The U.S. Trustee relies upon a case that is clearly distinguishable, Davis v. Elliot Mgmt. Corp. (In re Lehman Bros. Holdings, Inc.), 508 B.R. 283 (S.D.N.Y. 2014), in which the district court noted that Congress specifically precluded in Bankruptcy Code section 503(b)(3)(D) recovery by official creditors' committee members of their postpetition fees and expenses, and therefore any settlement of those expenses would have been an improper workaround of that provision. Id. at 288-91.

Mr. Feinberg's mediator's report [Dkt. No. 3339] makes it clear (and there is, in addition, unrefuted supporting testimony by Gary Gotto, John Guard, Peter Weinberger, and Jayne Conroy) that the compromised contingency fees provided for in section 5.8 -- again, almost all of which are for services rendered prepetition — are reasonable and indeed significantly reduced from a non-bankruptcy range of generally 20 to 40 percent to the ranges set forth in Section 5.8.

As stated at paragraphs 23-25 of the mediator's report, the contingency fee resolutions as well as the common benefit assessments reached in the mediation are consistent with fee arrangements or assessments agreed upon in other similar mass-tort contexts and are reasonable. See also the trial declaration of Gary Gotto at paragraphs 18(g) and 25(g); the John Guard declaration at paragraphs 57 through 60, 73, and 77 through 78; the Weinberger declaration at paragraphs 20 through 27 and 31 through 32; and the Conroy declaration at paragraphs 11 through 15.

It has been argued that because these section 5.8 fees and expenses are not being paid by the Debtors but by the clients through the trusts that the clients have agreed will be the source of their recovery, they are not subject to this Court's review for reasonableness under the plain terms of Bankruptcy Code section 1129(a)(4) but are, rather, like the fees any claimant would pay its counsel. I conclude, however, that the thrust of section 1129(a)(4), evidencing Congress' desire that unreasonable fees and expenses not be allowed under the pressure of plan confirmation, is that the Court have the ultimate say on the reasonableness of these fees under section 1129(a)(4).

That reasonableness inquiry does not require an extensive review, however, if reasonableness can be otherwise established. In re Journal Register Co., 407 B.R. 520, 537-38 (Bankr. S.D.N.Y. 2009), citing Mabey v. Southwestern Elec. Power Co. (In re Cajun Elec. Power Coop.), 150 F.3d 503, 517 (5th Cir. 1998). Based on the uncontested declarations and mediator's report that I've previously cited — and I note that the U.S. Trustee has made no effort to contest these, despite at least implicitly contending that the fees and expenses are improper or unreasonable — I find that all but one of the contingency fees provided for in section 5.8 of the plan and the mechanism for allocating them among counsel are reasonable. Indeed, the mediated settlement set forth in section 5.8 benefits the estates and creditors by materially reducing the fees and expenses that might otherwise be claimed from the clients and therefore indirectly reduces the claims against the estates.

There are, however, two sets of fees covered by section 5.8 that I cannot on this record make a reasonableness finding on, those of counsel to the personal injury ad hoc committee and of counsel to the school districts' ad hoc committee. I noted this issue during oral argument. These fees are not the reduced contingency fees that the parties and Mr. Feinberg as mediator negotiated and that I have analyzed based on the uncontroverted evidence as being reasonable but, rather, are based on counsels' hourly rates and perhaps in one instance a contingency fee that was not negotiated. I have not seen any time records or hourly rates charged by counsel billing at an hourly rate, nor have I seen the time spent relative to the contingency fee, nor do I have any testimony as to the reasonableness of the contingency fee, so I believe that I will need to make a reasonableness finding as to those counsel fees and expenses in the future under section 1129(a)(4).

The plan has already been amended to reflect this conclusion raised during oral argument, with one wrinkle. It contemplates that the contingency fee portion of counsel for the school districts' fees will not be reviewed by the Court but, rather, by Mr. Feinberg. I'm not prepared to accept that mechanism. I will certainly consider Mr. Feinberg's views, as I have regarding the contingency fee compromises that I have approved, but I ultimately must make the reasonableness determination on notice to parties in interest, including to the U.S. Trustee, under section 1129(a)(4).

[6] Objections by Creighton Bloyd, Stacey Bridges, and Charles Fitch. Creighton Bloyd, Stacey Bridges, and Charles Fitch in their individual capacities object that there was insufficient notice to those incarcerated in prison of the bar date for filing claims, notwithstanding the extensive notice testified to by Ms. Finegan.

There is a fundamental problem with these objections, however, in that all three of the objectors have filed a timely proof of

claim in these cases and a timely confirmation objection. They therefore lack standing under Article III of the Constitution to pursue, and this Court lacks the power to decide, their objections because there is no remedy that the Court can grant for their complained-of wrong.

[7] As stated in TransUnion LLC v. Ramirez, ––– U.S. ––––, 141 S. Ct. 2190, 2202-03, 210 L.Ed.2d 568 (2021), to have standing, and for there to be a case and controversy, the party raising a matter with a federal court must have a personal stake in fact in obtaining a remedy, which clearly is lacking here. See also Kane v. Johns-Manville, Corp., 843 F.2d 636, 642-46 (2d Cir. 1988), which dealt with almost the same issue as raised by these objections, with the same result.

[8] Mr. Bloyd also filed a second confirmation objection based on what he believes might be the consequences of the Debtors' guilty plea in their October 2020 criminal and civil settlement with the Department of Justice. Mr. Bloyd contends that people like him might have an individual right under the Mandatory Victims Restitution Act, 18 U.S.C. § 36633A, to proceeds to be paid by the Debtors to the United States under the DOJ settlement.

His counsel acknowledged at oral argument, though, that this issue is properly raised not here but at the Debtors' sentencing before the New Jersey District Court as contemplated by the settlement.

Even if that wasn't conceded, I conclude that any entitlement of Mr. Bloyd to a portion of the DOJ settlement proceeds arises not in the context of plan confirmation but, rather, properly after the Debtors make the DOJ settlement payment. I also do not believe the issue affects the feasibility of the plan and note, finally, that the discretion of the district court under the MVRA to require a specific restitution fund is likely to be informed by the very large number of potential victims for whom the DOJ could be said to be acting, as well as based on the complexity of determining the number and amount of the victims' claims and the allocation to them of the settlement proceeds.

Mr. Bloyd also arguably has suggested that somehow the Debtors and the Department of Justice colluded in agreeing to the October 2020 settlement agreement by not specifically providing for a restitution fund under the MVRA, but this contention is not supported by the record.

Regarding the plan's treatment of the United States, the Debtors have established that the plan was proposed in good faith under section 1129(a)(3) of the Bankruptcy Code. There is no evidence of any attempt to improperly cut off rights that individual victims would have under the DOJ settlement and, indeed, the personal injury class was well and actively represented in the mediation in these cases conducted by Messrs. Feinberg and Phillips that resulted in the plan's allocation of value among public and private creditors, including the agreement to fund the personal injury trusts.

It is well established in the Second Circuit that some creditors' failure to participate in a mediation does not render the results of a mediation improper or not in good faith if there was no conflict of interest. In re Drexel Burnham Lambert Group, 960 F.2d 285, 293 (2d Cir. 1992). The mediation between personal injury and other private claimants, on the one hand, and governmental claimants on the other over the allocation of funds to the personal injury trusts was in good faith, as shown by, among other things, the mediators' report and the ad hoc personal injury committee's alignment with all personal injury creditors. The extent of the vote of the non-NAS personal injury claimants'

class, 95.7 percent in favor of the plan, also argues in favor of the good faith treatment of the personal injury creditors under the Plan in relation to the United States' and other types of creditors' recoveries. I therefore will overrule Mr. Bloyd's second objection to confirmation of the plan.

[9] Certain Canadian Creditors' Objections. Certain Canadian municipalities and First Nations have objected to the plan on various grounds, all premised ultimately on their view that rather than be treated as general unsecured creditors in Class 11(c) of the plan, they must be classified with the U.S. non-federal governmental creditors and Native American Tribes in Classes 4 and 5, respectively, and thus participate in the opioid abatement trusts created under the plan for those classes instead of receiving their pro rata share of the cash payment to Class 11(c).

It should be noted that these objectors have not contended that the value to be paid to them under the plan differs unfairly in value from that to Classes 4 and 5. But, in any event, they concede that if their votes were counted in Class 11(c), as opposed to in Classes 4 and 5, Class 11(c) would still have overwhelmingly accepted the plan. Thus the provision in section 1129(b)'s cramdown requirement that there be no unfair discrimination among similarly situated creditors in different classes does not apply. Instead, the objection is, if at all, properly couched under different provisions of the Bankruptcy Code.

[10] In that regard, there was some suggestion during oral argument and in one sentence in the objection that the claims of the Canadian municipalities and First Nations should not have been allowed for voting purposes at $1.00, as provided in the Court's confirmation procedures order, along with all other contingent unliquidated claims, the objectors' implication being that if their claims had been liquidated they might have carried Class 11(c)'s vote. They have made no request, however, to estimate their claims for voting purposes under section 502(c) of the Bankruptcy Code or to temporarily allow them in a different amount than $1 under Bankruptcy Rule 3018(a).[2]

Further, such temporary allowance in a uniform amount of mass tort claims such as those here in the sum of $1 for voting purposes is well recognized as fair. See In re Lloyd E. Mitchell, Inc., 373 B.R. 416, 428 (Bankr. D. Md. 2007), and the cases cited therein. The alternative, fixing the amount of hundreds of thousands of unliquidated disputed claims before voting on a plan (because of course once the claims liquidation process started, most, if not all, of the claimants would insist on their claims being liquidated) would take years, defeating the conduct and purpose of the bankruptcy case. Kane v. Johns-Manville Corp., 843 F.2d at 647-48.

[11] Given that section 1129(b) doesn't apply to the objecting Canadian claimants because of the class vote, the only remaining issue is whether the plan's separate classification of them in Class 11(c), rather than in the classes where they want to be classified, is proper.

2. Indeed, based on my review of these Canadian municipalities and First Nations' proofs of claim, which rely on attached complaints against both non-Debtor Purdue Canada and other non-Debtors and against the Debtors that do not distinguish between the conduct of the Debtors and the non-Debtors, it is far from clear that the claims really are against the Debtors. To the extent they are against Purdue Canada or other non-Debtors, those claims are fully preserved under the plan. Nor are claims that are based on the shareholder released parties' conduct related to non-Debtors released or enjoined under the plan.

A plan proponent has the right under the Bankruptcy Code to classify similar claims in separate classes if there is a reasonable basis to do so. See generally 7 Collier on Bankruptcy ¶ 1122.03[1][c] (16th Ed. 2021); see also In re LightSquared, Inc., 513 B.R. 56, 83 (Bankr. S.D.N.Y. 2014); In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 759 (Bankr. S.D.N.Y. 1992).

Section 1123(a)(1) of the Bankruptcy Code, which is incorporated into section 1129(a)(1), states that "[n]otwithstanding any otherwise applicable non-bankruptcy law, the plan shall designate, subject to section 1122 of this title, classes of claims." 11 U.S.C. § 1123(a)(1). Section 1122 provides only that, "except as provided in subsection (b) of this section [which is inapplicable here], a plan may place a claim in a particular class only if such claim or interest is substantially similar to other claims or interests in such class." 11 U.S.C. § 1122. It does not require all substantially similar claims be placed in the same class.

Here, there are reasonable bases for separately classifying these objectors' claims from the U.S. public creditors and Native American Tribes: (x) the different regulatory regimes that the objectors operate under with regard to opioids and abatement, as well as (y) the fact that the allocation mediation conducted by Messrs. Feinberg and Phillips that resulted in the plan's division of the Debtors' assets and third-party claims among private and public claimants and then separately the public claimants' allocation of their share among themselves involved only U.S.-based public claimants with their own regulatory interests and characteristics.

There was no request by any of the objecting Canadian creditors to participate in that mediation. The record is also clear, and I can take judicial notice of the fact, as well, that those who did request to participate in the mediation, if they had a reasonable basis to do so, were generally invited into it, including, for example, the NAACP. One's failure to participate in a mediation should not detract from the settlement reached if the classification scheme is fair and rational. See Ad Hoc. Comm. of Non-Consenting Creditors v. Peabody Energy Corp. (In re Peabody Energy Corp.), 933 F.3d 918, 927-28 (8th Cir. 2019).

This is not the first time that U.S. and Canadian creditors have been found to be properly classified separately. See Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, 661 (6th Cir. 2012), and In re W.R. Grace & Co., 729 F.3d 311, 329-30 (3d Cir. 2013), where Canadian claimants, including the Queen on behalf of Canada, were found to be separately classified properly because of the different types of recovery their claims would have under applicable law, a close analogy to the different regulatory schemes that would apply here to the NOAT and Native American Tribes Trust. The plan's classification scheme therefore is proper as it pertains to the objecting Canadian municipalities and First Nations.

These objectors also suggested that the plan was not proposed in good faith for purposes of section 1129(a)(3) of the Bankruptcy Code. But that objection is premised on the same classification argument overruled above. Again, given the plan's rational basis for separate classification and the lack of any evidence to show that the objecting creditors were improperly silenced or excluded from negotiations, I find that the plan has been proposed in good faith as to them.

[12] These objectors also suggested that the Debtors have not satisfied the "feasibility" test under section 1129(a)(11) of the Bankruptcy Code. The uncontested

declaration of Mr. DelConte establishes, however, by showing projections for NewCo and discussing the assignability of the Debtors' insurance and insurance rights, that the plan satisfies section 1129(a)(11). The objecting Canadian municipalities and First Nations do not dispute this generally but contended at the confirmation hearing that their treatment under the plan would be sufficiently objectionable to the court presiding over the Canadian Companies Arrangement Act proceeding in Canada ancillary to those cases that it might not grant recognition of or enforce the plan in Canada.

Based on my understanding of the Model Law on Cross-Border Insolvencies, which is in effect in Canada as well as forming the basis of Chapter 15 of the Bankruptcy Code, I am reasonably comfortable, however, that the Canadian court will recognize and enforce the plan, although of course that is a decision for the Canadian court to make, and not view the plan as unduly discriminatory against Canadian creditors in the light of what they would reasonably recover from the Debtors if the plan were not confirmed, as well as the difference between the non-bankruptcy regulatory regime that governs the Canadian creditors from that applying to U.S. governmental units and Native American tribes.

I also believe that the "public policy" exception to recognition under the Model Law on Cross-Border Insolvencies would not be applied by the Canadian court given the narrow nature of that exception, although again, of course, that decision is left to the Canadian court.

Further, it appears based upon Mr. DelConte's declaration that while recognition in Canada is important and would bring clarity and finality to the claims of Canadian creditors against these Debtors, the absence of the Canadian CCAA court's recognition is not critical to the survival of NewCo under the plan and the Chapter 11 feasibility test therefore is satisfied in any event.

Besides raising the foregoing objections, the Canadian creditors object to the plan's release of third-party claims against the shareholder released parties. To the extent that they make the same arguments as others who raised this issue, I will address them collectively later.

In addition, however, the Canadian objectors have contended that because no money from the shareholder settlement is being specifically channeled to Class 11(c), Class 11(c) creditors like them should not be enjoined under the plan from pursuing whatever claims they may have against the shareholder released parties based on their U.S. conduct.

Upon the record before me, though, I conclude that the lack of specific channeling of any of the third-party claims settlement proceeds to Class 11(c) does not justify this objection. It is uncontested by the Canadian creditors that under the "best interests" liquidation analysis in the DelConte declaration, Class 11(c) would receive no recovery on their claims against the Debtors if, as I believe would occur, upon their carveout from the plan's third-party release provisions that are an essential quid pro quo to the shareholder released parties' settlement, the Debtors would liquidate. That settlement, in other words, enables Class 11(c)'s recovery to exist.

Further, there has been no indication by these claimants that the shareholder released parties would be liable to them based on their conduct related to the U.S. Debtors.[3] Indeed, as noted above, there is

3. Again, the third-party claims release does not cover claims based on the shareholder

little indication that these creditors have any claims against the U.S. Debtors in the first place, let alone claims against the Sacklers covered by the release. The Sacklers' defenses to such claims, as well as the costs and impediments to collecting on any eventual judgment against them, will be discussed later in the context of a general analysis of the plan's third-party claims release. Suffice it for now that that any recovery by these Canadian objectors under the plan is inextricably tied to the plan's release of the shareholder released parties and their payment of the settlement amount that enables the recovery to Class 11(c) creditors, a recovery they would not receive in a Chapter 7 liquidation from the Debtors' estates and the shareholder released parties combined. Thus even without those proceeds being specifically channeled to Class 11(c), it is fair to the Canadian objectors to bind them to the release provisions in the plan.

[13] Certain States' Classification Objection. Certain of the objecting states and the District of Columbia have also raised objections to confirmation besides their objection to the third-party claims release and injunction in the plan.

They have asserted, first, that the plan violates section 1122 of the Bankruptcy Code by classifying them in Class 4 along with their political subdivisions.

Given that classification, the objecting states and the District of Columbia are a small percentage of Class 4's 3.13% rejecting vote, compared to the class' 96.87% vote in favor of the plan. These objecting states and the District of Columbia obviously do not like being portrayed in that way, and I do view them to some extent as representing their populations as a whole (although various political subdivisions of these objecting states actively support the plan, raising the question, which political entity is closer to its constituents?).

I do not accept, however, their blanket characterization that because they are states, the other public creditors, political subdivisions, and municipalities that are in Class 4 can be silenced as a matter of non-bankruptcy law based, as the objectors argue, on the parens patriae doctrine or "Dillon rule" with respect to some of the subdivisions' claims. As briefed by the AHC and MSGE, the vast majority of states have enacted "home rule" laws that override those doctrines.

As importantly, the objecting states and the District of Columbia have made no attempt to silence the other members of Class 4 by seeking to disallow their claims for lack of standing or to designate their votes under section 1126(e) of the Bankruptcy Code so that they wouldn't be counted.

The objectors acknowledge, moreover -- as stated on the record by their counsel — that their claims have the same rights to the Debtors' assets as other general unsecured creditors, including the political subdivisions that are in their class. That is, the states' claims are not priority claims, they are not secured claims, they are simply general unsecured claims like their political subdivisions'.

And under those circumstances, the states' claims are properly classified under Bankruptcy Code section 1122(a) with the other governmental entity claims in Class 4. As noted by the Third Circuit in In re W.R. Grace & Co., 729 F.3d at 326, which upheld a chapter 11 plan's classification of the State of Montana with private claimants also holding personal injury claims,

> "[t]o determine whether claims are 'substantially similar' [for purposes of sec-

released parties' conduct related to non-Debtors.

> tion 1122(a)], 'the proper focus is on the legal character of the claim as it relates to the assets of the debtor.' In re AOV Indus., Inc., 792 F.2d 1140, 1150 (D.C. Cir. 1986); see also In re Tribune Co., 476 B.R. 843, 855 (Bankr. D. Del 2012) (concluding that the phrase 'substantially similar' reflects 'the legal attributes of the claims, not who holds them') (internal quotation marks omitted); In re Quigley, 377 B.R. 110, 116 (Bankr. S.D.N.Y. 2007) ('Claims are similar if they have substantially similar rights to the debtor's' assets.') (emphasis and internal quotation marks omitted)."

See also In re Drexel Burnham Lambert Group, Inc., 138 B.R. at 757; 7 Collier on Bankruptcy ¶ 1122.03[3].

That is clearly the case here and, therefore, the claims can and should properly be classified together given the agreement by all of the states (with the exception of West Virginia) and territories along with the other members of Class 4 to the allocation of distributions within Class 4 among themselves, as well to as the allocation of distributions to the public creditors, on the one hand, and the private creditors on the other, that was reached during the mediation conducted by Messrs. Phillips and Feinberg.

(It also is worth noting, although it has no bearing on the classification issue, that if the plan had separately classified the states and territories from the other public creditors (although that would have unduly complicated the universally agreed allocation of value as between the states and all of the other public entities in Class 4 and the public/private allocation under the plan), the percentage of states and territories accepting the plan would go to over 79 percent, still well above the 75 percent supermajority threshold in the analogous provision of Bankruptcy Code section 524(g).)

The objecting states and the District of Columbia also contend that the Court's order establishing confirmation procedures improperly allowed their claims for voting purposes at $1 (as it allowed all other opioid-related claims for voting purposes, which similarly have not been liquidated and would be disputed). Notwithstanding that the objectors have agreed to the allocation formula under the NOAT, and thus that their claims will never need to be liquidated for the plan's distributions to be made on their claims, they contend that their claims must be liquidated before their votes can be counted.

But this objection should be denied for the same reasons as the similar objection made by the Canadian municipalities and First Nations objectors. These objectors have made no attempt to seek to estimate their claims or temporarily allow them for voting purposes in a different amount under section 502(c) of the Bankruptcy Code or Bankruptcy Rule 3018(a). And there is an obvious reason why they haven't. If such a request had been made, almost all, if not all, of the other claimants with unliquidated claims would have made a similar request, leading to lengthy, expensive, and, as shown by the parties' agreement to their treatment in Class 4 solely for opioid abatement under an agreed formula, unnecessary litigation over the amount of their claims. Under such circumstances, it is entirely appropriate to allow the claims for voting purposes in the sum of $1.00. Kane v. Johns-Manville Corp., 843 F.2d at 647-48; In re Lloyd E. Mitchell, Inc., 373 B.R. at 428.

[14] The objectors also argue that they are being treated unfairly under the plan in relation to the United States, which, unlike them, is in large measure carved out of the plan's third-party claims release. This is not a proper objection, however, under section 1123(a)(4) of the Bankruptcy

Code, cited by the objectors, which states that a plan shall "provide the same treatment for each claim or interest of a particular class unless the holder of a claim or interest agrees to a less favorable treatment," 11 U.S.C. § 1123(a)(4), because the plan classifies the United States in different classes than the objectors.

Clearly also, that separate classification is appropriate. As discussed earlier, the Bankruptcy Code gives plan proponents the ability to classify similar claims in different classes if there is a reasonable basis to do so. 7 Collier on Bankruptcy ¶ 1122.03[1][a]. Here, there clearly is a rational basis to classify the United States separately from the other public creditors. Indeed, the United States has qualitatively different claims to the Debtors' assets in some respects, mandating its multiple separate classifications from general unsecured creditors. In addition to its general unsecured claims in Class 3, it has secured claims, which are treated as part of one of the aspects of the plan's settlements, it has a superpriority administrative expense claim under the October 2020 DOJ settlement, and it has priority claims. And, unlike the claimants in Class 4, the United States has already settled civil claims against the Sacklers for a specific payment under its separate postpetition DOJ settlement agreement with the Sacklers. Finally, the United States' treatment under the plan is different than the treatment of the Class 4 claims; unlike them, it is not required to use its plan distributions for abatement, although it has agreed under the DOJ settlement to forego $1.775 billion of its superpriority claim if, as the plan provides, NewCo is established on the effective date to operate for the public benefit and the states and other public claimants in Class 4 agree to use their distributions for abatement.

Clearly, then, the United States' different rights and different treatment support its separate classifications from Class 4, nor is an unfair discrimination argument available under section 1129(b) of the Bankruptcy Code given that Class 4 has accepted the plan, thus negating the need for the Code's cramdown provision to apply.

[15] West Virginia's Limited Objection to the NOAT Allocation Formula. The State of West Virginia does not object to any aspect of the plan other than its allocation in Class 4 and under the NOAT distribution procedures of the funds to be distributed to it for abatement of the opioid epidemic.

[16] First, it contends that the plan has not been proposed in good faith for purposes of section 1129(a)(3) of the Bankruptcy Code because of the NOAT's assertedly unfair allocation formula for the states. Under section 1129(a)(3), the Court shall confirm a plan only if the proponent shows that "the plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The Code does not define "good faith," but the courts have a fair consensus on its meaning in section 1129(a)(3). All courts emphasize, based on the section's plain terms, that the inquiry should primarily focus on whether the proposal of the plan was in good faith, not on whether the plan generally is in good faith or undertake an even more free ranging inquiry into fairness and equity. Many courts go further, to limit the section's application to whether the proposal of the plan was in good faith or instead infected with improper conflicts of interest or self-dealing. See, e.g., Garvin v. Cook Invs. NW, SPNWY, LLC, 922 F.3d 1031, 1035 (9th Cir. 2019) ("A contrary interpretation not only renders the words 'has been proposed' meaningless, but makes other provisions of § 1129(a) redundant.");

see also 7 Collier on Bankruptcy ¶ 1129.02[3][a].

Generally, the Second Circuit has focused on the proposal of the plan. See Argo Fund Ltd. v. Bd. Of Dirs. of Telecom Arg., S.A. (In re Bd. of Dirs. of Telecom Arg., S.A.), 528 F.3d 162, 174 (2d Cir. 2008); Kane v. Johns-Manville Corp., 843 F.2d at 649; In re Koelbl, 751 F.2d 137, 139 (2d Cir. 1984). On the other hand, courts in this district, while focusing largely on the proposal of the plan, including on the process of plan development, have also considered whether the plan, "... will achieve a result consistent with the standards prescribed under the Bankruptcy Code." In re Ditech Holding Corp., 606 B.R. at 578, and the cases cited therein. See also In re Chemtura Corp., 439 B.R. 561, 608 (Bankr. S.D.N.Y. 2010); In re Quigley Co., Inc., 437 B.R. 102, 125 (Bankr. S.D.N.Y. 2010); In re Genco Shipping & Trading Ltd., 513 B.R. 233, 261 (Bankr. S.D.N.Y.); In re Breitburn Energy Partners LP, 582 B.R. 321, 352 (Bankr. S.D.N.Y. 2018).

As recognized by Judge Garrity in Ditech, those policies or objectives include preserving going concerns, maximizing property available to satisfy creditors, giving debtors a fresh start, discouraging debtor misconduct, the expeditious liquidation of claims and distribution of the bankruptcy estate to creditors and, where warranted, interest holders, and achieving fundamental fairness in the collective context of a bankruptcy case. 606 B.R. at 578.

Here, I have ample testimony by John Guard, from the office of the Attorney General of the State of Florida, that the allocation of the NOAT among the states under the plan and the NOAT distribution procedures derived from good faith, arms' length negotiations by the states preceding the mediation by Messrs. Phillips and Feinberg and then continuing to completion during it. That testimony really is unassailable as to the plan's good faith on this issue. It highlighted that these difficult but ultimately nearly comprehensively successful negotiations (with the exception of West Virginia's disagreement) took into account the differing interests of the various states, which if not as weighty as those underlying the compromises at the Constitutional Convention, were similar: for example, the interests of states with small populations, though heavily impacted by opioids; the interests of states with large populations and therefore more people affected by opioids; the interest of states with different health and law enforcement resources; and the interests of states with different ways of reporting opioid-related deaths and other conditions of opioids' impact.

Mr. Guard testified credibly that while the negotiations were difficult, the states recognized and tried to address these differing interests in an overall allocation formula. He also testified credibly that no state was prepared to come even close to accepting the alternate allocation proposal put forth by West Virginia but that states with characteristics similar to West Virginia agreed that the plan's allocation formula adequately addressed their concerns.

The states' unanimous agreement to accept their recovery in the form of money solely devoted to opioid abatement, and their nearly unanimous agreement on the allocation of that distribution among them is truly remarkable, and, as noted during the confirmation hearing by the Attorney General of West Virginia, likely will serve as a model for the allocation of future settlement proceeds from other opioid manufacturers and distributors among the states. Without that agreement, the goals of the Bankruptcy Code would have been jeopardized. Such a failure would have resulted in extensive litigation over the vari-

ous states' claims, a lengthy delay in making distributions to abate the opioid crisis, and arguably a fallback to distributing the value under the plan not for abatement purposes but, rather, for general use by states and other public creditors.

Mr. Guard's testimony was supported by the cross-examination of West Virginia's expert, Charles Cowan, Ph.D. Mr. Cowan acknowledged that in publications that he wrote before being retained by the State of West Virginia for the purpose of showing why it should receive a larger allocation of the NOAT distributions, he recognized that other methods of allocating money towards abatement could be fair and reasonable, as well, and that there was no specific "best" formula for allocating settlement funds to public creditors. He also acknowledged that the plan's allocation formula was an acceptable choice if West Virginia's proposal was not adopted by the Court. He acknowledged that his proposed allocation to West Virginia was outside the range of allocations under formulas that he earlier had written were reasonable, whereas West Virginia's allocation of distributions to the NOAT was within those ranges.

It was clear that the allocation formula proposed by Mr. Cowan also would lead to peculiar allocations of the NOAT funds for abatement, for example that states with substantially smaller populations would get substantially more funds than states with large populations. Thus the State of Washington would have a larger recovery than Texas, and West Virginia would have a larger recovery than Virginia, although they are neighboring states and West Virginia is losing population and Virginia's is growing.

Mr. Guard and Mr. Cowan agreed that West Virginia and certain other states have been disproportionately harmed by the opioid crisis, but their testimony also reflected that a state's population is an important element of any allocation formula because it reflects the resources that a state will need to bring to bear for abatement. Their testimony established, moreover, that different states report opioid deaths and opioid disorders differently from each other, casting some doubt on the reliability of an "intensity" emphasis for an abatement allocation formula.

Lastly, the NOAT allocation formula does in certain ways recognize the interests of smaller states, including levels of intensity of harm.

I therefore find and conclude that the NOAT allocation was derived in good faith by arms' length and fair negotiations among the parties and satisfied Bankruptcy Code section 1129(a)(3).

[17] I also find and conclude that the treatment of the states in Class 4, and through it by means of the good faith, fair, and uniform trust procedures and allocation formula for the NOAT, provides for the same treatment of each claim in Class 4 for purposes of section 1123(a)(4) of the Bankruptcy Code. As discussed in In re W.R. Grace & Co., "[a]lthough neither the Code nor the legislative history precisely defines the standards of equal treatment, courts 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." 729 F.3d at 327 (internal quotations and citation omitted). See also In re Cent. Med. Ctr., Inc., 122 B.R. 568, 575 (Bankr. E.D. Mo. 1990), which W.R. Grace cites for the proposition that "a plan that subjects all members of the same class to the same process for claim payment is sufficient to satisfy the requirements of Section 1123(a)(4)." 729 F.3d at 327.

The W.R. Grace court goes on to state, "Courts are also in agreement that

§ 1123(a)(4) does not require precise equality, only approximately equality," id., citing In re Quigley Co., 377 B.R. 110, 116 (Bankr. S.D.N.Y. 2007), and In re Multiut Corp., 449 B.R. 323, 334 (Bankr. N.D. Ill. 2011). The consequences of how and when the class members would be paid under W.R. Grace's plan did not produce a substantive difference in a claimant's opportunity to recover and were the result of, among other things, a comprehensive mediation and arms' length negotiations, and thus the plan satisfied section 1123(a)(4). In re W.R. Grace & Co., 729 F.3d at 328. The same analysis applies to the treatment of the NOAT allocation among the states in Class 4.

I was not going to reach the same conclusion with respect to a former element of the NOAT allocation and distribution procedures. One of the adjustments made for the benefit of states with smaller populations like West Virginia in the NOAT allocation was a separate, so-called 1 percent fund, which all of the states, other than the small states that would participate in the fund, were going to contribute to, with, however, the exception of California.

I did not see sufficient evidence to justify California's being excepted from that contribution obligation to the 1 percent fund. However, since the discussion on the record during the confirmation hearing, California has agreed to contribute to the 1 percent fund. The one aspect of West Virginia's objection that I was going to grant has effectively been granted, therefore, by this agreement of the State of California.

Mr. Guard made it clear that all of the states recognized the huge impact that the opioid crisis has had on states like West Virginia and had tried to take that into account in negotiating the NOAT allocation. I too recognize that impact, but I believe that given the arms' length nature of the negotiation and the acceptable range of West Virginia's treatment even within the writings acknowledged by Mr. Cowan, its objection under Section 1129(a)(4) should be denied.

Pro se Objections/Good Faith. The remaining objections to the plan, other than objections based upon the plan's third-party release and injunction provisions and the plan settlement with the Sacklers and their related entities, have been asserted by several parties who were not represented by counsel.

These objections are properly viewed in roughly four different categories. First, Ms. Butler-Fink, Ms. Villnave, Mr. Cobb, and Mr. Wright have stated in one form or another that the plan should not give the Sackler family ". . . immunity from criminal charges."

I completely agree, as does the plan. The plan does not contain a release of criminal conduct. That is crystal clear in the plan and always has been in these cases.

It is understandable that a person who is not a lawyer and looks at these cases from afar through one form of the media or another may have reached a different conclusion. In part that is because either through ignorance or choice, the plan has been described in the media and online as providing "immunity" to the Sacklers for crimes, including murder and illegal drug dealing. "Immunity" clearly suggests immunity from criminal charges; that's how one generally thinks of the word. But the plan simply does not grant such a release. It couldn't do it, and it doesn't.

Those who should know better, whether they are reporters, law professors, or politicians, should not suggest otherwise. At best, suggestions that the plan would relieve the Sacklers of potential criminal liability reflect a lack of understanding about

these cases; at worst, such suggestions are irresponsible and, frankly, cruel to those whom they mislead.

If anyone has engaged in criminal activity either before or during these cases, they are not relieved of the consequences of that liability under the plan. If any prosecutor wants to pursue such a claim against the released parties, they can.

Ms. Graham, Mr. Normile III, Mr. Burris, Ms. Willis, Ms. Ecke, Mr. West, and Ms. Farash have in one form or another contended that it is improper or unfair for the plan to provide only $700 million to $750 million in the aggregate for distribution on account of non-NAS personal injury claims, while the bulk of the recovery goes to, as one of the objectors stated, "the government, politicians and big businesses."

I have said more than once during these cases, including to Ms. Ecke, who testified during the confirmation hearing, that one cannot put a price on a human life or an injury such as opioid addiction, and yet that's what courts do with respect to personal injuries. They take into account a number of factors that are relevant legally, including potential defenses and intervening circumstances that defeat or dilute the claim, and ultimately the claimant must meet the burden of showing proximate cause. The dollar amount that courts reach if they find a claim for personal injury often does not seem like sufficient compensation. That is particularly the case where the wrongdoer is insolvent.

I did not have any specific valuation of personal injury claims in this case. What I do have is a lengthy and difficult arms-length mediation led by two of the best mediators not only in the United States but in the world, Messrs. Feinberg and Phillips. They are, I believe, in no way beholden to any type of claimant or unduly sympathetic to any type of claimant or any other party.

Mr. Feinberg, for example, had the incredibly difficult job of working out, by dealing with victims and their families, the proper allocation of the 9/11 fund. Both mediators have extensively dealt with personal injury claims over the course of their careers, and I believe they have been so successful because they are as sympathetic, if not more so, to individual victims as they are to states, hospitals, and other corporate entities.

The people representing the personal injury claimants in the mediation were some of the most effective personal injury lawyers in the world, which means that they are aggressive, creative, knowledgeable and responsible in the pursuit of their clients' claims. I believe that, as set forth in the mediators' report, their negotiations with the other classes of creditors were at arms-length and in good faith. Dkt. No. 2548. I also do not see any conflict between their representation of their tens of thousands of clients in the mediation and the other tens of thousands of personal injury claimants in these cases, who collectively will receive the same type of treatment under the plan and the personal injury trust claims and distribution procedures.

I also carefully considered the trial declaration of Jayne Conroy, who is one of those personal injury lawyers and in fact with her colleagues was probably the main lawyer to pursue Purdue and the Sacklers over more than a decade on behalf of personal injury claimants. Because of that dogged work, she obtained a settlement for roughly 1,100 personal injury claimants, albeit many years ago. She described those clients in her declaration as those who could tie their injury to a prescription of one of Purdue's products, from which I inferred that they probably were among those most likely to obtain a recovery in a

litigation, notwithstanding all of the arguments that the defendants would throw back at them.

After deducting a reasonable contingency fee from that settlement, I believe on average the recovery under that settlement — and because I don't know how the recovery was divided among the clients, I simply allocate it evenly to each client -- was approximately $13,500 per person, which is well within the anticipated range under the plan for allowed personal injury claims.

The uncontroverted declarations of Peter H. Weinberger, Gary A. Gotto, and Ms. Conroy describe the hard-fought litigation and negotiation process leading to the settlement contained in the plan for personal injury claimants, a settlement they support and one which Ms. Conroy testified reflects a "settlement premium" paid to obtain a comprehensive result.

The uncontroverted trial declaration of Deborah E. Granspan details the procedures under the personal injury trust for efficiently -- though consistently with the burden to prove one's claim -- establishing the amount of one's personal injury claim and obtaining a distribution. Her declaration was uncontroverted in describing a trust procedures mechanism that minimizes the difficulty and cost of presenting a claim for personal injury while maintaining a sufficient degree of rigor over the burden of proof to ensure that as much of the money allocated to personal injury claimants can go promptly and directly to them instead of to lawyers.

I also have reviewed the declaration of Michael Atkinson on behalf of the Official Unsecured Creditors Committee, which attaches the Committee's letter in support of the plan and recognizes the Committee's role in balancing the interests of personal injury creditors with those of the states and other entities that also assert claims, and strongly supports confirmation of the plan as a fair balance of those interests.

The plan vote of approximately 95.7 percent of the non-NAS personal injury class in favor of the plan strongly argues that the members of that class support the plan and the fairness -- although only in this setting where one allocates money from a limited pot based not on a moral view of the value of a human life or a person's health but, rather, upon the likelihood of such claims recovering in a litigation — of the plan's allocation of value among personal injury claimants and other creditors. Under the plan that settlement provides for funds to be paid early to personal injury creditors, ahead of the states and other governmental entities, and fair procedures that make it relatively easy, though preserving the burden of proof, to obtain a recovery.

As I will discuss later, the plan's allocation of value to all other creditors to be devoted solely to abatement purposes will also provide value, though indirectly, to all surviving personal injury claimants.

In sum, then, the plan's treatment of personal injury claimants is a fair, mediated resolution of extremely difficult private/public allocation issues.

The next set of objections was made by Ms. McGaha, who also was a witness at confirmation, and Ms. VomSaal. Both raise legitimate concerns, as do all the objectors, although, as I said before, I believe the first group of objectors has been misled into thinking that the plan provides for a release of criminal conduct.

Ms. McGaha and Ms. VomSaal question why after the plan's effective date NewCo will continue to manufacture and sell opioids in any form, even though such sales would be lawful. Ms. McGaha also makes certain recommendations that could be viewed as abatement measures but are

not necessarily included in the abatement policies and guidelines under the plan, such as the banning of long-term opioids or at least making different disclosures regarding them, changes in packaging, and the promotion of non-opioid treatments for chronic pain and alternative, non-opioid therapies for pain.

I believe strongly that every constituency in these cases — including the Official Unsecured Creditors Committee, the Debtors themselves, the United States, the states, the other governmental entities, the Native American tribes group, the ad hoc group of hospitals, the ratepayer and third-party payors groups, the NAS committees, and the ad hoc committee of personal injury claimants -- has wanted to ensure that the production and sale of this dangerous product be not only lawful but also conducted in a way that is cautious, subject to layers of oversight, and informed by the public interest at every step. That is the purpose of the plan's provisions dealing with NewCo: the NewCo governance covenants, the NewCo monitor, the NewCo operating agreement, and the NewCo operating injunction.

From the start of these cases, this was a primary focus of the Official Unsecured Creditors Committee. This has also been a focus since the start of the states and political subdivisions and I believe soon after the start of these cases of the other institutional creditors, such as hospitals and school districts. That is why with the exception of personal injury creditors all claimants in these cases have agreed to take their distributions in the form of payments to be devoted solely to abatement of the opioid crisis.

The Debtors, too, have been focused on these goals, for example at the start of these cases volunteering a self-injunction pertaining to their legal manufacture and sale of these products, agreeing to the appointment of a monitor, and re-focusing their business in part to developing overdose and addiction treatments to be sold at or near cost. Those measures are described in Mr. Lowne's trial declaration, as well as the fact declaration of Mr. DelConte. They also were discussed in Mr. Atkinson declaration and the attached letter from the Creditors Committee, and they are reflected in the provisions of the plan that I've just described.

Since before the start of these cases, this focus has not involved any input from the Sackler family or their related entities, because since before the bankruptcy petition date the Sacklers have not taken any role whatsoever on the Debtors' Board or otherwise regarding the Debtors' management.

The Bankruptcy Code does not require this focus, but in keeping with the broader view of section 1129(a)(3)'s good faith requirement, the parties in interest have required it, and I have encouraged them, so that at this point I believe the measures that I have just described will set a standard not only for this company but for other companies that manufacture and distribute products like the Debtors' that are legal yet dangerous.

It is hard to imagine how any other company that engaged in this business or in the distribution of these types of products wouldn't also conclude that it was not only the right thing to do but also was in their interest to imitate these governance and operating constraints. They're not being imposed by a government; they're being imposed by this plan with the input of state and local representatives and the federal government and, importantly, representatives of the victims of Purdue's prior conduct. Again, these governance and operating constraints should serve as a model to similar companies as well as an implicit warning that if such companies do

not take such care, if they rely instead only on the minimum that the F.D.A. or other federal or state law or regulations require, they may nevertheless, like Purdue, be found lacking if their products cause harm.

The plan's abatement programs themselves are the subject of substantial unchallenged testimony, including by Dr. Gautam Gowrisankaran and Dr. Rahul Gupta, and, with respect to the hospital class, William Legier and Dr. Gayle Galan. And the abatement initiatives reflect heavy input by all of the states and non-state governmental entities. Again, to have reached agreement on these abatement metrics and mechanisms is an incredible achievement given the strong views that various parties have about what types of abatement are proper.

Dr. Gowrisankaran's unchallenged testimony described the clear multiplier effect of dedicating the bulk of the value to be distributed under the plan, including from the shareholder released parties, to abatement programs as opposed to individual payments that perhaps could be used for abatement but, as with prior national settlements such as the settlements with tobacco companies, also could be used for miscellaneous governmental purposes.

The foregoing testimony also shows, as do the abatement metrics themselves, that the plan contemplates abatement procedures that will take into account developments and lessons learned over time about what works and what doesn't. That incremental development is furthered by the plan's requirement for periodic reports on the use of the abatement funds, which then can be checked to see what succeeds and what doesn't and therefore how future NOAT distributions might best be reallocated.

The abatement procedures and metrics also include a consultation process taking into account the views of local governments and people within local communities in a reasonable and fair way; that is, they are not simply imposed from the top down by the respective states.

Ms. McGaha and Ms. VomSaal don't identify a specific legal basis for their objections (which is understandable given that they are not represented by counsel). I have addressed them, however, in the light of Bankruptcy Code section 1129(a)(3)'s good faith requirement. Given all that I've just described, it is clear that the use of most of the value to be distributed under the plan for abatement purposes as specified is in good faith and, in fact, beneficial to those who have individual claims against the Debtors as well as the communities and states that also have claims. It is also clear that the plan's provisions for the governance and operations of NewCo, facilitate not only the purposes of the Bankruptcy Code but also the broader good. Within the constraints of federal law, including regulations and guidance from the F.D.A, the NewCo governance provisions go beyond that law where possible to ensure the safety or the safe use of the Debtors' products, including the development of products that would assist those who are trying to recover from opioid use disorder and provide cheap and accessible prevention mechanisms for overdoses.

To suggest otherwise, to suggest that somehow this was an ill-cooked and cooked-in-secret stew (which I don't believe the two objectors are contending but has been suggested publicly by those who I don't think have been following these cases, or if they have been following them should know better), is incorrect and dramatically so.

The last objection by certain of the pro se objectors whom I've already named contends that the civil settlement under the

plan with the shareholder released parties — the Sacklers and their related entities -- is unfair and should not be approved. That settlement would resolve the claims of (x) the Debtors' estates against those parties and (y) certain claims against the shareholder released parties based in large measure on the same conduct underlying certain of the Debtors' claims against the shareholder released parties and the third parties' claims against the Debtors.

It is my main task, notwithstanding the length of this ruling already, to consider whether that settlement of the Debtors' claims and related third-party claims against the shareholder released parties is proper under the Bankruptcy Code.

One point should be addressed first regarding this inquiry, and I discuss it now in part because it has been raised by the pro se objectors, perhaps because of what they have read or heard in the media or from others.

Some assert that this Chapter 11 plan and the settlement in it is "the Sacklers' plan," or perhaps, artfully, it has been suggested that because it is proposed by the Debtors, and the Sacklers own the Debtors, the Debtors' plan is "the Sacklers' plan."

While I will separately examine whether the settlements with the Sacklers under the plan are fair, one thing is crystal clear, and anyone who contends to the contrary is, again, simply misleading the public: this is not the Sacklers' plan. The Debtors are not the Sacklers' company anymore. The Sacklers own the Debtors, but the Debtors are not run by the Sacklers in any way and have not been since before the start of these cases. There is literally no evidence to the contrary -- none. Although it was not necessary, because the record was clear, the examiner appointed in these cases confirmed it in his report. Dkt. No. 3285.

More importantly, and as recognized by the examiner, these cases were driven as much, if not more, by the Official Unsecured Creditors Committee and the other creditors in these cases who formed well-represented ad hoc committees, including committees of the 48 states and territories that have claims against the Debtors (two states having settled those claims before the start of the bankruptcy cases) and strong representatives of non-state governmental entities and Native American tribes; personal injury claimants; victims of neonatal abstinence syndrome or their guardians, hospitals, ratepayers and third-party payors, and school districts.

These creditors essentially have represented the interests of all creditors of these Debtors, although of course other creditors were free as parties in interest to appear and be heard. And from the start of these cases, all of the Debtors' assets were dedicated to them. These creditor groups wanted more than anything to obtain as much value not only from the Debtors but also from the Sacklers, who were viewed by all as the opposition, the other side, the potential defendants, the payors. And it is clear that the Official Unsecured Creditors Committee, the states and territories, the other governmental entities and tribes, and the other ad hoc groups were completely independent from the Sacklers in their focus on that goal.

They were facilitated in achieving that goal by the two incredibly experienced and effective mediators I've already discussed, Messrs. Philips and Feinberg. And, further, even after a largely successful mediation of the claims against the Sacklers -- claims by the Debtors' estates and claims assertable by others — which ultimately resulted from the mediators' own proposal as to what would be a fair settlement that was accepted by all of the foregoing

groups with the exception of the so-called nonconsenting state group of 24 states and the District of Columbia, I directed another mediation with another of the best mediators in the world, my colleague Judge Shelly Chapman. Based on her mediation report [Dkt. No. 3119], Judge Chapman held over 140 discussions before the mediation day set aside to see whether the remaining nonconsenting states could reach agreement with the Sacklers. That "day" lasted 27 hours. Id.

Judge Chapman, like Mr. Feinberg and former Judge Phillips, is a successful mediator because she does not browbeat people, although even if she wanted to, she could not browbeat the nonconsenting states' representatives. She, like Messrs. Feinberg and Phillips, is a successful mediator because she points out the risks and rewards of not reaching a settlement and of reaching a settlement. At the end of her mediation, fifteen of the states that had previously fought the Sackler settlement tooth and nail agreed to the modified settlement in the amended plan.

I'm saying this not to show my support for the underlying settlement but to highlight again the arms-length negotiation of the plan and the fact that it is not a "Sackler plan" but a plan agreed to by 79 percent of the states and territories and well over 96 percent of the non-state governments, and actively supported by the Official Unsecured Creditors Committee and the other ad hoc committees, notwithstanding the incredible harm that the Debtors' products have caused their constituents.

Bitterness over the outcome of these cases is completely understandable. Where there has been such pain inflected, one cannot help but be bitter. But one also must look at the process and the issues in the light of the alternatives and with a clear understanding of the risks and rewards of continued litigation versus the settlements set forth in the plan. And it's that process to which I'll turn next.

[18] **Analysis of the Settlements with the Shareholder Released Parties.** As I noted, the plan includes two settlements with the Sacklers and their related entities. It provides for the settlement of the Debtors' estates' claims -- that is, the Debtors' claims against the Sacklers and related entities for the benefit of the Debtors' creditors. (And the estates have substantial claims against the Sacklers. Indeed, one can argue that those claims are the main claims against them.) Second, the plan provides for the settlement of certain third-party claims — that is, claims that could be asserted by others -- against the Sacklers and their related parties, the "shareholder released parties" under the plan.

I will focus first on the settlement of the Debtors' estates' claims, but I will note before doing so that the plan is not just a plan that settles the estates' claims and certain third-party claims against the Sacklers related to those claims and the third parties' claims against the Debtors. In fact, the plan contains several other settlements interrelated to those settlements that would not be achievable if either of the settlements with the Sacklers fell away.

These include a settlement of the complex allocation between personal injury claimants, NAS-personal injury claimants and non-governmental entities, on the one hand, and claims by public, governmental entities on the other, a subject of months of mediation that I've already discussed. They also include a settlement of the allocation of value among the public creditors -- the states and nongovernmental entities and Native American tribes.

Remarkably, all parties with the exception of the personal injury claimants agreed in the mediation to use the value that they would receive solely for abatement purposes, the multiplier-effect benefits of which I've already described. This includes the private, corporate entity claimants as well as the non-federal governmental claimants.

In addition, during these cases, the Debtors settled both civil and criminal claims of the federal government, and the plan encompasses those settlements, importantly including the United States' agreement to release $1.775 billion of its $2 billion superpriority administrative expense claim for the benefit of the other public creditors if, as is the case here, the plan meets the requirements of the DOJ settlement to establish an abatement structure and the corporate governance and other public purposes for NewCo that I have previously described.

Each of those settlements hinges on at least the amount of money to be distributed under the plan coming from the Sacklers and their related entities in return for (x) the Debtors' settlement and (y) the third-party claims settlement. Without the $4.325 billion being paid by the Sacklers under the plan and the other elements of the Sackler settlements, those other elements of the plan would not happen. The record is clear on that. The private/public settlement would fall apart and the abatement settlements likely would fall apart for lack of funding and the inevitable fighting over a far smaller and less certain recovery with its renewed focus on pursuing individual claims and races to collection.

That still begs the question, though, is the $4.325 billion, coupled with the Sackler's other agreements, including the dedication of the two charities worth at least $175 million for abatement purposes, the Sacklers' agreement to a resolution on naming rights, their agreement not to engage in any business with NewCo, their agreement to exit their foreign companies within a prescribed time, their agreement to various "snap back" protections to ensure the collectability of their settlement payments, and their agreement to an unprecedented extensive document depository accessible to the public that will archive in a comprehensive way the Debtors' history, including as it relates to the development, production, and sale of opioids, sufficient? Obviously, more money from the Sacklers, if such were obtainable, would not unravel the settlements that I've already described.

Settlements and compromises of asserted or assertable claims by debtors' estates are a normal part of the process of reorganization in bankruptcy and are strongly favored over litigation. Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968). This is in part for the obvious reason that in bankruptcy the pie is not large enough to feed everyone. In bankruptcy the cost and delay factors in deciding whether to approve a settlement are more significant than in a non-bankruptcy context, as is an assessment of the merits of the claims that are being settled: the risks of losing a piece of the pie or having it go stale are magnified if from the start there is not enough to go around.

[19, 20] In determining whether to approve a settlement of a debtor's estate's claims, a bankruptcy court must make an informed independent judgment that the settlement is "fair and equitable" and "in the best interests of the estate." TMT Trailer Ferry, 390 U.S. at 424, 88 S.Ct. 1157; In re Drexel Burnham Lambert Group, 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991). "In undertaking an examination of

the settlement ... this responsibility of the bankruptcy judge ... is not to decide the numerous questions of law and fact raised ... but rather to canvas the issues and see whether the settlement falls below the lowest point in the range of reasonableness." Nuevo Pueblo, LLC v. Napolitano (In re Nuevo Pueblo, LLC), 608 Fed. Appx. 40, 42 (2d Cir. 2015), quoting In re W.T. Grant Co., 699 F.2d 599, 608 (2d Cir. 1983); see also Weinberger v. Kendrick, 698 F.2d 61, 74 (2d Cir. 1982) ("The Supreme Court could not have intended that, in order to avoid a trial, the judge must in effect conduct one."); E. 44th Realty, LLC v. Kittay, 2008 WL 217103, at *8, 2008 U.S. Dist. LEXIS 7337, at *22 (S.D.N.Y. Jan. 23, 2008). Nevertheless, a request to approve a settlement, including of course a major settlement like this in the context of a Chapter 11 plan, requires careful consideration and the right to an evidentiary hearing, and here warranted a six-day trial involving 41 witnesses.

Based on the framework laid out in TMT Trailer Ferry, courts in this Circuit have long considered the following factors in evaluating proposed settlements:

(1) The probability of success, should the issues be litigated, versus the present and future benefits of the settlement;

(2) the likelihood of complex and protracted litigation if the settlement is not approved, with its attendant expense, inconvenience and delay, including the difficulty of collecting on a judgment;

(3) the interests of the creditors, including the degree to which creditors support the proposed settlement;

(4) whether other interested parties support the settlement;

(5) the competence and experience of counsel supporting, and the experience and knowledge of the court in reviewing, the settlement;

(6) the nature and breadth of the releases to be obtained by officers and directors or other insiders; and

(7) the extent to which the settlement is the product of arms-length bargaining. See generally, Motorola, Inc. v. Off. Comm. of Unsecured Creditors & JPMorgan Chase Bank, N.A. (In re Iridium Operating LLC), 478 F.3d 452, 464-66 (2d Cir. 2007).

The Iridium court also noted that how a settlement's distribution plan complies with the Bankruptcy Code's priority scheme may be the dispositive factor. That is, unless the remaining factors weigh heavily in favor of approving a settlement, if the settlement materially varies the Bankruptcy Code's priority scheme, the court should normally not approve it. That concern does not apply here, however. As I have noted regarding objections to classification and treatment under the plan, the plan does not vary the Bankruptcy Code's priority scheme or otherwise violate the Code's requirements for classification and treatment within a class.

I will address the elements of evaluating a settlement in a different order than listed by the Iridium court, noting first, however, that they are applied even where part of the settlement involves not just the simple trade of money for a claim but, as here, also performance, such as ceasing to be involved with Purdue or agreement to the public document depository. See, e.g., DeBenedictis v. Truesdell (In re Global Vision Prods.), 2009 WL 2170253, 2009 U.S. Dist. LEXIS 64213 (S.D.N.Y. July 13, 2009).

As discussed, the Sackler settlement was clearly and unmistakably the product of arm's-length bargaining conducted in two separate mediations by three outstanding mediators. It was preceded, moreover, by the most extensive discovery process that not only I have seen after

practicing bankruptcy law since 1984 and being on the bench since 2002, but I believe any court in bankruptcy has ever seen.

The record is unrefuted regarding the incredible extent of discovery taken not only by the Debtors through their Special Committee and counsel, but also the Official Unsecured Creditors Committee in consultation with the nonconsenting states group and the other states and governmental entities, in fact anyone who wanted to sign a standard nondisclosure agreement to permit discovery to proceed without extensive fights over confidentiality.

From the first hearing in these cases, I made it clear -- as was also recognized by Judge McMahon in Dunaway v. Purdue Pharm. L.P. (In re Purdue Pharm. L.P.), 619 B.R. 38, 58-59 (S.D.N.Y. 2020), in affirming the preliminary injunction that I entered -- that the Sacklers and their related entities must provide discovery beyond even the normally extensive discovery in bankruptcy cases as a condition to retaining the continued benefit of the injunction. And that discovery occurred.

I did not have to decide one discovery dispute on the record. Each of the chambers conferences with parties over discovery disputes led to the production of additional discovery. As a result of that process, approximately ten million documents were produced, comprising almost 100 million pages, an almost unfathomable record that nevertheless teams of lawyers for the creditor groups have pored through to find anything suggesting a claim against the shareholder released parties.

Thus any assertion that there has not been "transparency" in these cases, at least to those who negotiated the plan's settlements, who again in essence represented all of the creditors in these cases, is simply incorrect, and is particularly galling when asserted by any of the states that continue to object to the plan on this basis. They know what they had access to. They know how unprecedentedly extensive that information was.

The only argument that they can make is that the public hasn't had access to such information. But of course if the discovery and information-sharing process had not been conducted as it was by the public's representatives, including the very states that make this argument, far less information would have been produced, most of which the public would never have had access to in any event, including if the settled claims instead went to trial or an examiner issued an examiner's report. Further, the objectors had the ability to probe the merits of the proposed settled claims, including their own claims, during the confirmation hearing, and objecting states took advantage of it to, among other things, extensively examine four members of the Sackler family and present the deposition testimony of a fifth.

The discovery record armed the parties in their negotiations in the mediations, and the mediations further fostered the arms-length bargaining in these cases.

The clearly arms-length nature of the negotiations also establishes that conflicts of interest or self-dealing do not taint the nature and breadth of the plan's proposed release of the shareholder released parties, who certainly once were "insiders," one element of the analysis of the Iridium factor focusing on such releases that otherwise will be discussed later when focusing on the plan's proposed release of third-party claims.

Applying the next Iridium factor -- the competency and experience of counsel supporting the settlement -- the Debtors were represented by very capable counsel and forensic and financial advisors that assist-

ed the Debtors' Special Committee in discovering most of the Debtors' claims against the Sacklers and their related entities. These claims, for over $11 billon of assertedly avoidable transfers, are described in the trial declarations of Richard Collura, Mark Rule, and David DeRamus, Ph.D and commented on by John Dubel in his trial declaration, as well as set forth in even greater detail in the report filed by the Debtors before the start of the mediation. Dkt. No. 654.

The Official Unsecured Creditors Committee also had very experienced and capable counsel and financial advisors, who led the Committee's own extensive analysis of potential estate claims, including vetting the Debtors' analysis of avoidable transfer claims. The Committee also thoroughly investigated the estates' claims against the Sacklers that are not in the nature of avoidable transfer causes of action but, rather, claims based on theories of alter ego, piercing the corporate veil, and breach of fiduciary duty/failure to supervise. Here it appears clear that such claims would belong to the Debtors' estates, not individual creditors, because at least as far as the confirmation hearing record reflects, such claims would be based on a generalized injury to the estates and creditors rather than conduct directed only at certain creditors. See, e.g., St. Paul Fire and Marine Insur. Co. v. PepsiCo, Inc., 884 F.2d 688, 704-705 (2d Cir. 1989); Bd. of Trs. Of Teamsters Local 863 Pension Fund v. Foodtown Inc., 296 F.3d 164, 169 (3d Cir. 2002).

Similarly, the counsel and advisors for the states and other governmental entities, all of whom were on the other side of the table from the Sacklers, were every match for the Sacklers' own able counsel. In many cases, in addition to their outside counsel, states' own attorneys general played an active role in the negotiations, such as, for example the AGs for Massachusetts and New York who after the second mediation, led by Judge Chapman, agreed to the modified settlement.

The next two Iridium factors are closely related: the interests of creditors, including the degree to which creditors support the proposed settlement, and whether other interested parties support the settlement.

Given the over 95 percent aggregate vote in favor of the plan; given the support by the Official Unsecured Creditors Committee, over 79 percent of the states and territories, over 96 percent of the other governmental entities and Native American tribes, apparently in this context the United States -- although one can't really make heads or tails of the U.S. Trustee's objection, which is not based on participation in the cases' discovery process,[4] regarding the merits of the Debtors' settlement with the shareholder released parties — approximately 96% of the personal injury and NAS personal injury claimants, and a supermajority of the other claimants; and given the paucity of objections to the plan's confirmation notwithstanding the size of the creditor body, it is clear that by an overwhelming margin the creditors support the settlements. They do so, again, after being fully informed in making that decision, or with their representatives being fully informed.

4. The U.S. Trustee did not participate in that discovery process and apparently took no independent discovery before the confirmation hearing to explore the merits of its factual objections to the plan. It also has offered no evidence for any of its fact-based objections to the plan, instead apparently assuming that it can nevertheless act credibly as an outside commentator on others' analysis of the settlements (which it mostly did not seek to challenge by cross examination).

The next Iridium factor requires analysis of the likelihood of complex and protracted litigation if the settlement is not approved, with its attendant cost and delay, and, relatedly, the difficulty in collecting on a judgment. I'll focus first on the difficulty of collecting on a judgment absent the settlement.

As often happens, parties who support a settlement, such as here the Official Unsecured Creditors Committee, the consenting states and other governmental entities, and the Debtors are careful not to describe in detail the reasons for their support that would show the potential weaknesses of their underlying claims or their views on how difficult it would be to collect on a judgment. They are legitimately concerned that the settlement won't be approved, in which case they would have given their opponents a regretted roadmap. This leaves the Court to draw reasonable inferences from the record, as well as its knowledge and experience regarding the legal issues bearing on the merits and collection. Here, that record is fairly extensive in the light of submissions by the Sacklers and those overseeing their wealth.

One might think at first that the issue of collectability weighs against the settlement. The record is uncontroverted that the Sacklers, as a family, are worth -- again, in the aggregate -- approximately $11 billion, reduced perhaps by $225 million agreed to be paid under the Sacklers' own postpetition civil settlement with the United States. The discovery process that I have described has largely identified their assets and where and how they are held. And the preliminary injunction in these cases precluded the further transfer of their assets. So, assuming the entry of judgments against them instead of the settlement, one might reasonably believe that collecting significantly more than $4.325 billion, plus access to, or the dedication of, at least $175 million of charitable assets under the settlement, is readily achievable

The Sacklers are not a simple group of a few defendants, however. They are a large family divided into two sides, Side A and Side B, with eight pods or groups of family members within those divisions that have their own unique sources and holdings of wealth. As described in the trial declarations of Timothy Martin and Steven Ives, their assets are in fact widely scattered and primarily held (x) in purportedly spendthrift offshore trusts, (y) in purportedly spendthrift U.S. trusts, and/or (z) by people who themselves live outside of the territorial jurisdiction of the United States and might not have subjected themselves sufficiently to the U.S. for a U.S. court to get personal jurisdiction over them.

I want to be clear that I am not deciding that jurisdictional issue, nor whether the trusts where most of the Sackler family's wealth is held are in fact spendthrift trusts that could not be invaded to collect a judgment, including in a possible bankruptcy case of a beneficiary of such a trust forced into bankruptcy by the pursuit of litigation.

[21] A beneficial interest in a valid spendthrift trust may be excluded from a debtor's bankruptcy estate. Patterson v. Shumate, 504 U.S. 753, 757, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992). As provided in Bankruptcy Code section 541(c)(2), "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under [the Bankruptcy Code]." 11 U.S.C. § 541(c)(2). That section directs one to applicable non-bankruptcy law, which may or may not be the law of the United States with regard to the Sacklers' foreign trusts, almost all of which are established under the law of the Bailiwick of Jersey.

Based on the trial declaration and examination of Michael Cushing, an expert in the law of the Bailiwick of Jersey and the enforceability of judgments against trusts organized under that law, there is a substantial question regarding the collectability from such a trust of even a U.S. fraudulent transfer judgment against the trust, let alone a judgment against a trust beneficiary, including for his or her conduct such as the beneficiary being an alter ego of another entity, like Purdue, or otherwise legally responsible for Purdue's conduct.

For U.S. spendthrift trusts, on the other hand, generally applicable non-bankruptcy law provides that a transfer into such a trust that is fraudulent to creditors is recoverable for the benefit of creditors. See, e.g., Sec. Investor Prot. Corp. v. Bernard L. Madoff Sec. LLC (In re BLMS), 631 B.R. 1, 9–13 (Bankr. S.D.N.Y. 2021); see also In re BLMIS, 476 B.R. 715, 728, n.3 (S.D.N.Y. 2012).

U.S. law also generally does not recognize self-settled trusts that in name only are spendthrift trusts. But again, many of the trusts here might well be governed by the law of the Bailiwick of Jersey, which according to Mr. Cushing's declaration -- which was not meaningfully controverted on these points -- strongly suggests that a different result might apply when enforcing a judgment against a beneficiary of such a trust. And none of the evidence at the confirmation hearing clearly showed that any of the trusts was self-settled.

Lastly, the summaries of the Sackler family's wealth reveal that much of it is not held in readily liquidated assets but rather in the shares of closely held businesses, including the foreign businesses they are required to sell within seven years under the settlement.

Once more, I'm not deciding any legal issues that would affect the collectability of judgments against Sackler family members or their entities, but, given the record before me, as well as the agreement of substantially all of the parties in these cases to a settlement of the estates' claims against the Sacklers and their related entities after the due diligence that they have undertaken, I make the reasonable inference that the issue of collection if the settlement were not approved is in fact a significant concern.

Under the settlement, on the other hand, although the shareholder released parties are given several years to make their payments (in at least partial recognition, one infers, of the illiquid nature of many of their assets), (x) the shareholder settling parties have agreed to "snap back" provisions that enhance collectability upon a default and (y) the trustees and asset managers for the foreign trusts have agreed to seek, and believe they will obtain, the approval of the Jersey court to comply with the settlement.

As noted, Iridiumalso requires the Court to consider the cost and delay of continued litigation in comparison to the benefits of the proposed settlement. If the estate's claims against the Sacklers and their related entities were not settled as provided in the plan, the cost and delay to the estates clearly would be substantial. That cost and delay would not be limited to the cost and delay of pursuing litigation claims against the family members and their related entities and collecting any ensuing judgments, which primarily would involve preparation for trials against multiple defendants (the discovery for which has mostly occurred) and the trials themselves, as well as judgment enforcement litigation and other collection costs in multiple jurisdictions. That cost and delay alone would be substantial, as it is reasonable to infer that the hundreds of prepetition lawsuits naming the Sacklers would resume and proceed along-

side prosecution of the estates' claims against the Sacklers and related entities.[5]

Besides that cost and delay, moreover, is the cost and delay that would ensue from the unraveling of the other plan settlements that I have described. The confirmation hearing record strongly reflects that if the settlement of the Debtors' claims against the shareholder released parties were not approved, the creditor parties would be back essentially to square one on allocating the value of the Debtors' estates, including any ultimate recovery on the estates' litigation claims. And the creditors would be litigating against each other over the merits of their respective claims against the Debtors.

In that regard, the analysis in Mr. DelConte's second declaration, which contains the Debtors' section 1129(a)(7) "best interests" liquidation analysis, is instructive. Under the most realistic scenarios described in that analysis, there would literally be no recovery by unsecured creditors from the estates in a Chapter 7 liquidation, which is, I believe, the most likely result if the settlements with the shareholder released parties were not approved, given the likely unraveling of the heavily negotiated and intricately woven compromises in the plan and the ensuing litigation chaos.

That projected outcome also reflects that in a liquidation scenario the United States' agreement in the DOJ's October 2020 settlement with Purdue to forego $1.775 billion of its $2 billion superpriority administrative expense claim for the benefit of the plan's abatement program would disappear. The United States would be entitled to all of that recovery first from the Debtors' estates. And no one has controverted the trial declaration of Joseph Turner, the Debtors' investment banker in which he gives a midpoint valuation of the Debtors' businesses as going concerns at $1.8 billion. Thus the estates would be litigating their own claims against the Sacklers and their related entities in that highly contested environment on a severely reduced budget with no assurance of administrative solvency.

That leaves the last Iridium factor, a comparison of the legal risks posed by continued litigation against the results of the settlement.

As with the issue of the difficulty of collection, the parties supporting the settlement have been careful not to bare their views of the defenses that the shareholder released parties would have to the estates' claims against them. However, I do have an extensive report and trial declarations as to the nature of the assertedly over $11 billion of avoidable transfers, when they occurred, what they comprised, and who they were made to. Those objecting to the settlement also had the opportunity to examine at length four members of the Sackler family at the confirmation hearing -- David Sackler, Richard Sackler, Mortimer Sackler, and Kathe Sackler -- and in addition submitted the deposition of Irene Sackler, including to attempt to show the strength of the estates' and third-parties' claims against them based on their actions in their capacities as shareholders and members of Purdue's Board and, in three instances, in Purdue's management. Finally, I have extensive submissions by both sides of the Sackler family regarding the defenses that they would argue in the absence of the settlement in response to the

5. The preliminary injunction in these cases enjoined over 2,600 pending prepetition lawsuits against Purdue by governmental entities, hundreds of which named one or more Sackler family members as a co-defendant, and presumably most of the other actions would be amended to add Sackler family members as defendants, and other third parties also would attempt to pursue such claims, as well.

claims asserted against them and their related entities.

In evaluating that evidence and those arguments I want to be clear again that I am not deciding anything close to the merits of those claims. This assessment could not, therefore, serve as collateral estoppel or res judicata. Nor do I particularly have any fondness or sympathy for the Sacklers.

I will note the following, however. The Sackler family — or rather 77, I believe, of them -- received releases from most of the states in 2007. In addition, 2007 is about as far back under any theory that one could look to avoid a fraudulent transfer to the Sacklers or any of their related entities under U.S. law. Thus one would, both for estate claims and for third-party claims, be looking at primarily, if not exclusively, potentially wrongful actions by the Sacklers or their related entities or potentially avoidable transfers to them that took place only after 2007. This would limit claims against them, for example, based on OxyContin's role since its introduction in 1999 to 2007 in dramatically increasing the use of opioids and related addictions and opioid use disorders.

Avoidable Transfers. As described in the trial declaration of Carl Trompetta and as generally acknowledged, over 40 percent of the asserted avoidable transfers to the Sacklers or their related entities went to pay taxes associated with Purdue, including large amounts to the IRS and the states that continue to object to the plan and, of course, intend to keep the tax payments. The fact that these payments went to pay taxes obviously relieved the Sacklers of an obligation. I do, however, have uncontroverted testimony from Jennifer Blouin that if the partnership structure of Purdue, with the taxes running through the Sacklers, was not in place, Purdue itself would have been liable for taxes in almost all of the amount of the tax payments to or for the benefit of the Sacklers and, therefore, arguably received fair consideration for those tax payments.

The Sacklers also would argue the applicability of various statutes of limitation to the fraudulent transfer claims that would limit the reach-back by the estates to most of the claims. The estates would have arguments to the contrary, based on rights that unique creditors like the federal government would have to serve as a "golden creditor" under section 544(b) of the Bankruptcy Code, which provides that the Debtors "may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title," 11 U.S.C. § 544(b), although the Sacklers would argue that the purportedly "golden creditor's" current claims against the Debtors are not the claim it would have had when many of the transfers were made that would have enabled the creditor to avoid them.

The Sacklers would also argue that after the 2007 settlement between Purdue and the United States, Purdue paid manageable amounts in settlements of litigation claims related to opioid matters or of other litigation claims between 2008 and 2019 and that as recently as 2016 Purdue was receiving ratings from rating agencies that indicated it was financially healthy. They would contend, therefore, that except for the last year or so before the bankruptcy filing date, when only a small fraction of the roughly $11 billion of transfers occurred, Purdue was not insolvent, unable to pay its debts when they came due, or left with unreasonably small capital -- requirements to prove constructive fraudulent transfers. Finally, they would argue that for these same reasons, and bolstered by at least some of the Sacklers' willing-

ness to continue to invest large amounts of capital in Purdue in years after 2007, the Debtors would not be able to prove that most, if not all, of the transfers were intentionally fraudulent, either.

There are, on the other hand, statements in the record suggesting that at least some of the Sacklers were very aware of the risk of opioid-related litigation claims against Purdue and sought to shield themselves from the economic effect of such claims by causing Purdue to make billions of dollars of transfers to them and to shield their own assets, as well, from collection. Further, the estates would argue that the potential sheer size of opioid-related claims against Purdue was obvious several years before the second onslaught of litigation claims against it.

Alter Ego, Veil Piercing, and Breach of Fiduciary Duty/Failure to Supervise Claims. As discussed earlier, claims based on alter ego, piercing the corporate veil, and breach of fiduciary duty/failure to supervise theories would appear to stem from allegations against Sackler family members that they caused harm to the creditor body generally, or to the Debtors, in exercising their control of the Debtors and, therefore, would belong to the Debtors' estates rather than to individual creditors. As discussed later, very closely related, indeed usually the same, factual allegations also underly the objecting states' third-party claims against Sackler family members.

In response to such claims, most Sackler family members would argue that they did not serve on Purdue's Board or in management during the relevant period and that no actions by them in their capacity as a shareholder of Purdue have been identified that would show liability for such claims. In response, the Debtors and others would contend that notwithstanding the large size of the Sackler family, the Sacklers acted in a coordinated way over investment and business strategies involving Purdue, with regular meetings of authorized family representatives. The Sacklers would argue, supported by the trial declaration of Lawrence A. Hamermesh that generally the ability to control a corporate entity and such actions as were identified at the confirmation hearing do not give rise to such liability, however. In response, the Debtors' estates would argue, as did the objecting states at the confirmation hearing, that Mr. Hamermesh's declaration speaks only in generalities regarding the law of corporate fiduciaries and does not address the actual actions of Sackler family members in controlling Purdue.

The Sacklers would also point out that after the 2007 settlements with the federal government and the states, the U.S. Department of Health and Human Services entered into a five-year corporate integrity agreement with Purdue to monitor its compliance with federal healthcare law, which was in effect from July 31, 2007 to July 30, 2012. That agreement is available as part of the record but also is public and a matter for judicial notice. In addition, in 2015, after Purdue implemented an "Abuse and Diversion Detection" program, the New York Attorney General required the program be subjected to annual reviews, which occurred from 2015 to 2018. The Sackers would argue that both the H.H.S.'s OIG monitor and those ADD reviews identified no improper actions by Purdue and therefore that as controlling shareholders or Board members they should not be liable for Purdue's improper actions to the extent they were inconsistent with those reviews. More generally they would argue that as Board members they would not have a fiduciary duty for actions by Purdue's management that were improper or unlawful unless they were aware of them or blindfolded them-

selves to them. Those who were not on the Board and did not individually control ownership of Purdue would argue that they were yet another step removed from such a duty. They would also point out the difficulty under applicable state law of piercing the corporate veil between a corporate entity and its owners.

Of course trials on the merits might well establish, as some of the testimony that I heard from the Sacklers tended to show, that as a closely held company Purdue was run differently than a public company and that its Board and shareholders took a major role in corporate decision-making, including Purdue's practices regarding its opioid products that was more akin to the role of senior management.

Moreover, strong arguments could be made that the Sackler Board members and the shareholders as a whole not only understood the highly addictive nature of Purdue's opioid products -- which the Sackler witnesses acknowledged -- but also that F.D.A.-approved warning labels and modifications to the product and how it was sold that allegedly made it less likely to be abused were not preventing massive harm. The Sackler witnesses testified that their aim, especially after 2007, was to avoid Purdue's causing more harm from the sale of highly addictive products. But a jury might well conclude to the contrary that the Sacklers' evident desire to continue to drive profits from the products' sale blinded them to evidence of the fraud, kickbacks and other crimes to which Purdue pled guilty in the October 2020 DOJ settlement or that the pain-relieving benefits of those products was still horribly out of balance with the harm caused, so that they could be held liable for such harm.

I believe that in a vacuum the ultimate judgments that could be achieved on the estates' claims (and the closely related third-party claims that are being settled under the plan) might well be higher than the amount that the Sacklers are contributing. But I do not believe that recoveries on such judgments would be higher after taking into account the catastrophic effect on recoveries that would result from pursuing those claims and unravelling the plan's intricate settlements. And as I said at the beginning of this analysis, there is also the serious issue of problems that would be faced in collection that the plan settlements materially reduce.

This is a bitter result. B-I-T-T-E-R. It is incredibly frustrating that the law recognizes, albeit with some exceptions, although fairly narrow ones, the enforceability of spendthrift trusts. It is incredibly frustrating that people can send their money offshore in a way that might frustrate U.S. law. It is frustrating, although a long-established principle of U.S. law, that it is so difficult to hold board members and controlling shareholders liable for their corporation's conduct.

It is incredibly frustrating that the vast size of the claims against the Debtors and the vast number of claimants creates the need for the plan's intricate settlements. But those things are all facts that anyone who is a fiduciary for the creditor body would have to recognize, and that I recognize.

A settlement is not evaluated in a vacuum, as a wish list. It takes an agreement, which means that if properly negotiated -- and I believe that's clearly the case here -- it generally reflects the underlying strengths and weaknesses of the opposing parties' legal positions and issues of collection, not moral issues or how someone might see moral issues.

It is not enough simply to say "we need more," or "I don't care whether we don't get anything; I'd rather see it all burned up before the Sacklers keep anything."

One must focus on the foreseeable consequences of litigation versus settlement.

I must say that at the middle stage of these cases, before the mediation, I would have expected a higher settlement. And frankly anyone with half a brain would know that when I directed a second mediation, bravely undertaken by Judge Chapman, I expected a higher settlement, perhaps higher than the materially improved settlement that resulted from that mediation. Nevertheless, extremely well-represented and dedicated parties on the prospective plaintiffs' side, knowing far more than I have laid out today about the strengths and weaknesses of the claims, costs, delay, and collection issues, agreed to this settlement as modified as a result of that second mediation.

Are the Sacklers paying a "settlement premium" in their settlements than they would pay in litigation, as Ms. Conroy suggested? Perhaps. As noted, Ms. Conroy as much as anyone has dedicated much of her professional career to pursuing Purdue and the Sacklers and has no reason to pull her punches now. In any event, I am not prepared, given the record before me, to risk that agreement. I do not have the ability to impose what I would like on the parties. Thankfully, no judge in our system is given that power. I can only turn down a request for approval of it and deny confirmation of the plan. Given this record, I'm not prepared to do that.

I will note, as far as the bona fides of the settlement are concerned, and notwithstanding my reservations, under this plan 100 percent of these Debtors, closely held by the Sacklers, is taken away from them and devoted to abating opioids' ill effects in one way or another.

In addition, the amount being paid is to my knowledge the highest amount that any shareholder group has paid for these types of claims. Throughout the history of litigation involving Purdue, the Sacklers themselves were not targets, except leading up to the relatively modest settlement payments by Purdue on their behalf to a number of states in 2007,[6] until roughly three years before the bankruptcy petition date. The entire negotiation process in these cases has magnified that focus on them and will be remembered for doing so.

While I wish that the amount were higher, as I believe everyone on the other side of the Sacklers does, the settlement is reasonable in the light of the standards laid out by the Supreme Court and the Second Circuit. And clearly both it and the process of arriving at it have not been in any shape or form a free ride for the Sacklers or enabled them to "get away with it."

If what people mean by "getting away with it" is being relieved of criminal liability, that obviously is not the case. And I believe, given all the factors that I've outlined, the Sacklers are paying a substantial and, under the circumstances of this case, justifiable amount, as well as agreeing to the other material aspects of the settlement that I have described.

I will note, finally, that as alluded to this morning by the Debtors' counsel, they

6. The 2007 settlement between 26 states and the District of Columbia, on one side, and Purdue on the other called for a $19.5 million multi-state payment by Purdue to the states. Consent Judgement, Washington v. Purdue Pharma L.P., Cause No. 07-2-00917-2 (Sup. Ct. Wash. Thurston Cnty. May 3, 2007), http://www.atg.wa.gov/news/news-releases/washington-receiveshare-195-million-settlement-oxycontin-maker#:~:text=FOR%20IMMEDIATE%20RELEASE%3A%20May%208%202007%20SEATTLE%20%E2%80%93,to%20doctors%20while%20downplaying%20the%20risk%20of%20addiction.

have agreed to enforcement mechanisms that are quite rigorous as part of the settlement, so that the potential collection problems that I addressed are far lessened by the settlement if any released party doesn't live up to it, including as to the ability to hide behind spendthrift trusts.

So, I will overrule the objections to the merits of the settlement of the Debtors' estates' claims against the shareholder released parties.

Analysis of Plan's Release and Injunction of Third-Party Claims. That leaves the last issue for determination, which is the most complex issue legally: the propriety of the plan's release and injunction of certain third-party claims against the shareholder released parties. The third-party claims that the plan would release and enjoin are very closely related on the facts to the estates' claims for alter ego, veil piercing, and breach of fiduciary duty/failure to supervise settled under the plan. See Dunaway v. Purdue Pharm. L.P., 619 B.R. at 50 (noting virtually identical allegations against Purdue and third-party claims against Richard Sackler, each stemming from conduct by Purdue allegedly under his control). My analysis of the merits of the plan's treatment of such third-party claims thus is in large measure informed by my analysis of the alternatives to the settlement of the estates' claims against the shareholder released parties that I've just finished. Before turning to the merits, however, multiple other grounds for the objections to the plan's nonconsensual release and injunction of third-party claims against the shareholder settling parties must be addressed.

I will note first that I have agreed with certain of those objections, namely as to the over-breadth of the releases in the plan as initially proposed. In the light of colloquy during the confirmation hearing, the current form of the plan has substantially narrowed those releases. As discussed in more detail later, the settling shareholder parties are now being released of true third-party claims only if they are opioid-related and then only for such claims where Purdue's conduct is at least in material part a legal element of the third-party claim.

Other released parties, including the Sacklers, are released from certain other third-party claims, as well under the plan, but it is clear, given the plan's revised definitions, that those releases cover claims that are truly derivative of the Debtors' claims such that the releases simply prevent third parties from going after released parties through the back door when the Debtors have resolved the claims, or, to change the metaphor, from improperly adding a second fork with which to eat their share of the pie.

The first objection to the release of third-party claims against the shareholder released parties is premised on the Court's asserted lack of subject matter jurisdiction to impose the release on those who do not consent to it.

[22] It is axiomatic that federal courts, including bankruptcy courts, have only the jurisdiction given to them by the Constitution or Congress. Purdue Pharma L.P. v. Kentucky, 704 F.3d 208, 213 (2d Cir. 2013). Under 28 U.S.C. § 1334(b), however, this Court has broad jurisdiction over matters that are related to the Debtors' property and cases. Section 1334 of the Judicial Code provides that district courts have original jurisdiction (which is referred by standing orders to the bankruptcy courts under 28 U.S.C. § 157(a)-(a)) over "all cases under title 11" 28 U.S.C. § 1334(a), and "all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1334(b).

This includes the power to enjoin claims of third parties that have a conceivable effect on the Debtors' estates. As noted by the Supreme Court in Celotex Corp. v. Edwards, 514 U.S. 300, 307-08, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995), which involved a preliminary injunction of a third-party's right to pursue a third-party claim, "Congress did not delineate the scope of 'related to' jurisdiction, but its choice of words suggests a grant of some breadth." The Court found bankruptcy jurisdiction because the third-party's pursuit of the enjoined claim would affect or impede the debtor's reorganization. Id. at 312, 115 S.Ct. 1493.

[23–25] In this Circuit, "a civil proceeding is related to a title 11 case if the action's outcome might have any conceivable effect on the bankrupt estate. If that question is answered affirmatively, it falls within the 'related to' jurisdiction of the bankruptcy court. Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate. While 'related to' jurisdiction is not limitless, it is fairly capacious and includes suits between third parties that have an effect on the bankruptcy estate. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt's estate." SPV OSUS, Ltd. v. UBS AG, 882 F.3d 333, 339-40 (2d Cir. 2018) (internal quotations omitted), citing Celotex Corp. v. Edwards, 514 U.S. at 307-08, 115 S.Ct. 1493; Parmalat Cap. Fin. Ltd. v. Bank of Am. Corp., 639 F.3d 572, 579 (2d Cir. 2001); In re Cuyahoga Equip. Corp., 980 F.2d 110, 114 (2d Cir. 1992).

In SPV OSUS, the court found bankruptcy jurisdiction over third-party claims based on the conceivable possible legal effect of an indemnification or contribution right against the debtor, although the party that might assert those rights had not filed a proof of claim in the case. 882 F.3d at 340-42. That decision is not alone. The Second Circuit has extensively dealt with bankruptcy jurisdiction over actions to stay or prevent the assertion of third-party claims in bankruptcy cases, the most informative of which for present purposes is In re Quigley Co., 676 F.3d 45 (2d Cir. 2012).

In Quigley the court undertook a lengthy analysis of bankruptcy jurisdiction over the preclusion of third-party claims. It did so because of the parties' confusion over the extent of such jurisdiction arguably injected by Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.), 517 F.3d 52 (2d Cir. 2008), rev'd sub nom. Travelers Indem. Co. v. Bailey, 557 U.S. 137, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009), which Quigley refers to as Manville III. Manville III left the impression, at least with the third-party claimant in Quigley, that the only source for jurisdiction to enter a coercive release of third-party claims and an injunction to support it was if the claim was "derivative" — that is, derivative of the debtor's rights and therefore affecting the res of the debtor's estate. 676 F.3d at 53-54.

The point was somewhat cleared up in the Circuit's next Manville case, Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.), 600 F.3d 135 (2d Cir. 2010), referred to as Manville IV in the Quigley opinion, but Quigley addressed the asserted limitation head on.

In Manville III, a party that had brought a third-party claim against an insurer, notwithstanding the Manville Chapter 11 plan's injunction of claims against the insurer, asserted that the bankruptcy court did not have jurisdiction to enjoin the claim because it alleged a violation of

an independent legal duty owed by the defendant, rather than a claim that was derivative of the debtor's claim. Quigley, 676 F.3d at 54. The Circuit disagreed that Manville III imposed this imitation on jurisdiction. Id. at 54-55, adding, "because [the third-party's] mistake as to the nature of the jurisdictional inquiry under 28 U.S.C. § 1334(a) and (b) stems from a misunderstanding of our case law's treatment of derivative liability in the context of bankruptcy jurisdiction, we discuss our previous cases addressing this subject in some detail." Id. at 55.

After analyzing MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir. 1988), the court held that there was no independent jurisdictional requirement that to be barred by a plan a third-party claim must be derivative of the estate's rights. Id. Rather, the claim must affect the debtor's estate, id. at 56, and "Manville III did not work a change in our jurisprudence. After Manville III, as before it, a bankruptcy court has jurisdiction to enjoin third-party non-Debtor claims that directly affect the res of the bankruptcy estate: As in Macarthur, the salience of Manville III's inquiry as to whether [the third party's] liability was derivative of the debtor's rights and liabilities was that, in the facts and circumstances of Manville III, cases alleging derivative liability would affect the res of the bankruptcy estate, whereas cases alleging non-derivative liability would not." Id. (internal quotations and citations omitted). However, "Manville III did not impose a requirement that an action must both directly affect the estate and be derivative of the debtor's rights and liabilities for bankruptcy jurisdiction over the action to exist." Id. at 57 (emphasis in the original).

After noting that Manville IV was consistent with this view, the court summed up: "It thus appears from our case law that, while we have treated whether a suit seeks to impose derivative liability as a helpful way to assess whether it has the potential to affect the bankruptcy res, the touchstone for bankruptcy jurisdiction remains 'whether its outcome might have any conceivable effect on the bankruptcy estate.' Cuyahoga, 980 F.2d at 114. This test has been almost universally adopted by our sister circuits, see Celotex Corp. v. Edwards, 514 U.S. [300] 308 n.6 [115 S.Ct. 1493] (1995) (collecting cases), which is some instances have found bankruptcy jurisdiction to exist over non-derivative claims against third-parties." Id., citing EOP-Colonnade v. Faulkner (In re Stonebridge Techs., Inc.), 430 F.3d 260, 263-64, 267 (5th Cir. 2005); Dogpatch Props., Inc. v. Dogpatch U.S.A., Inc. (In re Dogpatch U.S.A., Inc.), 810 F.2d 782, 786 (8th Cir. 1987).

Thus, "[a] suit against a third party alleging liability not derivative of the debtor's conduct but that nevertheless poses the specter of direct impact on the res of the bankrupt estate may just as surely impair the bankruptcy court's ability to make a fair distribution of the bankrupt's assets as a third-party suit alleging derivative liability. Accordingly, we conclude that where litigation of [the claimant's] suits against [the third party] would almost certainly result in the drawing down of insurance policies that are part of the bankruptcy estate . . . the exercise of bankruptcy jurisdiction to enjoin these suits was appropriate." Id. at 58.

[26] I conclude that the third-party claims that are covered by the shareholder release under the plan, as I will further narrow that release in this ruling, directly affect the res of the Debtors' estates, including insurance rights, the shareholder released parties' rights to indemnification and contribution, and the Debtors' ability to pursue the estates' own closely related, indeed fundamentally overlapping, claims,

and thus that bankruptcy subject matter jurisdiction to impose a third-party claims release and injunction under the plan exists.

Certain of the objectors cite Callaway v. Benton, 336 U.S. 132, 69 S.Ct. 435, 93 L.Ed. 553 (1949), for the proposition that there is no such jurisdiction. That decision, however, preceded 28 U.S.C. § 1334(b)'s jurisdictional grant, which, as discussed in Celotex, SPV OSUS, and Quigley, significantly broadened the jurisdictional scheme that existed before the Bankruptcy Code's enactment. In re Dow Corning Corp., 255 B.R. 445, 486-87 (E.D. Mich. 2000) (distinguishing Callaway on this basis), vacated on other grounds, In re Dow Corning Corp., 280 F.3d at 648. See also Howard C. Buschman, III & Sean P. Madden, "Power and Propriety of Bankruptcy Court Intervention in Actions Between Non-debtors," 47 Bus. Lawyer 913, 914-19 (May 1992).[7] See generally, Lynch v. Lapidem Ltd. (In re Kirwan Offices S.A.R.L.), 592 B.R. 489, 504-07 (S.D.N.Y. 2018), aff'd Lynch v. Mascini Hldgs. Ltd. (In re Kirwan Offices S.A.R.L.), 792 Fed. Appx. 99 (2d Cir. 2019).

Depending on the kinds of third-party claims covered by a plan's release and injunction of such claims, I conclude, therefore, that the Court has jurisdiction to impose such relief, based upon the effect of the claims on the estate rather than on whether the claims are "derivative," although if they are derivative that is a good sign that they affect the estate. Quigley, 676 F.3d at 52.

[27] The objectors have also contested that the release of third-party claims under a plan violates the third-party claimants' rights to due process. There are two aspects to this objection. The first is not accepted by courts in this Circuit, which is that such a release is an adjudication of the claim. It is not. It is part of the settlement of the claim that channels the settlement funds to the estate. See Macarthur Co. v. Johns-Manville Corp., 837 F.2d at 91-92; Lynch v. Lapidem, 592 B.R. at 504-05; see also In re Millennium Lab Holdings II, LLC, 575 B.R. 252, 273 (Bankr. D. Del. 2017) ("An order confirming the plan with releases does not rule on the merits of the state law claims being released."), aff'd 591 B.R. 559 (D. Del. 2018), aff'd 945 F.3d 126 (3d Cir. 2019), cert. denied, Loan Tr. v. Millennium Lab Holdings, — U.S. ——, 140 S. Ct. 2805, 207 L.Ed.2d 142 (2020).

The other aspect of the due process objection goes to the extent and quality of notice provided regarding the proposed release. Under the amended plan, it is now clear, however, that only holders of claims against the Debtors are being deemed to grant the shareholder release, and it is equally clear, as discussed earlier, that holders of such claims received due process notice of the plan's intention to provide a broad release of third-party claims against the shareholders and their related entities related to the Debtors.

As set forth in that widespread notice, including the press releases, short form publication notices, and short form notices sent, the proposed release was far broader than it is today in the amended plan. To

7. I will note that another case that the objectors rely on, In re Aegean Marine Petroleum Network, Inc., 599 B.R. 717 (Bankr. S.D.N.Y. 2019), in questioning the Court's jurisdiction to impose the release of a third-party claim, which cites Callaway v. Benton but discusses neither SPV OSUS nor Quigley, nevertheless acknowledges that where there is "a huge overlap between claims that [a debtor] is making against the parent . . . [and] the parent did not want to settle the claims made by [the debtor] unless the overlapping third-party claims were also barred," a third-party release was justified. Id. at 727.

argue that because it was more complicated then it somehow violated due process is equally incorrect.

[28, 29] The issue of what process is due requires a court to ask whether the notice was reasonably calculated under the circumstances to apprise interested parties of the pendency of the plan's proposed release and afford them an opportunity to present their objections. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). See also Elliott v. GM, LLC (In re Motors Liquidation Co.), 829 F.3d 135, 158 (2d Cir. 2016). As noted in Motors Liquidation, this requirement equally applies in bankruptcy proceedings, where whether notice satisfies due process turns upon what is reasonably known by the debtor of the party who would be affected by the action for which the debtor is seeking permission.

Based upon Ms. Finegan's testimony, holders of claims received sufficient notice of the proposed release. (Indeed, the media separately fostered the assumption, though incorrect, that the release was even broader, including of criminal liability.) And in fact there were multiple objections to the plan based upon its proposed third-party release. The Debtors' compliance with the procedures described by Ms. Finegan, which also were well within the dictates of Bankruptcy Rule 3016 (which requires the prominent display of such release language in a proposed plan) was more than sufficient for due process purposes. See, e.g., Macarthur Co. v. Johns-Manville Corp., 837 F.2d at 94; Finova Cap. Corp. v. Larson Pharma., Inc., 2003 U.S. Dist. LEXIS 26681, at *26-27 (M.D. Fla. Oct. 6, 2003), aff'd Finova Capital Corp. v. Larson Pharma., Inc., 425 F.3d 1294 (11th Cir. 2005); In re Retail Grp., Inc., 2021 WL 962553, at *5–7, 2021 Bankr. LEXIS 547, at *51-57 (Bankr. E.D. Va. March 9, 2021); In re Otero Cty. Hosp. Ass'n, Inc., 551 B.R. 463, 471-72 and 478-79 (Bankr. D.N.M. 2016).

If someone can make the case after the fact that the notice that Ms. Finegan testified to was in fact not provided, or that they did not receive actual notice of the confirmation hearing and proposed release although the Debtors were aware of their specific claim, they would have the right to return and argue that they did not receive due process, as in Motors Liquidation, 829 F.3d at 135, but as far as the record before me is concerned, notice of the confirmation hearing and the plan's proposed third-party claims release satisfied due process.[8]

The next objection is based on a bankruptcy court's alleged lack of constitutional power to issue a final order confirming a plan that contains a third-party claims release, as opposed to an alleged lack of bankruptcy jurisdiction to approve confirmation of such a plan under section 1334(b) of the Judiciary Code.

[30] This issue was not addressed by the courts until fairly recently, but it has been resolved at length in two opinions that I will simply cite because their logic cannot be improved upon to establish that a proceeding to determine whether a Chapter 11 plan that contains such a release should be confirmed not only is a core proceeding under 28 U.S.C. § 157(b), but also is a fundamentally central aspect of a Chapter 11 case's adjustment of the

8. On a somewhat related point, certain objecting states asserted that the creation by some of the Sacklers of a website that described their defenses to liability constituted an improper solicitation. The objectors ignore, though, that throughout the solicitation period they publicly proselytized their objections to the plan's release, which was widely described in the media. Neither activity violated my order approving the disclosure statement for the plan and confirmation procedures.

debtor/creditor relationship and, therefore, "constitutionally core" under Stern v. Marshall, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), and its progeny. See In re Millennium Lab Holdings II, LLC, 945 F.3d 126, as well as the lower court opinions in that case, Opt-Out Lenders v. Millennium Lab Holdings II, LLC, 591 B.R. at 559; In re Millennium Lab Holdings II, LLC, 575 B.R. at 252.

Also on point is Lynch v. Lapidem, 592 B.R. at 506, 509-12. See also In re Quigley Co., 676 F.3d at 51-52.

In its affirmance of Lynch v. Lapidem, the Circuit did not reach Judge McMahon's determinations regarding the existence of bankruptcy subject matter jurisdiction and the bankruptcy court's power to issue a final order under Article III of the Constitution with respect to this type of injunction. Lynch v. Mascini Holdings, Ltd., 792 Fed. Appx. at 102-04. Her logic was impeccable, however, in the context of, as here, a request for confirmation of a Chapter 11 plan, which is a proceeding central to the bankruptcy court's adjustment of the debtor/creditor relationship and "arising in" a case (as it would "have no existence outside of the bankruptcy," In re Motors Liquidation Co., 829 F.3d at 151), and "under" the Bankruptcy Code (11 U.S.C. §§ 1129 and 1123) for purposes of 28 U.S.C. § 1334(b). That traditional context is to be distinguished from a request under Fed. R. Bankr. P. 7065, incorporating Fed. R. Civ. P. 65, for a preliminary injunction of third-party claims, which Judge McMahon found in Dunaway v. Purdue Pharm. L.P., 619 B.R. at 55-57, to be based on only 'related to' jurisdiction under 28 U.S.C. § 1334(b).

Having addressed the jurisdictional, due process, and Stern v. Marshall objections, one still must decide, though, whether the Court has statutory or other power to confirm a plan with a third-party claim release and injunction pertaining to the shareholder released parties, as well as the merits of the settlement that is the quid pro quo for that release and injunction.

Almost every circuit has addressed those issues. The clear majority (the First, Second, Third, Fourth, Sixth, Seventh, Eleventh, and D.C. Circuits) have determined that such releases and injunctions under a plan are authorized in appropriate, narrow circumstances. See Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 984-85 (1st Cir. 1995); Deutsche Bank A.G. v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136, 141 (2d. Cir. 2005), and the cases cited therein from the Second Circuit, including the Macarthur Co. v. Johns-Manville Corp., 837 F.2d at 93-94, and In re Drexel Burnham Lambert Group, 960 F.2d at 293; In re Millennium Lab Holdings II, LLC, 945 F.3d at 133-40; Nat'l Heritage Found., Inc. v. Highbourne Found., Inc., 760 F.3d 344, 350 (4th Cir. 2014), cert. denied, 574 U.S. 1076, 135 S. Ct. 961, 190 L.Ed.2d 833 (2015), and Menard-Sanford v. Mabey (In re A.H. Robins Co.), 880 F.2d 694, 700-02 (4th Cir. 1989); In re Dow Corning Corp., 280 F.3d at 656-58; Airadigm Communs. v. FCC (In re Airadigm Communs., Inc.), 519 F.3d 640, 655-59 (7th Cir. 2008), and In re Ingersoll, Inc., 562 F.3d 856 (7th Cir. 2009); SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying), 780 F.3d 1070, 1076-79 (11th Cir. 2015), cert. denied, Vision-Park Props. v. Seaside Eng'g & Surveying, 577 U.S. 823, 136 S.Ct. 109, 193 L.Ed.2d 37 (2015); and In re AOV Indus., Inc., 792 F.2d 1140, 1153 (D.C. Cir. 1986).

Three circuits are on record that third-party claims releases are improper for a court exercising bankruptcy jurisdiction to approve. See Bank of New York Tr. Co., NA v. Off. Unsecured Creditors' Comm.

(In re Pacific Lumber Co.), 584 F.3d 229, 252 (5th Cir. 2009); Resorts Int'l v. Lowenschuss (In re Lowenschuss), 67 F.3d 1394, 1401-02 (9th Cir. 1995); In re W. Real Estate Fund, 922 F.2d 592, 600 (10th Cir. 1990).

The following can be said about them, or the line of cases from those three courts, however. First, they are fundamentally based on the view that section 524(e) of the Bankruptcy Code precludes the grant of such a release. That section provides in relevant part, "[D]ischarge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity, for such debt." 11 U.S.C. § 524(e). This statutory reading has been effectively refuted, however. See, e.g., In re Airadigm Communs.: ("If Congress meant to include such a limit [in section 524(e)], it would have used the mandatory terms 'shall' or 'will' rather than the definitional term 'does.' And it would have omitted the prepositional phrase 'on, or for, . . . such debt,' ensuring that 'the discharge of the debt of a debtor *shall* not affect the liability of another entity' — whether a debtor or not. See 11 U.S.C. § 34 (repealed Oct. 1, 1979) ('The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankruptcy shall not be altered by the discharge of such bankruptcy.') (prior version of § 524(e)). Also, where Congress has limited the powers of the bankruptcy court, it has done so clearly.") 519 F.3d at 656; In re Dow Corning Corp., 280 F.3d at 657 (section 524(e) "explains the effect of a debtor's discharge. It does not prohibit the release of a non-debtor"). See also Macarthur Co. v. Johns-Manville Co., 837 F.2d at 91, and Lynch v. Lapidem, 592 B.R. at 504-05, which distinguish a bankruptcy discharge or a final determination on the merits from a settlement of claims.

Second, the Fifth Circuit observed in Pacific Lumber that "non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets" in cases concerning "global settlements of mass claims against the debtors and co-liable parties," 584 F.3d at 252, citing a similar observation by the Fifth Circuit in Feld v. Zale Corp., 62 F.3d 746, 760-61 (5th Cir. 1995), thus suggesting that in a context like the plan before this Court, the Fifth Circuit might reach a different result.

I will note, further, that notwithstanding its reliance on Bankruptcy Code section 524(e) as precluding any third-party claim release, which the Ninth Circuit in Lowenschuss, 67 F.3d at 1401-02, and In re Am. Hardwoods, 885 F.2d 621, 623 (9th Cir. 1989), equated with a discharge, the Ninth Circuit has more recently held that a release of third-party claims based on actions taken in or related to the bankruptcy case could, in appropriate circumstances, be imposed in a plan, although such post-bankruptcy, preconfirmation claims would be subject to the discharge, as well. Blixseth v. Credit Suisse, 961 F.3d 1074, 1081-85 (9th Cir. 2020).

Fourth, both Am. Hardwoods, 885 F.2d at 624-25, and W. Real Estate Fund, 922 F.2d at 599, recognized the propriety of imposing a preliminary injunction of third-party claims to "facilitate the reorganization process," leading one to ask why couldn't such a stay become permanent if it was crucial to a reorganization process involving massive numbers of overlapping estate and third-party claims, in contrast to the peripheral third-party claims in those two decisions, simply because it was opposed by a small number of objecting creditors, or just one?

In any event, W. Real Estate Fund, has been interpreted by a court in the Tenth Circuit as not standing for the proposition

that section 524(e) of the Bankruptcy Code precludes all third-party releases but rather that section 105(a) of the Bankruptcy Code and other applicable bankruptcy law might, in appropriate circumstances, justify a release of third-party claims under different circumstances. In re Midway Gold, 575 B.R. 475, 505 (Bankr. D. Colo. 2017).

The minority circuits' reliance on Bankruptcy Code section 524(e) to preclude third-party claims releases under a plan, is also inconsistent with section 524 as a whole. Section 524(g) of the Bankruptcy Code specifically provides for certain third-party releases if certain conditions are met in a plan that addresses asbestos liabilities, including the affirmative vote of the affected class by a supermajority of 75 percent of those voting.

But more importantly, section 524(h)(1) of the Bankruptcy Code expressly provides that section 524(g) does not mean that plans that were confirmed before the enactment of that section that are generally in conformity with it are unlawful. 11 U.S.C. § 524(h)(1). The legislative history to the amendment makes the same point:

> "[S]ection [524(h)] contains a rule of construction to make clear that the special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan of reorganization. Indeed, Johns-Manville and UNR firmly believe that the court in their cases had full authority to approve the trust injunction mechanism. And other debtors in other industries are reportedly beginning to experiment with similar mechanisms. The Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind. The Committee has decided to provide explicit authority in the asbestos area because of the singular and cumulative magnitude of the claims involved. How the new statutory mechanism works in the asbestos area may help the Committee judge whether the concept should be extended into other areas."

H.R. Rep. 103-834, 103d Cong., 2nd Sess. 12; 140 Cong. Rec. H10765 (Oct. 4, 1994).

A similar floor statement by Senator Heflin at 140 Cong. Rec. S14461-01 (Oct. 6, 1994) reads, "Finally, Mr. President, with respect to the senator's specific question, this Section applies to injunctions in effect on or after the date of enactment. What that means is, for any injunction that may have been issued under a court's authority under the Code prior to enactment, such an injunction is afforded statutory permanence from the date of enactment forward, assuming that it otherwise meets the qualifying criteria described earlier."

It appears clear, therefore, under well-reasoned caselaw as well as the Code itself that section 524(e) is not a statutory impediment to the issuance or enforcement of a third-party claim release under a plan in appropriate circumstances.

That raises the issue, however, what is the statutory or other source of power for such a release? This issue also has been addressed at the appellate level. See In re Airadigm Communs., Inc., where after determining that section 524(e) does not bar a third-party claims release, the Seventh Circuit stated,

> "The second related question dividing the circuits is whether Congress affirmatively gave the bankruptcy court the power to release third parties from a creditor's claims without the creditor's consent, even if 524(e) does not expressly preclude the releases. A bankruptcy court 'appl[ies] the principles and rules

> of equity jurisprudence,' Pepper v. Litton, 308 U.S. 295, 304, 60 S.Ct. 238, 84 L.Ed. 281 (1939), and its equitable powers are traditionally broad. United States v. Energy Resources Co, Inc., 495 U.S. 545, 549, 110 S.Ct. 2139, 109 L.Ed.2d 580 (1990). Section 105(a) [of the Bankruptcy Code] codifies this understanding of the bankruptcy court's powers by giving it the authority to effect any 'necessary or appropriate' order to carry out the provisions of the bankruptcy code. Id. at 549 [110 S.Ct. 2139]; 11 U.S.C. § 105(a). And a bankruptcy court is also able to exercise these broad equitable powers within the plans of reorganizations themselves. Section 1123(b)(6) [of the Bankruptcy Code] permits a court to 'include any other appropriate provision not inconsistent with the applicable provisions of this title.' 11 U.S.C. § 1123(b)(6). In light of these provisions, we hold that this 'residual authority' permits the bankruptcy court to release third parties from liability to participating creditors if the release is 'appropriate' and is not inconsistent with any provision of the Bankruptcy Code."

519 F.3d at 657. See also In re Dow Corning Corp., 280 F.3d at 656-58; Lynch v. Lapidem, 592 B.R. at 511 ("[T]hird-party releases contained in a confirmed plan are subject to 11 U.S.C. §§ 1129(a)(1), 1123(a)(5) & (b)(6), 105, and 524(e). In other words, those releases flow from a federal statutory scheme. This statutory scheme reflects Congress's exercise of its preemption powers, which permit the abolition of [rights] to attain a permissible legislative object. Congress possesses exceedingly broad power [t]o establish uniform laws on the subject of [b]ankruptcies throughout the United States. By way of the Bankruptcy Code, Congress authorized wholesale preemption of state laws regarding creditors' rights and has delegated this preemptive power to the bankruptcy courts."); Adam J. Levitin, "Toward A Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime", 80 Am. Bankr. L.J. 1, 79-80, 83-84 (2006) (finding source for third-party releases and injunctions under a plan in federal common law as much as, if not more, than under section 105(a) of the Bankruptcy Code coupled with sections 1123(a)(5) and (b)(6)).

All courts considering whether to approve a third-party claims release under a plan have noted that such power is subject to considerable scrutiny and may be exercised only in limited, rare cases. See, e.g., In re Metromedia Fiber Network, Inc., 416 F.3d at 143, and the cases cited therein. In deciding whether this Chapter 11 plan presents such a case, it is worthwhile to look first at the types of claims that courts find are properly subject to such a release. In re Quigley Co., 676 F.3d 45, again provides guidance, because it extensively addressed "derivative" claims not only in the context of subject matter jurisdiction, discussed earlier, but also when considering the types of third-party claims that can properly be released and enjoined under a plan, albeit in interpreting Bankruptcy Code section 524(g).

"Derivative claims" are widely understood to be claims by a third party that asserts injury to the corporate entity and requests relief that if granted would go to the corporate entity. See Donoghue v. Bulldog Invs. Gen. P'ship, 696 F.3d 170, 176 (2d Cir. 2012).

The Second Circuit has spent substantial time interpreting what constitutes a true derivative claim, one that, though asserted by a third party, properly belongs to the debtor's estate, as opposed to being recoverable by the third party. In such disputes, the courts generally ask whether the relief sought by the third party would really

address only a secondary harm to that which flows primarily to the estate. See Marshall v. Picard (In re Bernard L. Madoff Inv. Secs. LLC), 740 F.3d 81 (2nd Cir. 2014); Tronox Inc. v. Kerr–McGee Corp. (In re Tronox Inc.) 855 F.3d 84 (2nd Cir. 2017). This inquiry supports the strong bankruptcy policy in favor of the ratable recovery by all similarly situated creditors from the debtor's estate, which as a concomitant principle requires that claims that purport to be independent of a remedy held by the debtor's estate but in fact arise from harm to the debtor be reserved only for the estate's benefit.

This is the type of claim that is included within the non-opioid third-party claims release under the plan. That release, as defined in the plan's "non-opioid excluded claim" definition, excludes "any cause of action that does not allege (expressly or impliedly) any liability ... that is derivative of any liability of any Debtor or any of their Estates."

If, in fact, those types of claims were the only claims to be released, we would not be talking about a "third-party claims" release of the shareholder released parties. We would be talking about a release that clarifies and protects the estates from backdoor attacks through the assertion of purported third-party claims, that, in fact, are estate claims to be shared ratably with the estate's creditors.

Instead, true third-party releases involve claims that are independent of the debtor's estate's claims at least on a legal basis, if not as a factual basis. See, e.g., In re Drexel Burnham Lambert Group, 960 F.2d at 288, 293 (release of securities laws claims against officers and directors proper); Macarthur Co. v. Johns-Manville Corp., 837 F.2d at 90-92 (claims of co-insured and direct claims of personal injury claimants against debtor's insurance properly enjoined as part of plan's resolution of claims against insurers); Cal. Dep't of Toxic Substances Control v. Exide Holdings, Inc. (In re Exide Holdings, Inc.) 2021 WL 3145612, 2021 U.S. District LEXIS 138478 (D. Del. July 26, 2021) (claims against plan funders as potentially responsible parties properly enjoined as part of resolution of debtor's cleanup obligations); Cartalemi v. Karta Corp. (In re Karta Corp.) 342 B.R. 45, 50, 56-57 (S.D.N.Y. 2006) (claims against nondebtor affiliates and their fiduciaries).

But obviously not all independent legal claims are properly covered by such a release if based on simply having some relationship to the debtor, a clear example being a third party's guaranty of a debtor's obligation. Quigley helps to sort out the degree of the necessary relationship.

There, the party relying upon a plan's third-party claims release argued that because the claim against it would not have arisen but for the debtor, because the debtor distributed its products, it should be covered by the release. 676 F.3d at 59-60. The claimant argued otherwise, and the Circuit agreed with it. Id. at 60-61.

The court concluded that a "but for" test creates too much of an "accidental nexus" to the bankruptcy estate and that instead the third-party claim, to be subject to the plan's release and injunction, must arise "as a legal consequence" of the debtor's "conduct or the claims asserted against it must be a legal cause of or a legally relevant factor to the third party's alleged liability." Id. at 60; see also id. at 61 (channeling authority limited "to situations in which the third party's relationship with the debtor is legally relevant to its purported liability [to the claimant]"). See also Cont'l Cas. Co. v. Carr (In re W.R. Grace & Co.), 900 F.3d 126, 136-37 (3d Cir. 2018) (claim need not be directly derivative of the debtor's rights; instead, "[t]he proper inquiry is ... to determine whether the

third-party's liability is wholly separate from the debtor's liability or instead depends on it").

Again, the discussion in Quigley, as well as in W.R. Grace, came in the context of interpreting the limits of Bankruptcy Code section 524(g)'s release and injunction of third-party claims; however, the need to limit third-party claims releases and injunctions generally to such closely related, though independent, claims is a consistent theme throughout the case law, and it is reasonable therefore to be guided by the section 524(g) cases. See, e.g., In re Karta Corp., 342 B.R. at 55-57 (relying on identity of interest between debtors and non-debtor released parties); In re Dow Corning Corp., 280 F.3d at 658 (noting identity of interest between the debtor and third-party claimants).

[31] To properly be subject to a third-party claims release under a plan, therefore, the third-party claim should be premised as a legal matter on a meaningful overlap with the debtor's conduct. Otherwise, the release would be too broad and would cover, for example, a claim against one of the Sacklers, some of whom are doctors, for negligently prescribing OxyContin to a patient. On the other hand, given a causal legal dependence on the Debtor's conduct, or a legally meaningful relationship with the debtor's conduct, a third-party claim is sufficiently close to the claims against the debtor to be subject to settlement under the debtor's plan if enough other considerations support the settlement.

[32] So, while I firmly believe that I have subject matter jurisdiction, that the Debtors have satisfied due process, that I have the power to issue a final confirmation order under Article III of the Constitution, and that there is a sufficient source of power in the Bankruptcy Code itself, in sections 105(a) and 1123(a)(5) and (b)(6), as well as in the Court's inherent equitable power, I will require section 10.7(b) of the plan, which provides for the release of third-party claims against the shareholder released parties, to be further modified to state that a Debtor's conduct, or a claim asserted against the Debtor, must be a legal cause of the released claim, or a legally relevant factor to the third-party cause of action against the shareholder released party, for the third-party claim to be subject to the release.

On the other hand, having read the objecting states' complaints against the Sacklers, which, as noted not only by me but also by Judge McMahon in Dunaway v. Purdue Pharm. L.P., 619 B.R. at 50, essentially dovetail with the facts of the claimants' third-party claims against the Debtors, such third-party claims would be properly covered by such a revised release and injunction.

This still leaves whether under the remaining applicable standards and the facts of these cases the plan's third-party claims release in favor of the shareholder released parties should be imposed. Those standards vary among the circuits. In In re Metromedia Fiber Network, Inc., the Second Circuit listed a number of circumstances in which courts have exercised their power to impose such a release under section 105(a) of the Bankruptcy Code, observing that non-debtor releases have been approved when the release is "important" to the plan, the estate receives substantial consideration in return, the enjoined claims would be channeled to a settlement fund rather than extinguished, the released claims would otherwise indirectly impact the debtors' reorganization by way of indemnity or contribution, and the plan otherwise provided for the full payment of the enjoined claims. 416 F.3d at 141-42.

The court went on to state, however, that "this is not a matter of factors or prongs" and further that "[n]o case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique." Id. at 142. It also cautioned that such releases can be abused, especially if they are for insiders, and need to be supported by sufficient findings by the bankruptcy court. Id.

The Third Circuit has used a similar set of factors with perhaps one important difference. As summarized in In re Exide Holdings, Inc., 2021 WL 3145612, at *13, 2021 U.S. Dist. LEXIS 138478, at *44-45: "To grant non-consensual releases a court must assess 'fairness, necessity to the reorganization' and [make] specific actual findings to support these conclusions. [In re]Cont'l Airlines, 203 F.3d [203] at 214 [(3d Cir. 2000)]. These considerations might include whether: '(i) the non-consensual release is necessary to the success of the reorganization; (ii) the releasees have provided a critical financial contribution to the debtor's plan; (iii) the releasees' financial contribution is necessary to make the plan feasible; and (iv) the release is fair to the nonconsenting creditors, i.e. whether the non-consenting creditors received reasonable compensation in exchange for the release.' In re Spansion, Inc., 426 B.R. 114, 144 (Bankr. D. Del. 2010)."

The Fourth, Sixth, and Eleventh Circuits have applied a similar multifactor test: there is an identity of interest between the debtor and the third-party, usually an indemnity relationship, such that a suit against the nondebtor is, in essence, a suit against the debtor or will deplete assets of the debtor's estate; the non-debtor has contributed substantial assets to the reorganization; the injunction is essential to the reorganization -- namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; the affected class or classes have voted overwhelmingly to accept the plan; the plan provides a mechanism to pay for all, or substantially all, of the claims in the class or classes affected by the injunction; the plan provides an opportunity for those claimants who choose not to settle to recover in full; and the bankruptcy court made a record of specific factual findings that support its conclusions. Behrmann v. Nat'l Heritage Found., Inc., 663 F.3d 704, 712 (4th Cir. 2011) (noting, however, that not all factors are required in each case); In re Dow Corning Corp., 280 F.3d at 658; In re Seaside Eng'g & Surveying, 780 F.3d at 1079.

The Seventh Circuit has used a broader standard, although also noting the potential for abuse, as well as the fact-based nature of the inquiry: whether the release is narrowly tailored, not blanket, whether there has been a finding that the release was an essential component of the plan, whether it was the fruit of long-term negotiations, and whether it was achieved by the exchange of good and valuable consideration that will enable unsecured creditors to realize distributions in the case. In re Ingersoll, Inc., 562 F.3d at 865.

Again, according to Metromedia Fiber, none of these factors is dispositive, but they do need to be considered, the release must be supported by factual findings in the record, and the release must be requested in the context of unique circumstances and necessary to the plan.

Certainly the circumstances of these cases are unique. Every Chapter 11 case has its own difficulties, but I believe these cases are the most complex, given the issues before the parties and ultimately the Court, that I have handled, and frankly that the courts under Chapter 11 have handled. At least that view is shared by

the parties to these cases, who were represented by very capable and experienced counsel.

The release of the shareholder released parties under the plan as amended also is narrowly tailored and as discussed above will need to be further narrowed.

Again for reasons that I've already stated, it is also clear that the monetary contributions by the Sacklers and their related entities are critical to confirmation of the plan. Without the settlement payments, I find that the plan would unravel, including the complex interrelated settlements that depend upon the payments being supplied under the settlement in addition to the non-monetary consideration under it.

Not every shareholder released party is necessarily going to make a specific payment under the plan, but the Sackler family members are obligated to cause the payments to be made, and the relationships among the shareholder released parties are sufficiently close to lead to the conclusion that the aggregate settlement payment hinges on each being released. Understandably the shareholder released parties are not going to agree to provide the consideration under the settlement without receiving the shareholder release in return.

The plan also has been overwhelmingly accepted, including by the classes affected by the third-party claims release, by well above the 75 percent supermajority in section 524(g) of the Bankruptcy Code. Indeed, over 95 percent of the large number of creditors voting have accepted the plan, including in the objectors' classes.

It is also clear that the amount being paid under the settlement is substantial. As I noted earlier, not only is it substantial in dollar terms, I believe that it is the largest amount that shareholders have ever paid in such a context of these types of third party claims and closely related claims for piercing the corporate veil, alter ego, and breach of fiduciary duty/failure to supervise. Moreover, the non-monetary consideration under the settlement also is substantial, including the agreement to allocation by charities to opioid abatement valued at least at $175 million, resolution of naming rights, and the public document depository.

Objectors have argued that in the light of either the aggregate amount of claims asserted against Sacklers or the aggregate amount of their wealth, the settlement sum is not substantial. I've considered those points carefully. The Sackler settlement does not provide anything close to enough to pay for all or substantially all of the asserted claims of the classes affected by the third-party claims release. The United States' claim alone, for example, will recover only a small fraction of its allowed claim, and it is fair to assume that if the other claims were liquidated they, too, would not be paid in full. In addition, the settlement, although clearly substantial in dollars, leaves the Sackler family members in the aggregate with substantial wealth.

On the other hand, neither a defendant's wealth nor the amount of claims asserted against it should dictate the fairness of a settlement without considering the claims' merits, the costs and delay of continued litigation, and risks relating to the collectability of any eventual judgments.

More relevant than the prospect of full payment, therefore, is the Third Circuit's focus on the fairness of the settlement to the third-party claimants. In re Exide Holdings, Inc., 2021 WL 3145612, at *13, 2021U.S Dist. LEXIS 138478, at *44-45.[9]

9. Courts have analogized the power to compel a third-party claims release under a plan

That issue can be assessed in two ways: first, the Court's analysis, based on the evidence, of the factors for and against the settlement and, second, based on the process leading to the settlement — that is, whether it was conducted at arms-length by well-informed and well-represented parties whose interests were aligned with the third parties whose claims would be released, as well as whether those parties and the overwhelming number of parties affected by the settlement, support it.

I therefore have analyzed the fairness of the settlement from the perspective of the third-party claimants in comparison to the likely result if they were instead able to separately pursue their third-party claims.

This analysis in large measure overlaps the analysis of the merits of the Debtors' estates' settlement of certain of their claims against the shareholder released parties. This is because, as noted, the third-party claims being released under the settlement are based on essentially the same facts as the Debtors' veil piercing, alter ego, and breach of fiduciary duty/failure to supervise claims.

Having considered the complaints filed against the Debtors and certain of the Sacklers by the objecting states, their claims ultimately derive from the Debtors' conduct to the extent that as a legal matter one or more of the Sacklers can be said to have directed it or have had the knowledge and power to have directed it but failed to do so. As far as the gravamen or the proof that would need to be shown, I've not gone through every state's applicable law on this point, but I will note that the main cases that they have cited -- Grayson v. Nordic Const., Co., 92 Wash.2d 548, 599 P.2d 1271 (1979), and State v. Ralph Williams' N. W. Chrysler Plymouth, Inc., 87 Wash.2d 298, 553 P.2d 423, 439 (1976) -- found individual liability based upon the controlling shareholder's personal direction, including fraud committed by the corporation through the shareholder, of many of the unlawful acts and practices taken by the corporation.

The Sacklers therefore would raise the same defenses to these claims (to the extent that they would belong to the third party claimants instead of to the Debtors) as they would to the estates' closely similar claims: all would argue that many of the claims pre-date 2007 and are barred by prior settlements or statutes of limitations; most of the shareholder released parties would argue that they never served on Purdue's Board, did not otherwise engage in decision-making for Purdue, and that their ability to control Purdue, if they exercised their shares along with their family members, does not, standing alone, suffice to ascribe liability; and the Sacklers who were on Purdue's Board would argue that the evidence does not show their involvement sufficiently in Purdue's wrongful conduct, such as the conduct admitted by it in the October 2020 DOJ settlement, and would point in support to the OIG and ADD certifications, although as I've discussed, they still face substantial legal risk on such claims.

As I've also discussed, moreover, there are serious collection issues pertaining to any judgment against shareholder released parties. These issues are exacerbated by

to the equitable doctrine of marshalling. In re Dow Corning Corp., 280 F.3d at 656; In re A.H. Robins Co., 880 F.2d at 701 ("A creditor has no right to choose which of two funds will pay his claim. The bankruptcy court has the power to order a creditor who has two funds to satisfy his debt to resort to the fund that will not defeat other creditors."). This approach similarly focuses the Court on the value of the third-party claim, taking into account all relevant factors, not just the size of the asserted claim or the target's net worth in a vacuum.

the inevitable competition not only among all of those who assert third-party claims against the shareholder released parties (and it is noteworthy that none of these claims has been identified as being based on wrongful conduct specifically aimed at the claimant, as opposed to at all claimants), but also from the estates' claims. Indeed, as noted, the estates' fraudulent transfer avoidance claims, which the third-party claimants clearly would not be able to pursue on their own behalf, probably would have the best chance of material success among all of the claims against the shareholder released parties.

The issue of collection is two-fold. First, because of the dispersal of the Sacklers' wealth, including (x) among many different people or family groups, including outside of the U.S. and (y) in allegedly spendthrift trusts, including, again, outside of the U.S., recovery on judgments would be difficult, especially since the generally well-recognized fraudulent transfer exception to the integrity of U.S. spendthrift trusts would not be available to creditors that would not have standing to pursue fraudulent transfers for themselves because they would be pursued by the estates for the benefit of all creditors.

Second, as I've discussed, without the releases the plan would unravel and the Debtors' cases would likely convert to cases under Chapter 7 of the Bankruptcy Code. I've already found that in a liquidation, unsecured creditors would probably recover nothing from the Debtor's estates, as set forth in the unrefuted liquidation analysis by Mr. DelConte. Under that analysis, even in the less likely "best case" scenario, they would receive no more than their pro rata share of $699 million, which would be small.

I've already gone through the dilutive effect resulting from conversion of these cases to Chapter 7. Claims that under the plan are to be resolved by agreed multi-billion-dollar payments for abatement, and thus do not require being determined on the merits, would then be contested, as would the personal injury claims. The contests would be extraordinarily expensive and time-consuming, and, after being determined, the resulting claims would likely not only receive zero from the Debtors' estates but also, because of their collective size, only a small pro rata share of any recovery from the shareholder released parties.

Collectively, the states and territories filed proofs of claims in these cases aggregating at least $2.156 trillion. The share of that sum for the objectors who have attacked the plan's third-party claims release is roughly 450 billion, or less than 21 percent. If you factor in the other, non-state claimants, many of which, like the City of Seattle, would clearly assert third-party claims, too, as well as the Debtors' estates' claims against the Sacklers and their related entities, the dilutive effect upon any individual third-party claimant's recovery from the shareholder released parties is clear. And I have no doubt that a Chapter 7 trustee and at least the other governmental entities would pursue similar claims against the shareholder released parties (in addition to a Chapter 7 trustee's pursuit of the estates' avoidance claims). They would never permit the objecting states, which are similarly situated to them, to win a litigation race.

I therefore conclude that if I denied confirmation of the plan, the objectors' aggregate net recovery on their claims against the Debtors <u>and</u> the shareholder released parties would be materially less than their recovery under the plan.

This conclusion is strongly supported by the second, process-related inquiry into the fairness of the settlement from the third-party claimants' perspective that I

have identified. As discussed earlier, the negotiations of the Sackler settlement were clearly arms-length. The Sacklers were on one side, and everyone else was on the other. The Sacklers and their related entities were required to provide extraordinary disclosure regarding (x) their conduct related to Purdue and (y) their assets and liabilities, at least as much, and often more, than would be reasonably expected if they themselves sought bankruptcy relief (which for many of the Sacklers and most of their related entities would not be under the U.S. Bankruptcy Code). The parties investigating and negotiating against the Sacklers were very well represented and aligned with the objectors; indeed, in addition to the Official Unsecured Creditors Committee, those parties were fellow state attorneys general and other governmental representatives, many of whom have been in the forefront pursuing Purdue and its shareholders for years. Lastly, the settlement was negotiated in not one but two mediations conducted by superb mediators.

Arguably the "best interests" analysis under section 1129(a)(7) of the Bankruptcy Code overlaps with the foregoing assessment of the fairness of the plan's third-party claims release to the objectors. The objectors have argued that the plan does not satisfy section 1129(a)(7) of the Code because in a Chapter 7 liquidation of the Debtors they would have two sources of recovery -- from the Debtors' estates and separately from the shareholder released parties.

I have said that section 1129(a)7) "arguably" applies to this objection because the section's plain meaning may well not contemplate it. As previously quoted, section 1129(a)(7) provides that for the holder of a claim that has not accepted its treatment under a plan, such holder must be projected to "receive or retain under the plan on account of such claim . . . property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date." 11 U.S.C. § 1129(a)(7) (emphasis added). As a matter of grammar, therefore, the comparison required by section 1129(a)(7) apparently is between the amount that the objecting creditor would receive under the plan on account of its claim and what it would "so" receive -- that is, also on account of its claim -- if the debtor were liquidated under chapter 7. It would not, therefore, require analysis of the claimant's rights against third parties.

I recognize that the interpretation of section 1129(a)(7) by two of my colleagues, whom I greatly respect, was to the contrary in In re Ditech Holding Corp., 606 B.R. at 610-14, and In re Quigley Co., 437 B.R. at 145. In deciding, however, that when conducting the "best interests" test the court should take into account a claimant's recovery from a third-party source that is precluded by the plan if one can make a reasoned determination of the recovery on that third-party claim, neither of those decisions addresses the plain meaning argument that I've just described (and, moreover, the applicability of section 363(*o*) of the Bankruptcy Code in a Chapter 7 liquidation when it was found inapplicable under the plan [10] in the Ditech case would have placed the focus on third-party claims in a way absent here).

I have not limited my ruling, though, to the foregoing plain meaning interpretation. I have instead assessed, based on the rec-

10. Section 363(*o*) of the Code, which Ditech found did not apply in a Chapter 11 plan context though it would in Chapter 7, id. at 595, expressly preserves the types of third-party claims that the plan would have released. 11 U.S.C. § 363(*o*).

ord of the confirmation hearing, what I believe would be recovered by the objectors if the Debtors were liquidated in Chapter 7, both on account of their claims against the Debtors and on account of their third-party claims. And based on that assessment, I have concluded that under the plan they would recover at least as much as their recovery in a hypothetical Chapter 7 case, indeed materially more.

In Quigley, 437 B.R. at 145, and Ditech, 606 B.R. at 615, the courts stated that the hypothetical recovery from non-debtor sources should be included in the "best interests" analysis if it was neither speculative nor incapable of estimation. The Debtors have argued that here such a recovery would be too speculative.

In Quigley the court relied on various admissions by the debtor regarding an over 20-year history of settlements of similar claims that such a recovery, which would be barred by the plan, was not speculative. 437 B.R. at 146. In Ditech, the court concluded that the debtors had not carried their burden to show that the claims that would be barred under the plan in return for a small pro rata distribution from a settlement fund could not be estimated or that the fund was a reasonable settlement, in part because the limited evidence offered by the debtors suggested to the contrary. 606 B.R. at 620-21. The objecting states have suggested that a similar failure of proof exists here given the absence of expert testimony regarding the value of the third-party claims against the shareholder released parties.

It is true that there was no such expert testimony, but given the evidence regarding the strengths and weaknesses of the claims, including the cost of pursuing them, the risks of collection, and the dilutive effect of all of the other litigation that would be pursued by all of the other creditors in these cases, including all of the other states and governmental entities who are otherwise agreeing to the plan that would have the same types of third-party claims, as well as the Chapter 7 trustee on behalf of the estate, I conclude that no additional evidence is required.

Unlike in Quigley, there is a paucity of any post-2007 settlement history here of third-party claims against the Sacklers and their related entities, with the exception of the Sacklers' postpetition payment of $225 million to the United States in respect of the civil claims that were the subject of their postpetition settlement with the DOJ; the Sacklers' settlement shortly before the bankruptcy petition date with the State of Oklahoma for $75 million;[11] and the fact that the Sacklers paid nothing to the Sate of Kentucky but obtained a release under Purdue's $24 million December 2016 settlement with the State of Kentucky,[12] which amounts reasonably compare to the proposed recoveries of the objecting states under the plan. And unlike in Ditech, no one has tried to hide the Sacklers' settlement history.

In this context, the merits of the plan's settlement of the third-party claims can properly be undertaken by the Court not only in the light of that history but also the other evidence that I have already dis-

11. Attorney General Hunter Announces Historic $270 Million Settlement with Purdue Pharma, Office of the Oklahoma Attorney General (May 28, 2019), http://oag.ok.gov/articles/attorney-general-hunter-announces-hitoric-270 -million-settlement-purdue-pharma-200-million.

12. Settlement Agreement and General Release, Commonwealth of Kentucky, ex rel. Jack Conway, Attorney General, and Pike County, Kentucky v. Purdue Pharma, L.P., et al., Civil Action No. 07-Cl-013303 (Ky. Ct. App. Dec. 22, 2015) (N0. 1606).

cussed at length.[13] Accordingly, for the same reasons that that the plan's settlement/third-party claims release of the shareholder released parties is fair to the objectors, the plan also meets Bankruptcy Code section 1129(a)(7)'s "best interests" test under a broad construction of that test. Having a second fork in the pie does not help, it hurts because of the resulting "battle of the century" among the creditor parties, as well as the Chapter 7 trustee.

[33] The last argument made by the objecting states, as well as the City of Seattle, is that the plan's nonconsensual third-party release and injunction violates their sovereignty and police power.

There is, however, no such bar or exception under the Bankruptcy Code.

In certain carefully delineated instances, the Bankruptcy Code and the Judicial Code recognize the police power of states and other governmental units, but only in those limited contexts. Thus, in section 362(b)(4) of the Code, Congress provided a limited exception to the automatic stay under section 362(a) "of the commencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police or regulatory power, including enforcement of a judgment other than a monetary judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's ... police or regulatory power." 11 U.S.C. § 362(b)(4). By its own terms, however, section 362(b)(4) does not except governmental units' actions to enforce a monetary judgment from the automatic stay under section 362(a); nor does the exception apply to governmental units' actions to obtain or enforce a lien against the estate. See Ohio v. Kovacs, 469 U.S. 274, 283 n.11, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985); SEC v. Brennan, 230 F.3d 65, 71-72 (2d Cir. 2000); 3 Collier on Bankruptcy ¶ 362.05[5][b].

Similarly, 28 U.S.C. § 1452(a) precludes the removal, which is generally permitted under that section when the district court has bankruptcy jurisdiction under 28 U.S.C. § 1334, of a claim or cause of action in a civil proceeding to enforce a governmental unit's police or regulatory power.

The scope of the "police or regulatory power" in those exceptions has not been decided definitively by the Second Circuit. As noted in the thorough discussion in People of Cal. v. GM L.L.C. (In re GM L.L.C. Ignition Switch Litig.) 69 F.Supp.3d 404 (S.D.N.Y. 2014), the definition of police power for purposes of these exceptions has always recognized a distinction between "whether the governmental action relates primarily to the government's pecuniary interest in the debtor's property or to matters of public health and welfare." Id. at 410 (internal quotation and citation omitted). After Bd. of Governors of Fed. Reserve Sys. v. MCorp. Fin., Inc., 502 U.S. 32, 40, 112 S.Ct. 459, 116 L.Ed.2d 358 (1991), courts' focus turned from assessing whether the governmental unit was truly intending to deter harmful conduct rather than seeking to benefit the government financially, to an objective inquiry into the purpose of the law that the governmental unit was attempting to enforce. In re GM L.L.C. Ignition Switch Litig., 69 F. Supp. 3d at 410-12. Thus the fact that a governmental unit seeks a money judgment is not enough to take its claim out of the police power exception, and at

13. It is worth noting that, unlike here, both Quigley, 437 B.R. at 126-29, and Ditech, 606 B.R. at 624-25, found that the proposed settlements of the third-party claims at issue were not negotiated by those whose interests were aligned with the third-party claimants and that this flaw meant that the plan either was not in good faith for purposes of section 1129(a)(3) of the Bankruptcy Code or that the settlement was not fair and reasonable.

least for many of the governmental objectors' causes of action against shareholder released parties, therefore, the "police power exception" would apply.

But, again, that exception is a limited one. It is well recognized -- indeed the 10th Circuit states that it is a matter of hornbook law -- that actions excepted from the automatic stay, including under the police or regulatory power, may be subject to injunctive relief under section 105(a) of the Bankruptcy Code. In re W. Real Estate Fund, 922 F.2d at 599; In re Commonwealth Cos., Inc., 913 F.2d 518, 527 (8th Cir. 1990). See also 3 Collier on Bankruptcy ¶ 362.05[5][d]; H.R. Rep. 95-595 95th Congress 1st Sess. (September 8, 1977) ("Subsection (b) lists five exceptions to the automatic stay. The effect of an exception is not to make the action immune from injunction.").

And where police and regulatory power or state sovereignty generally is not specifically recognized in the Bankruptcy Code, Congress' power under Art. I cl. 8 of the Constitution to enact uniform bankruptcy laws overrides it. See, e.g., Cty. of San Mateo v. Peabody Energy Corp. (In re Peabody Energy Corp.), 958 F.3d 717, 724-25 (8th Cir. 2020) (chapter 11 plan discharges governmental units' public nuisance claim); see also In re Fed'l-Mogul Global, 684 F.3d at 364-65, 367-70; In re Airadigm Communs., Inc., 519 F.3d at 653-54. Plan injunctions have previously been imposed over governmental units' police or regulatory power. See, e.g., In re Exide Holdings, Inc., 2021 WL 3145612, at *15, 2021 U.S. Dist. LEXIS 138478, at *51 (California Department of Toxic Substances Control enjoined from pursuing claims against plan funder); see also In re Airadigm Communs., Inc., 519 F.3d at 557 (third-party claims release of plan funder applied to F.C.C.); cf. In re Dow Corning Corp., 280 F.3d at 648 (plan's third-party claims release could be applied to United States as claimant under Medicare Secondary Payer Program and Federal Medicare Recovery Act; remanded for findings in accordance with opinion). Such an injunction is most clearly within the ambit of traditional bankruptcy power when it pertains primarily to the collection of money on claims that overlap claims against a debtor's estate, not to enforcement of states' rights otherwise to regulate conduct.

The objecting states' and Seattle's police power and parens patriae arguments therefore should be considered only in evaluating the fairness of the settlement to them as governmental units, not as a bar to the settlement. Given the limited scope of the plan's release of the shareholder released parties and those parties' agreement to no longer be involved with the Debtors or NewCo except to perform the settlement, as a practical matter the plan only limits the objecting states' remedies against the shareholder released parties to collect money on account of their past conduct. As to that limitation, moreover, all of the states, including the objecting states, have agreed to the public/private allocation and the NOAT allocation under the plan for abatement purposes. Indeed, during the confirmation hearing, counsel for the objecting State of Washington lauded the constructive nature of the NOAT allocation and the plan's proposed abatement procedures guidelines. Further, I have found that if the objecting governmental units were carved out of the release, the plan would fail, the Debtors would likely liquidate, and the objectors would collect materially less money from the Debtors and the shareholder released parties in the aggregate, as would the other states and governmental entities and non-public unsecured creditors who support the plan's confirmation.

The objecting states and Seattle nevertheless contend that the plan deprives them of establishing a sufficient civil remedy for the released claims. And sending a message to others who might similarly be shown to have improperly engaged in conduct that would subject them to liability certainly can be a valid aspect of the police power.

Should that interest, though, defeat a plan that 79 percent of their sister states support, more than 96 percent of the other governmental entities and Native American Tribes support, and more than 95 percent of the other claimants support? Should that interest deprive the other creditors of their assessment of the merits of the settlement, with which this Court's analysis agrees?

As noted earlier, moreover, the plan does not just address claims against the Debtors and the Sacklers for money. It not only deprives the Sacklers of all their interest in the Debtors and requires them to cause the delivery of $4.5 billion to the creditors, primarily for abatement purposes. It not only has been negotiated in a context that has subjected them to national opprobrium. It also addresses their naming rights and includes the Sacklers and the Debtors' agreement to provide the comprehensive public document depository, including waivers of the attorney-client privilege, for future analysis by the federal government, states, and others.

Ms. Conroy, who has been pursuing Purdue and the Sacklers for as long and as diligently as anyone, in fact testified that the document depository is perhaps the most important aspect of the settlement, even more important than the billions of dollars being paid by the shareholder released parties. It is especially important given the public interest raised by the objecting states. It will provide far more transparency to the conduct of Purdue and those it did business with and those who regulated it, including perhaps some of these very objectors, including the state of Connecticut where Purdue's headquarters is located, as well as, of course, the federal government, than would renewed litigation and any eventual trials against various members of the Sackler family.

The record to be established by the public document depository is important for the continued pursuit of lawsuits against other parties in this industry, and it will guide legislatures and regulators about how to better address other companies with lawful products that also are incredibly dangerous.

Similarly, the plan's mandated use of most of its anticipated distributions for abatement purposes, the parties' agreement on parameters for abatement, and the required periodic reporting on those efforts should guide the public's consideration of the efficacy of abatement measures going forward.

The aspects of the plan that regulate NewCo's future governance and conduct also, as I've noted, should provide a model for further self-regulation of similar companies or regulation by governmental entities.

I conclude therefore that the objectors' expressed public interests in opposing the settlement are outweighed by the foregoing considerations.

Each of the four members of the Sackler family who testified during the evidentiary hearing was asked if they would apologize for their role and conduct related to Purdue. Their reactions, typically for an unhappy family, varied. None would give an explicit apology, which I suppose is understandable given the legal risks faced, although I will note that in a somewhat similar context I have received a profound apology to victims of misconduct.

One of the witnesses, Richard Sackler, did not accept any level of responsibility. The other three with differing degrees of emotion stated their regret for what their companies had done. A forced apology is not really an apology. So we will have to live without one unless apologies follow the plan's confirmation.

The writer Stendahl wrote that most people do not forgive, they just forget. But given the nature of this settlement, including the document depository, forgetting should be impossible unless by choice. To me, the elements of the settlement, taken together, more than justify the admittedly serious implications of overriding the objecting states' and Seattle's rights.

So, assuming that the changes to sections 5.8 and 10.07(b) of the plan that I outlined will be made, as well as one other change that I will address in a moment, I will confirm the plan. I do so agreeing with the Official Unsecured Creditors Committee and everyone else on the other side of the table from the Sackler family, including the Debtors, that I wish the plan had provided for more, but I will not jeopardize what the plan does provide by denying its confirmation.

The other change to the plan that I believe is required involves section 11.1(e), which provides that those who would prosecute a cause of action against released parties based on its being a "non-opioid excluded claim," which by definition truly is not a derivative claim, nevertheless must obtain leave from the bankruptcy court to do so. The provision is intended to protect the estates and released parties from having to go to other courts to litigate whether someone is usurping the estates' claims and thus violating the release.

Consistent with my remarks to counsel for certain Canadian municipalities and First Nations during the confirmation hearing, that provision should be clarified to apply only to a causes of action that colorably are derivative and therefore would belong to the Debtors' estates. Thus, for example, if a cause of action seeks to avoid a fraudulent transfer made by a non-Debtor, the plaintiff should not have to obtain permission under section 11.1(e) from the bankruptcy court to bring it.

I will enter an order confirming the plan if it is amended as required hereby, which order can generally be in the form of proposed confirmation order previously circulated to the parties and provided to chambers.

IN RE: HELIOS AND MATHESON ANALYTICS, INC. et al.,[1] Debtors.

Case No. 20-10242 (DSJ) (Jointly Administered)

United States Bankruptcy Court, S.D. New York.

Signed September 24, 2021

Background: Chapter 7 trustee objected to portion of movie theater chain's claim based on liquidated damages formula in contract with debtor-theatrical movie subscription service, requiring debtor to pay liquidated damages in the amount of any

1. The Debtors in these Chapter 7 cases, along with the last four digits of each Debtor's federal tax identification number, include: Helios and Matheson Analytics, Inc., a/k/a MovieFone (9913); Zone Technologies, Inc. a/k/a Red Zone, a/k/a Zone Intelligence (5124); and MoviePass, Inc. (9893).

635 B.R. 26
United States District Court, S.D. New York.

IN RE: PURDUE PHARMA, L.P.
This Filing Relates to All Matters

21 cv 7532 (CM) [Master Case]
|
[rel: 21 cv 7585 (CM)
|
21 cv 7961 (CM), 21 cv 7962 (CM), 21 cv 7966 (CM), 21 cv 7969 (CM), 21 cv 8034 (CM), 21 cv 8042 (CM), 21 cv 8049 (CM), 21 cv 8055 (CM), 21 cv 8139 (CM), 21 cv 8258 (CM), 21 cv 8271 (CM), 21 cv 8548 (CM), 21 cv 8557 (CM), 21 cv 8566 (CM)]
|
Signed 12/16/2021

Synopsis
Background: Chapter 11 debtors, a privately-held pharmaceutical company and affiliated entities involved in the manufacture and promotion of a proprietary prescription opioid pain reliever, sought confirmation of proposed plan of reorganization which, inter alia, contained broad releases of civil claims against non-debtor family members who owned debtors and against their related entities. United States Trustee (UST), numerous states and municipalities, and others objected. The Bankruptcy Court, Robert D. Drain, J., 633 B.R. 53, entered order confirming plan. Appeal was taken from that order as well as two merged and related orders, one approving debtors' disclosure statement and solicitation materials, and the other authorizing the implementation of certain preliminary aspects of plan.

Holdings: The District Court, Colleen McMahon, J., held that:

[1] the Bankruptcy Court lacked constitutional authority to enter a final order approving the non-consensual releases, even though they were incorporated into proposed plan, and so standard of review was de novo as to both the Bankruptcy Court's factual findings and its conclusions of law;

[2] the Bankruptcy Court had subject matter jurisdiction to approve the release of claims against non-debtors;

[3] addressing an issue of apparent first impression for the court, the Bankruptcy Code does not authorize a bankruptcy court to order the non-consensual release of non-derivative third-party claims against non-debtors in connection with confirmation of a Chapter 11 plan; and

[4] the plan's classification and treatment of the claims of Canadian unsecured creditors vis-a-vis those of their domestic unsecured creditor "counterparts" did not violate the Code.

Vacated.

West Headnotes (70)

[1] **Bankruptcy** Number of creditors and amount of claims concurring

Under the Bankruptcy Code, a Chapter 11 plan must be approved, not by a supermajority of all eligible voters, but by a supermajority of all actual voters. 11 U.S.C.A. § 1126.

[2] **Bankruptcy** Appointment; Election

Bankruptcy Representation of debtor, estate, or creditors

United States Trustee (UST) is a Department of Justice (DOJ) official appointed by the Attorney General to supervise the administration of bankruptcy cases and, under the Bankruptcy Code, has standing to appear in bankruptcy cases and comment on proposed disclosure statements and Chapter 11 plans. 11 U.S.C.A. § 307; 28 U.S.C.A. §§ 581-589.

[3] **Bankruptcy** Construction and Operation

Bankruptcy Code is "comprehensive scheme" devised by Congress for resolving debtor-creditor relations.

[4] **Bankruptcy** Judicial authority or approval

Bankruptcy courts consider the factors set forth by the Second Circuit in *Iridium*, 478 F.3d 452, in evaluating the fairness of proposed settlements.

[5] **Bankruptcy** Property held in trust or custody for debtor; deposits

Spendthrift trusts can and often do insulate assets from the bankruptcy process.

[6] **Bankruptcy** Conclusions of law; de novo review

Bankruptcy Clear error

Generally, in bankruptcy appeals, the district court reviews the bankruptcy court's factual findings for clear error and its conclusions of law de novo. Fed. R. Bankr. P. 8013.

[7] **Bankruptcy** Conclusions of law; de novo review

Bankruptcy court's conclusions of law, reviewed de novo, include rulings as to the bankruptcy court's jurisdiction and interpretations of the Constitution. Fed. R. Bankr. P. 8013.

[8] **Bankruptcy** Clear error

Clear error standard used by the district court in reviewing a bankruptcy court's findings of fact is a deferential one. Fed. R. Bankr. P. 8013.

[9] **Bankruptcy** Clear error

Bankruptcy court's finding of fact is "clearly erroneous" only if the district court is left with the definite and firm conviction that a mistake has been committed. Fed. R. Bankr. P. 8013.

[10] **Bankruptcy** Submission to district court for judgment

Bankruptcy District court review or decision

Standard of review applied by the district court in reviewing a bankruptcy court's findings of fact is far less deferential if bankruptcy court is presented with something it cannot adjudicate to final judgment as constitutional matter unless parties consent; in such circumstance, bankruptcy judge has authority only to hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for de novo review and entry of judgment. Fed. R. Bankr. P. 8013.

[11] **Bankruptcy** District court review or decision

If bankruptcy court issues final order in mistaken belief that it has constitutional authority to do so, district court can treat bankruptcy court's order as report and recommendation, but it must review proceeding de novo and enter final judgment.

[12] **Bankruptcy** Particular proceedings or issues

Bankruptcy Issues between non-debtors

On Chapter 11 debtors' motion to confirm proposed plan of reorganization, the Bankruptcy Court lacked constitutional authority under *Stern* to enter a final order approving the non-consensual third-party releases incorporated into the plan, and so, on appeal of the Bankruptcy Court's confirmation order, the standard of review was de novo as to both the Bankruptcy Court's factual findings and its conclusions of law; even though the Bankruptcy Court had authority to confirm the plan, which was a core function of a bankruptcy court, the non-consensual releases applied to third-party claims against non-debtors, such third-party claims neither stemmed from debtors' bankruptcy nor would necessarily be resolved in the claims allowance process, and the Bankruptcy Court had only "related to" jurisdiction over them. 28 U.S.C.A. § 157(a); Fed. R. Bankr. P. 8013.

4 Cases that cite this headnote

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[13] **Bankruptcy** Core, Non-Core, or Related Proceedings in General; Nexus

Under statute governing bankruptcy procedure, Congress divided bankruptcy proceedings into three types: (1) those that "arise under" title 11, (2) those that "arise in" a title 11 case, (3) and those that are "related to" a title 11 case. 28 U.S.C.A. § 157(a).

[14] **Bankruptcy** Core or non-core proceedings

Cases that "arise under" or "arise in" a title 11 matter are known as "core" bankruptcy proceedings, while "related to" proceedings are "non-core." 28 U.S.C.A. §§ 157(a), 157(b)(1)-(2)(C).

[15] **Bankruptcy** Core or non-core proceedings

Every proceeding pending before a bankruptcy court is either core or non-core. 28 U.S.C.A. § 157(a).

[16] **Bankruptcy** Core or non-core proceedings

Core versus non-core distinction is critical when assessing bankruptcy court's constitutional authority to enter final judgment disposing of particular proceeding. 28 U.S.C.A. § 157(a).

[17] **Bankruptcy** Core or non-core proceedings

Core/non-core distinction is critically important when assessing the bankruptcy court's subject matter jurisdiction. 28 U.S.C.A. § 157(a).

[18] **Bankruptcy** Related proceedings

Bankruptcy Consent to or Waiver of Objections to Jurisdiction or Venue

Bankruptcy court lacks constitutional authority to enter final judgment in proceeding over which it has only "related to" subject matter jurisdiction unless all parties consent. 28 U.S.C.A. § 157(a).

[19] **Bankruptcy** Consent to or Waiver of Objections to Jurisdiction or Venue

A party otherwise entitled to have a matter adjudicated by an Article III court does not forfeit that constitutional right if the matter is disposed of as part of a plan of reorganization in bankruptcy. U.S. Const. art. 3.

1 Cases that cite this headnote

[20] **Bankruptcy** Bankruptcy Jurisdiction

Pursuant to *Stern*, bankruptcy courts have the power to enter a final judgment only in proceedings that stem from the bankruptcy itself or would necessarily be resolved in the claims allowance process.

[21] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Debtors and their affiliated non-debtor parties cannot manufacture constitutional authority for bankruptcy court to resolve non-core claim by artifice of including release of that claim in plan of reorganization.

1 Cases that cite this headnote

[22] **Bankruptcy** Settlement, adjustment, or enforcement of claims

In assessing a bankruptcy court's jurisdiction to enjoin a third-party dispute under a plan, the question is not whether the court has jurisdiction over the settlement that incorporates the third-party release, but whether it has jurisdiction over the attempts to enjoin the creditors' unasserted claims against the third party.

[23] **Bankruptcy** Consent to or Waiver of Objections to Jurisdiction or Venue

Bankruptcy Settlement, adjustment, or enforcement of claims

A bankruptcy court's order extinguishing a non-core claim and enjoining its prosecution without an adjudication on the merits finally determines

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that claim and is equivalent to entering a judgment dismissing the claim and bars the claim under principles of former adjudication; therefore, Congress may not allow a bankruptcy court to enter such an order absent the parties' consent.

[24] **Bankruptcy** Bankruptcy Jurisdiction

Bankruptcy court is creature of statute.

[25] **Bankruptcy** Jurisdiction over property

Bankruptcy court's subject matter jurisdiction is in rem and is limited to res of estate.

[26] **Bankruptcy** Core, Non-Core, or Related Proceedings in General; Nexus

A proceeding "arises under" title 11, for jurisdictional purposes, if the claims invoke substantive rights created by that title. 28 U.S.C.A. § 1334(b).

[27] **Bankruptcy** Core, Non-Core, or Related Proceedings in General; Nexus

A proceeding "arises in" a title 11 case, for jurisdictional purposes, if, for example, parties, by their conduct, submit themselves to the bankruptcy court's jurisdiction by litigating proofs of claim without contesting personal jurisdiction. 28 U.S.C.A. § 1334(b).

[28] **Bankruptcy** Related proceedings

A proceeding is "related to" a title 11 proceeding, for jurisdictional purposes, if its outcome might have any conceivable effect on the bankrupt estate. 28 U.S.C.A. § 1334(b).

[29] **Bankruptcy** Issues between non-debtors

Release of most third-party claims against non-debtor touches outer limit of bankruptcy court's jurisdiction. 28 U.S.C.A. § 1334(b).

[30] **Bankruptcy** Related proceedings

Standard for bankruptcy court's jurisdiction is not that action's outcome will certainly have, or even that it is likely to have, an effect on res of estate; rather, it is whether it might have any conceivable impact on estate. 28 U.S.C.A. § 1334(b).

[31] **Bankruptcy** Related proceedings

The only question a bankruptcy court need ask in determining whether it can exercise "related to" jurisdiction is whether the action's outcome might have any conceivable effect on the bankrupt estate; if the answer to that question is yes, then related to jurisdiction exists, no matter how implausible it is that the action's outcome actually will have an effect on the estate. 28 U.S.C.A. § 1334(b).

[32] **Bankruptcy** Particular proceedings or issues

Under governing broad standard, the Bankruptcy Court had "related to" subject matter jurisdiction to approve, as part of proposed plan of reorganization, a release of non-derivative third-party claims against non-debtor family members who owned Chapter 11 debtors; civil proceedings asserted against non-debtor family members might have had conceivable impact on the rest of the estate, as pursuit of such claims threatened to unravel plan's intricate settlements, to alter liabilities of the estate, and to change amount available for distribution to other creditors, all claims in case had high degree of interconnectedness with lawsuits against debtors and against family members, and it was likely that debtors' litigation of their indemnification, contribution, and/or insurance obligations to family members who had served as their directors, officers, or managers would burden estate assets. 28 U.S.C.A. § 1334(b).

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[33] **Insurance** Public policy limitations in general

Insurance Defense Costs, Supplementary Payments and Related Expenses

Insurance Scope of Duty

California law specifically prohibits indemnity or insurance coverage for losses resulting from a violation of its false advertising law or unfair competition law, and under that law an insurer has no duty to defend or advance costs. Cal. Ins. Code § 533.5.

[34] **Bankruptcy** Equitable powers and principles

Bankruptcy Carrying out provisions of Code

Bankruptcy Settlement, adjustment, or enforcement of claims

Bankruptcy Code does not authorize a bankruptcy court to order the non-consensual release of non-derivative third-party claims against non-debtors in connection with confirmation of a Chapter 11 plan; sole section of Code expressly authorizing court to enjoin third-party claims against non-debtors without consent of third parties is limited to asbestos cases, neither section of Code authorizing court to enter any "necessary or appropriate" order to carry out provisions of Code nor subsections authorizing a plan to provide adequate means for its implementation or providing that a plan may include "any other appropriate provision" not inconsistent with applicable provisions of Code, whether read individually or together, provide court with such authority, there is no such thing as "equitable authority" or "residual authority" in a bankruptcy court untethered to some specific, substantive grant of authority in Code, and any congressional silence on matter could not be deemed consent. 11 U.S.C.A. §§ 105(a), 524(e), 524(g), 1123(a)(5), 1123(b)(6).

2 Cases that cite this headnote

[35] **Bankruptcy** Rights of Action; Contract Rights Generally

Bankruptcy Claims allowable; what constitutes "claim."

"Derivative" claims are those that seek to recover from the bankruptcy estate indirectly on the basis of the debtor's conduct, as opposed to a non-debtor's own conduct.

[36] **Bankruptcy** Rights of Action; Contract Rights Generally

Derivative claims in every sense relate to adjustment of debtor-creditor relationship, because they are claims that relate to injury to corporation itself; if creditor's claim is one that bankruptcy trustee could bring on behalf of estate, then it is "derivative."

[37] **Bankruptcy** Claims allowable; what constitutes "claim."

In the bankruptcy context, "direct" claims are based upon a "particularized" injury to a third party that can be directly traced to a non-debtor's conduct.

[38] **Bankruptcy** Rights of Action; Contract Rights Generally

Claims asserted by states against non-debtor family members who had served as Chapter 11 debtors' officers, directors, or managers, based on family members' alleged violation of state laws under which individuals who serve in certain capacities in a corporation are individually and personally liable for their personal participation in certain unfair trade practices, were not derivative; claims arose out of out of a separate and independent duty that was imposed by statute on individuals who, by virtue of their positions, were alleged to have personally participated in acts of corporate fraud, misrepresentation, and/or willful misconduct.

[39] **Statutes** Language

When assessing statutory authority, courts should turn first to the text of the statute.

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[40] **Bankruptcy** Injunction or stay of other proceedings

Bankruptcy Code expressly authorizes a bankruptcy court to enjoin third-party claims against non-debtors without the consent of those third parties solely and exclusively in cases involving injuries arising from the manufacture and sale of asbestos, and such injunctions cannot be entered in favor of just any non-debtor, but are limited to enjoin actions against a specific set of non-debtors, namely, those who have a particular relationship to the debtor, including owners, managers, officers, directors, employees, insurers, and financiers. 11 U.S.C.A. §§ 524(g), 524(g)(4)(A).

[41] **Bankruptcy** Exemptions

Bankruptcy Code explicitly exempts certain debtor assets from the bankruptcy estate and provides a finite number of exceptions and limitations to those asset exemptions; courts are not authorized to create additional exceptions. 11 U.S.C.A. § 522.

[42] **Bankruptcy** Preservation of priority

In Chapter 11 bankruptcies, a plan that does not follow normal priority rules cannot be confirmed over the objection of an impaired class of creditors. 11 U.S.C.A. § 1129(b).

[43] **Bankruptcy** Effect; proceedings in converted case

In a "structured dismissal," the debtor obtains an order that simultaneously dismisses its Chapter 11 case and provides for the administration and distribution of its remaining assets.

[44] **Bankruptcy** Carrying out provisions of Code

Equitable power conferred on the bankruptcy court by the section of the Bankruptcy Code authorizing a court to enter any "necessary or appropriate" order to carry out the provisions of title 11 is the power to exercise equity in carrying out the provisions of the Code, rather than to further the purposes of the Code generally, or otherwise to do the right thing. 11 U.S.C.A. § 105(a).

[45] **Bankruptcy** Contents in general

Subsection of Bankruptcy Code providing that Chapter 11 plan may include "any other appropriate provision" not inconsistent with applicable provisions of Code does not confer substantive authority on the bankruptcy court. 11 U.S.C.A. § 1123(b)(6).

[46] **Bankruptcy** Fraud

Congress intended that the Bankruptcy Code ensure that all debts arising out of fraud are excepted from discharge no matter what their form. 11 U.S.C.A. § 523(a)(2), (4), (6).

[47] **Bankruptcy** Fines, penalties, and forfeitures; punitive damages, and interest

Civil penalties payable to and for the benefit of governmental units are not dischargeable in bankruptcy. 11 U.S.C.A. § 523(a)(7).

[48] **Bankruptcy** Effect as to co-debtors, guarantors, and sureties

Under the Bankruptcy Code, releasing a debtor on a debt owed to a creditor does not affect the liability that a non-debtor may have for the same debt. 11 U.S.C.A. § 524(e).

[49] **Bankruptcy** Means of implementation

Section of the Bankruptcy Code providing that a plan of reorganization must provide adequate means for its implementation contains a laundry list of things that a Chapter 11 plan can include in order to make sure that resources are available to

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implement the plan, any of which can be ordered by a bankruptcy court. 11 U.S.C.A. § 1123(a)(5).

[50] **Bankruptcy** Means of implementation

Under the section of the Bankruptcy Code providing that a plan of reorganization must provide adequate means for its implementation, it is the debtor's resources, not the resources of some third party, that are supposed to be used to implement a plan that will adjust the debtor's relations with its creditors. 11 U.S.C.A. § 1123(a)(5).

[51] **Bankruptcy** Means of implementation

Section of the Bankruptcy Code providing that a plan of reorganization must provide adequate means for its implementation does not confer any special power on the bankruptcy court. 11 U.S.C.A. § 1123(a)(5).

[52] **Bankruptcy** Means of implementation

Section of the Bankruptcy Code providing that a plan of reorganization must provide adequate means for its implementation does not authorize a court to give its imprimatur to something the Code does not otherwise authorize, simply because doing so would ensure funding for a plan. 11 U.S.C.A. § 1123(a)(5).

[53] **Bankruptcy** Means of implementation

Under the section of the Bankruptcy Code providing that a plan of reorganization must provide adequate means for its implementation, the mere fact that money is being used to fund implementation of the plan does not give a bankruptcy court statutory authority to enter an otherwise impermissible order in order to obtain that funding. 11 U.S.C.A. § 1123(a)(5).

[54] **Bankruptcy** Carrying out provisions of Code

Bankruptcy Construction, execution, and performance

Section of the Bankruptcy Code providing that a bankruptcy court shall confirm a Chapter 11 plan only if the plan complies with applicable provisions of title 11 confers no substantive right that could be used to undergird an injunction under the section of the Code authorizing the court to enter any "necessary or appropriate" order to carry out the provisions of title 11. 11 U.S.C.A. §§ 105(a), 1129(a)(1).

[55] **Bankruptcy** Construction and Operation

Bankruptcy Code provides comprehensive federal system to govern orderly conduct of debtors' affairs and creditors' rights.

[56] **Bankruptcy** Purpose

Bankruptcy Code was intended to free the debtor of personal obligations while ensuring that no one else reaps a similar benefit.

[57] **Statutes** General and specific terms and provisions; ejusdem generis

Statutes General and specific statutes

It is a commonplace of statutory construction that the specific governs the general.

[58] **Bankruptcy** Construction and Operation

The "general/specific canon" of statutory interpretation applies with particular force in bankruptcy, where Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.

[59] **Bankruptcy** Power and Authority

Any "residual authority" of a bankruptcy court, if it even exists, cannot be exercised in contravention of specific provisions of the Bankruptcy Code.

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[60] Bankruptcy Issues between non-debtors

"Special remedial scheme" contemplated by the Bankruptcy Code addresses the rights of persons who have claims against a debtor in bankruptcy, not claims against other non-debtors.

[61] Bankruptcy Determination

Bankruptcy Code lays out a claims allowance process so that creditors can file their claims against someone who has invoked the protection of the Code; it provides a mechanism for those parties to litigate those claims against the debtor and to determine their value.

[62] Bankruptcy Effect of Bankruptcy Relief; Injunction and Stay

In order to take advantage of the "special remedial scheme" set forth in the Bankruptcy Code, debtors have to declare bankruptcy, disclose their assets, and apply them, that is, all of them, with de minimis exceptions, to the resolution of the claims of their creditors.

[63] Bankruptcy Issues between non-debtors

Just as a bankruptcy court's ability to provide finality to a third party is defined by its jurisdiction, not its good intentions, so too its power to grant relief to a non-debtor from non-derivative third-party claims can only be exercised within confines of Bankruptcy Code.

[64] Bankruptcy Classification of claims

Classification and treatment of the claims of Canadian claimants vis-a-vis those of their domestic unsecured creditor "counterparts" by Chapter 11 plan of debtors, a privately-held pharmaceutical company and affiliated entities, did not violate the Bankruptcy Code; under the plan, Canadian claimants belonged to a different class, general unsecured creditors, than their domestic unsecured creditor "counterparts," which were placed in classes as "non-federal domestic governmental" claimants and "tribe" claimants, respectively, for legitimate reasons, given, inter alia, that Canadian claimants operated under different regulatory regimes with regard to opioids and abatement than their domestic counterparts and that the bulk of their legal claims arose in Canada, and there was no argument that the separate classification was done to disenfranchise a group, to engineer an assenting impaired class, or to manipulate class voting. 11 U.S.C.A. §§ 1129(a)(4), 1129(b)(1).

[65] Bankruptcy Classification of claims

Bankruptcy Code does not require that all creditor classes be treated equally, only that there be a reasonable basis for any differentiation. 11 U.S.C.A. §§ 1129, 1129(a)(4).

[66] Bankruptcy Classification of claims

Bankruptcy Code expressly permits differentiation between classes of creditors.

[67] Bankruptcy Equality of treatment within classes

Bankruptcy Code's "equal-treatment mandate" with respect to a Chapter 11 plan's treatment of creditors applies only to claims of all creditors within the same class. 11 U.S.C.A. § 1129(a)(4).

[68] Bankruptcy Classification of claims

It does not matter that certain creditors' claims are purportedly "indistinguishable" from those held by other creditors; a Chapter 11 plan may separately classify similar claims so long as the classification scheme has a reasonable basis for doing so. 11 U.S.C.A. § 1129.

[69] Bankruptcy Classification of claims

In evaluating a Chapter 11 plan's separate classification of creditors, the court must carefully scrutinize whether such classification

was done for the purpose of disenfranchising a particular group in a manner inconsistent with the Bankruptcy Code, to engineer an assenting impaired class, or manipulate class voting. 11 U.S.C.A. § 1129.

[70] **Bankruptcy** Fairness and Equity; "Cram Down."

Under the Bankruptcy Code, only creditors of a dissenting class can object to the confirmation of a Chapter 11 plan on the grounds that the plan discriminates against their creditor class. 11 U.S.C.A. § 1129(b)(1).

Attorneys and Law Firms

***34** Timothy E. Graulich, Marshall Scott Huebner, Benjamin S. Kaminetzky, Christopher Scott Robertson, Eli James Vonnegut, Davis Polk & Wardwell LLP, New York, NY, for In re: Purdue Pharma, L.P.

DECISION AND ORDER ON APPEAL

McMahon, J.:

This is an appeal from an order of the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court") (Drain, B.J.), announced from the bench on September 1, 2021, and filed on September 17, 2021, confirming the Plan of Reorganization proposed by Debtors Purdue Pharma L.P. ("Purdue Pharma") and certain associated companies[1] (the "Confirmation Order"). Appeal is also taken from two merged and related orders of the Bankruptcy Court: the June 3, 2021, order approving Purdue's disclosure statement and solicitation materials (the "Disclosure Order") and the September 15, 2021, order authorizing the implementation of certain preliminary aspects of the Plan (the "Advance Order").

1 Purdue Pharma Inc. ("PPI"), 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, and SVC Pharma Inc. (together, the "Debtors" or "Purdue").

Purdue's bankruptcy was occasioned by a health crisis that was, in significant part, of its own making: an explosion of opioid addiction in the United States over the past two decades, which can be traced largely to the over-prescription of highly addictive medications, including, specifically and principally, Purdue's proprietary, OxyContin.

Despite a 2007 Plea Agreement with the United States – in which Purdue admitted that it had falsely marketed OxyContin as non-addictive and had submitted false claims to the federal government for reimbursement of medically unnecessary opioid prescriptions ("2007 Plea Agreement") – Purdue's profits after 2007 were driven almost exclusively by its aggressive marketing of OxyContin. (*See* JX-2094.0047-88; JX-2481). But by 2019, Purdue was facing thousands of lawsuits brought by persons who had become addicted to OxyContin and by the estates of addicts who had overdosed – either on OxyContin itself or on the street drugs (heroin, fentanyl) for which Purdue's product served as a feeder. It also faced new federal, state and local Medicare reimbursement claims and a number of new false marketing claims brought under various state consumer protection ***35** laws. Finally, in November 2020, Purdue pled guilty to a criminal Information filed by the Department of Justice ("DOJ") in the United States District Court for the District of New Jersey; in its plea agreement, the company (though not the people through whom the company acted) admitted to substantial deliberate wrongful conduct ("2020 Plea Agreement"). *See USA v. Purdue Pharma L.P.*, No. 2:20-cr-01028.

Engulfed in a veritable tsunami of litigation, Purdue filed for chapter 11 bankruptcy in September 2019. The intent was for a "*Manville*-style" bankruptcy that would resolve both existing and future claims against the company arising from the prescription of OxyContin. The automatic stay brought a stop to civil litigation against Purdue; and a court-ordered stay halted litigation against certain non-debtors affiliated with the company – principally members of the Sackler family (the "Sacklers" or "Sackler family"),[2] which had long owned the privately-held company – to buy time to craft a resolution. For two years, committees of various classes of creditors –

individuals, state and local governments, indigenous North American tribes, even representatives of unborn children who were destined to suffer from opioid addiction – negotiated with Purdue and the Sacklers under the watchful eye of the experienced Bankruptcy Judge, with the assistance of two of this country's finest and most experienced mediators (Layn Phillips and Kenneth Feinberg), as well as a second Bankruptcy Judge (The Hon. Shelley Chapman).

2 The Sacklers or Sackler family in this opinion means the Mortimer D. Sackler Family (also known as "Side A" of the Sackler family) and the Raymond R. Sackler Family (also known as "Side B" of the Sackler family).

[1] Eventually, the parties crafted a plan of reorganization for Purdue that would, if implemented, afford billions of dollars for the resolution of both private and public claims, while funding opioid relief and education programs that could provide tremendous benefit to the consuming public at large (the "Plan").[3] That Plan was approved by supermajority of the votes cast by the members of each class of creditors.[4] It was confirmed by Judge Drain, who had invested so much of himself in the effort to find a workable solution to a seemingly intractable problem.

3 The Plan refers to confirmed chapter 11 bankruptcy plan of reorganization at Bankruptcy Docket Number 3726. (*See* Dkt. No. 91-3, at App.1070-1227).

4 It is true that many members of some creditor classes did not cast a vote, but the law provides that a plan must be approved, not by a supermajority of all eligible voters, but by a supermajority of all actual voters. 11 U.S.C. § 1126. That being so, there is no merit to Appellants' argument that the court should not deem the Plan approved by a supermajority of the affected creditor classes.

[2] But not everyone voted yes. Eight states and the District of Columbia ("D.C."), as well as certain Canadian municipalities and Canadian indigenous tribes, the City of Seattle (alone among all voting municipalities in the United States), as well as some 2,683 individual personal injury claimants, voted against the adoption of the Plan. The same states, municipalities and tribes, together with three of those individual claimants (representing themselves), filed formal objections to the Plan and have appealed from its confirmation.[5] The United States Trustee (the "U.S. Trustee") in Bankruptcy[6] and the U.S. ***36** Attorney's Office for this District on behalf of the United States of America join in their objections.

5 While the City of Seattle objected to the Plan before the Bankruptcy Court, it did not appeal.

6 The U.S. Trustee "is a DOJ official appointed by the Attorney General to supervise the administration of bankruptcy cases" and has standing under 11 U.S.C. § 307 to appear in bankruptcy cases and "comment on proposed disclosure statements and chapter 11 plans." (Dkt. No. 91, at 8 (citing 28 U.S.C. §§ 581-589 and 28 U.S.C. § 586(a)(3)(B)).

All Appellants assign the same reason for their opposition: the Plan provides broad releases, not just of derivative, but of particularized or direct claims – including claims predicated on fraud, misrepresentation, and willful misconduct under various state consumer protection statutes – to the members of the Sackler family (none of whom is a debtor in the bankruptcy case) and to their affiliates and related entities. As the opioid crisis continued and worsened in the wake of Purdue's 2007 Plea Agreement, the Sacklers – or at least those members of the family who were actively involved in the day to day management of Purdue[7] – were well aware that they were exposed to personal liability over OxyContin. Concerned about how their personal financial situation might be affected, the family began what one member described as an "aggressive[ ]" program of withdrawing money from Purdue almost as soon as the ink was dry on the 2007 papers. The Sacklers upstreaming some $10.4 billion out of the company between 2008 and 2017, which, according to their own expert, substantially reduced Purdue's "solvency cushion." Over half of that money was either invested in offshore companies owned by the Sacklers or deposited into spendthrift trusts that could not be reached in bankruptcy and off-shore entities located in places like the Bailiwick of Jersey.

7 Ilene Sackler Lefcourt, Kathe Sackler, Mortimer D.A. Sackler, Theresa Sackler, Richard Sackler, Jonathan Sackler, and David Sackler were at some or all relevant times directors of Purdue and its related enterprises. Mortimer D. Sackler and Raymond Sackler had management roles at the company as co-chief executive officers; Richard Sackler also served as president; and Mortimer D.A. Sackler, Ilene Sackler Lefcourt, and Kathe Sackler held officer roles as vice presidents. Mariana Sackler worked at Purdue in research and development.

When the family fortune was secure, the Sackler family members withdrew from Purdue's Board and management. Bankruptcy discussions commenced the following year. As part of those pre-filing discussions, the Sacklers offered to contribute toward a settlement, but if – and only if – every member of the family could "achieve global peace" from all civil (not criminal) litigation, including litigation by Purdue to claw back the money that had been taken out of the corporation. The Plan confirmed by the Bankruptcy Court extinguishes all civil claims against the Sacklers that relate in any way to the operations of Purdue – including claims on which certain members of the Sackler family could be held personally liable to entities other than Purdue (principally the various states). These claims could not be released if the Sacklers were themselves debtors in bankruptcy.

Appellants attack the legality of the Plan's non-consensual release of third-party claims against non-debtors on a number of grounds. They argue that the release (referred to in this opinion as the "Section 10.7 Shareholder Release") is both constitutionally defective and not statutorily authorized; that the Bankruptcy Court lacks constitutional authority and subject matter jurisdiction to approve the release or to carry out certain "gatekeeping" aspects of the Plan that relate to it; and that granting a release to the non-debtor Sacklers is unwarranted as a matter of fact and would constitute an abuse of the bankruptcy process.

***37** Debtors and those who voted in favor of the Plan – buttressed by Judge Drain's comprehensive Confirmation Order – argue that the Bankruptcy Court had undoubted jurisdiction to impose these broad third-party releases; insist that they are a necessary feature of the Plan; point out the tremendous public benefit that will be realized by implementing the Plan's many forward-looking provisions; and urge that the alternative – Purdue's liquidation – will inevitably yield far less benefit to all creditors and victims, in light of the cost and extraordinary hurdles that would have to be surmounted in order to claw back the billions of dollars that the Sacklers have taken out of Purdue.

Two of the questions raised by appellants are easily answered. The Bankruptcy Court had undoubted subject matter jurisdiction to enter the challenged releases. And while it may have lacked constitutional authority to give them final approval under the rule of *Stern v. Marshall*, 564 U.S. 462 (2011), that matters little in the great scheme of things; it changes the level of deference this court should give to Judge Drain's findings of fact, but those findings are essentially unchallenged.

The great unsettled question in this case is whether the Bankruptcy Court – or any court – is statutorily authorized to grant such releases. This issue has split the federal Circuits for decades. While the Circuits that say no are united in their reasoning, the Circuits that say yes offer various justifications for their conclusions. And – crucially for this case – although the Second Circuit identified the question as open back in 2005, it has not yet had occasion to analyze the issue. Its only guidance to the lower courts, uttered in that 2005 opinion, is this: because statutory authority is questionable and such releases can be abused, they should be granted sparingly and only in "unique" cases.

This will no longer do. Either statutory authority exists or it does not. There is no principled basis for acting on questionable authority in "rare" or "unique" cases, especially as the United States Supreme Court has recently held that there is no "rare case" rule in bankruptcy that allows a court to trump the Bankruptcy Code. *See* *Czyzewski v. Jevic Holding Corp.*, ––– U.S. ––––, 137 S. Ct. 973, 986, 197 L.Ed.2d 398 (2017).

[3] Moreover, the lower courts desperately need a clear answer. As one of my colleagues on the Bankruptcy Court recently noted, plans releasing non-debtors from third party claims are no rarity: "Unfortunately, in actual practice the parties ... often seek to impose involuntary releases based solely on the contention that anybody who makes a contribution to the case has earned a third-party release. *Almost every proposed Chapter 11 Plan that I receive includes proposed releases*." *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 726 (S.D.N.Y. 2019) (Wiles, B.J.) (emphasis added). When every case is unique, none is unique. Given the frequency with which this issue arises, the time has come for a comprehensive analysis of whether authority for such releases can be found in the Bankruptcy Code – that "comprehensive scheme" devised by Congress for resolving debtor-creditor relations. *See* *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012).

Aided by superb briefing and argument on both sides of the question, and by extended ruminations on the subject by several esteemed bankruptcy judges of our own District – Judge Drain not the least – this Court concludes that the Bankruptcy Code does not authorize such non-consensual

non-debtor releases: not in its express ***38** text (which is conceded); not in its silence (which is disputed); and not in any section or sections of the Bankruptcy Code that, read singly or together, purport to confer generalized or "residual" powers on a court sitting in bankruptcy. For that reason, the Confirmation Order (and the Advance Order that flows from it) must be vacated.

Because I conclude that the Bankruptcy Court lacked statutory authority to impose the Section 10.7 Shareholder Release, I need not and do not reach the constitutional questions that have been raised by the parties. Nor do I need to decide whether this is a case in which such releases should be imposed if my statutory analysis is incorrect. Those issues may need to be addressed some day, but they do not need to be addressed in order to dispose of this appeal.

This opinion will not be the last word on the subject, nor should it be. This issue has hovered over bankruptcy law for thirty-five years – ever since Congress added §§ 524(g) and (h) to the Bankruptcy Code. It must be put to rest sometime; at least in this Circuit, it should be put to rest now.

PARTIES[8]

8 In this decision, docket numbers abbreviated "Dkt. No." refer to the consolidated docketed appeals at 7:21-cv-7532; docket numbers abbreviated "Bankr. Dkt. No." refer to the underlying bankruptcy docket at 19-23649.

The Appellants in this case are the U.S. Trustee William K. Harrington; the States of California, Connecticut, Delaware, Maryland, Oregon, Rhode Island, Vermont, Washington, and D.C. (together, the "State Appellants"); the City of Grande Prairie as Representative 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 (together, the "Canadian Appellants"); and *pro se* Appellants Ronald Bass, Marie Ecke, Andrew Ecke, Richard Ecke, and Ellen Isaacs on Behalf of Patrick Ryan Wroblewski (together, the "Pro Se Appellants").

The Appellees are the Purdue Debtors, as well as the Official Committee of Unsecured Creditors of Purdue Pharma L.P., et al. (the "UCC"),[9] the Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants ("AHC"),[10] the Ad Hoc Group of Individual Victims of Purdue Pharma, L.P. ("PI Ad Hoc Group"), the Multi-State Governmental Entities Group ("MSGE"), the Mortimer-side Initial Covered Sackler Persons ("Side A"), and the Raymond Sackler Family ("Side B").

9 The UCC is also referred to in court filings and the appellate record as the "Creditors' Committee." The Court uses the terminology "UCC" consistent with the language provided in the glossary at Docket Number 115-1.

10 The AHC is also referred to in court filings and the appellate record as the "Ad Hoc Committee." The Court uses the terminology "AHC" consistent with the language provided in the glossary at Docket Number 115-1.

The Ad Hoc Committee of NAS Children ("NAS Children") appears as *amicus curiae* and has filed an *amicus* brief. (Dkt. No. 158). The U.S. Attorney's Office for this District also appears on behalf of the United States of America as *amicus curiae* and has filed a statement of interest in this case. (Dkt. No. 94).

BACKGROUND

The following facts are derived from the appellate record as designated by the parties to this appeal, unless indicated otherwise. (*See* Dkt. Nos. 78-1, 105, 255). The ***39** Court judicially notices certain public court records and other matters that are subject to judicial notice. *See* Fed. R. Evid. 201(b)-(d).[11]

11 *See Garber v. Legg Mason Inc.*, 347 F. App'x 665, 669 (2d Cir. 2009) (" '[a] court may take judicial notice, whether requested or not.' ") (quoting Fed. R. Evid. 201(c)); *Hotel Emps. & Rest. Emps. Union, Local 100 of New York, N.Y. & Vicinity, AFL-CIO v. City of NY Dep't of Parks & Recreation*, 311 F.3d 534, 540 n.1 (2d Cir. 2002) (" 'Judicial notice may be taken at any stage of the proceeding.' ") (quoting Fed. R. Evid. 201(d)); *Schenk v. Citibank/Citigroup/Citicorp*, No. 10-CV-5056 (SAS), 2010 WL 5094360, at *2 (S.D.N.Y. Dec. 9, 2010) (citing *Anderson v. Rochester–Genesee Reg'l Transp. Auth.*, 337 F.3d 201, 205 n.4 (2d Cir. 2003)) ("Judicial notice may encompass the status of other lawsuits in other courts and the substance of papers filed in those actions"); *Giraldo v. Kessler*, 694 F.3d 161, 163 (2d Cir. 2012) (courts

may "take judicial notice of relevant matters of public record.").

I. Purdue Pharma, L.P.

Purdue – originally known as "Purdue Frederick Company" – was founded by John Purdue Gray and George Frederick Bingham in 1892. The company was sold to brothers Arthur, Mortimer and Raymond Sackler in 1952. (*See* JX-2148; JX-1985, at 33:12-13).

Purdue Pharma, the Debtors' main operating entity, is a Delaware limited partnership headquartered in Stamford, Connecticut. (Dkt. No. 91-4, at App.1244). Purdue Pharma's general partner is Purdue Pharma Inc. ("PPI"), a New York corporation, also headquartered in Stamford, Connecticut. (*Id.*, JX-1221). The board of directors of PPI manages Purdue Pharma (the "Board"). (Dkt. No. 91-4, at App.1250). Purdue Pharma has 22 wholly owned subsidiaries in the United States and the British Virgin Islands. (*Id.* at App.1244).

Purdue Pharma is wholly owned by Pharmaceutical Research Associates, L.P. ("PRA"), a Delaware limited partnership that is not a debtor in this case. (*Id.* at App.1252). PRA is 99.5% owned, in equal parts, by non-debtors Beacon Company ("Beacon"), a Delaware general partnership, and Rosebay Medical Company L.P. ("Rosebay"), a Delaware limited partnership, which are in turn owned by certain trusts established for the benefit of the Sackler Families. (*Id.*). Beacon is the partnership of Side A of the Sackler family; Rosebay is the partnership of Side B of the Sackler family. (*See* JX-1987, at 42:10-23; JX-3298 at 160:8-10).[12]

12 In this opinion, unless otherwise specified, where reference is made to the "Sackler entities" this means Rosebay and Beacon, as well as other Sackler family affiliated trusts and entities relevant to this appeal, including those in Exhibit X to the Settlement Agreement, incorporated into the Plan. (*See* Dkt. No. 91-3, at App. 1112, App.1041-1069).

Purdue Pharma operates Purdue's branded prescription pharmaceutical business, which includes both opioid and non-opioid products. (Dkt. No. 91-4, at App.1244). OxyContin is one of Purdue Pharma's three principal branded opioid medications. (*Id.*). The other two are Hysingla and Butrans. (*Id.*). Purdue generated approximately $34 billion in revenue total between 1996-2019, most of which came from OxyContin sales (*See e.g.*, JX-2481); prior to bankruptcy, OxyContin accounted for some 91% of Purdue's U.S. revenue. (*See* JX-1984, at 40:24-41:5; JX-3275, at 338:6-9; JX-0999).

Purdue Pharma manufactures OxyContin for itself and, in limited quantities, for certain foreign independent associated companies ("IAC"), which are ultimately owned by the Sackler family. (Dkt. No. 91-4, at App.1245). Purdue Pharma receives royalties from IACs' sales for OxyContin ***40** abroad. (*Id.*). The IACs are not debtors in this case.

Until early 2019, members of the Sackler family served as directors of Purdue; the last Sackler's resignation from the Board became effective in the beginning of that year, although many family members stepped down during 2018.

II. The Sackler Family

Since Purdue was sold to brothers Arthur, Mortimer and Raymond Sackler in 1952 (*see* JX-1985, at 33:12-13),[13] the company has been closely held and closely run by members of the Sackler family, many of whom took on an active role in the company comparable to that of senior management prior to 2018. *See In re Purdue Pharma L.P.*, No. 19-23649, 2021 WL 4240974, at *33 (Bankr. S.D.N.Y. Sept. 17, 2021). In large part due to the success of their pharmaceutical business, the Sackler family have long been ranked on Forbes' list of America's Richest Families, becoming one of the top twenty wealthiest families in America in 2015, with a reported net worth of $14 billion dollars. (*See* JX-1985, at 40:24-42:10).

13 The Arthur Sackler family sold its interest in Purdue to the other two branches of the family prior to the invention of OxyContin and has no involvement in the company or in this bankruptcy.

Mortimer Sackler's side of the family is known as "Side A," and Raymond Sackler's side is known as "Side B." (Dkt. No. 91-4, at App.1250). From approximately 1993 until 2018, there were always at least six or seven members of the Sackler family on the Board; independent directors never equaled or outnumbered the number of Sackler family directors on the Board. (*See* Confr. Hr'g Tr., Aug. 19, 2021, at 159:17-25, 22:5-9; Dkt. No. 91-4, at App.1345).

In addition to Purdue, certain members of the Sackler family served as directors of an entity called "MNP," later "MNC" ("MNP/MNC"), which operated as an advisory board for IACs worldwide, including for "specific pharmaceutical manufacturer IACs" and "corporations throughout the world that [the Sackler] family owns and that are in the ...

pharmaceutical business." (*See* Confr. Hr'g Tr., Aug. 18, 2021, at 31:8-18; Confr. Hr'g Tr., Aug. 19, 2021, at 24:12-23). MNP/MNC's recommendations were typically followed by the IACs. (Confr. Hr'g Tr., Aug. 19, 2021, at 23:9-17).

A. Side A

Mortimer D. Sackler, who died in 2010, served as the co-chief executive officer of Purdue with his brother Raymond until the end of his life. (JX-3275.0168-69; Dkt. No. 91-5, at App.2089).

Three of his seven children – Ilene Sackler Lefcourt, Kathe Sackler, and Mortimer David Alfons Sackler ("Mortimer D.A. Sackler") – sat on the Board of Purdue for nearly 30 years, until 2018. (Confr. Hr'g Tr., Aug. 19, 2021, at 19:13-20, 158:6-15; JX-3298.0037; Dkt. No. 91-5, at App.2089). They also served as officers of Purdue, with Mortimer D.A. and Ilene holding the title of vice president and Kathe the title of senior vice president. (Confr. Hr'g Tr., Aug. 19, 2021, at 19:21-25, 22:18-23:4, 158:16-21; JX-3298.0075; JX3275.0169).

Mortimer Sackler's wife Theresa Sackler also served on the Board of Purdue from 1993 until 2018, explaining that her "husband asked me to join ... it was a family company and he felt that family members should be on the board." (JX-3275.0034, 36; Dkt. No. 91-4, at App.1345).

All four – Ilene, Kathe, Theresa, and Mortimer D.A. Sackler – served as directors on the board of MNP/MNC for many years. (Confr. Hr'g Tr., Aug. 19, ***41** 2021, at 19:21-25, 22:18-23:4, 161:2-11; JX-3298.0080; JX-3275.0059).

B. Side B

Raymond Sackler, who died in 2017, served as co-chief executive officer of Purdue with his brother Mortimer D. Sackler. (*See* JX-3275.0168-69).

Raymond Sackler's wife and two sons served as Board members of Purdue. (*See* Dkt. No. 91-4, at App.1345). His sons, Jonathan and Richard Sackler, served from 1990 until 2018, and his wife Beverly Sackler from approximately 1993 until 2017. (*See id.*; Confr. Hr'g Tr., Aug. 18, 2021, at 30:6-8).

In addition to his role as director, Richard Sackler also served as president of Purdue from 2000-2003, co-chair of the Board from 2003-2007, and chair of the Board from approximately 2008 until 2010 or 2011. (Confr. Hr'g Tr., Aug. 18, 2021, at 30:6-22, 44:20-21). He served as a director of MNP/MNC until 2018 and has served as director of at least one IAC. (*Id.* at 31:23-32:19).

Richard Sackler's son David Sacker also served on the Board from 2012 until 2018 and as a director of MNP/MNC. (Confr. Hr'g Tr., Aug. 17, 2021, at 43:12-14, 44:6-13).

Finally, Mariana Sackler, Richard Sackler's daughter, held several roles within the "family business" (JX-1991, at 58:19-25), including working as a consultant in the "research and development department" of Purdue on OxyContin projects and a "PR" role at Mundipharma Italy, an IAC, advancing "information around topics about pain in Italy" and "marketing and selling OxyContin" there. (*Id.* at 30:4-18; 32:12-33:3; 58:19-64:25). Marianna has never been an officer or director of Purdue.

III. OxyContin

OxyContin is a synthetic opioid analgesic – a powerful narcotic substance designed to relieve pain. (*See* JX-2181; JX-2195.0048; JX-2195.0059). Opioid analgesics have been available for several decades to treat moderate to severe pain. (JX-2181; Dkt. No. 91-4, at App.1259). But until the early 1980's they were limited to immediate-release dosage forms. (JX-2181; *see* JX-2199). Immediate-release pain killers are less than ideal because they control pain for only 4-6 hours at a time; by contrast, a controlled-release pain killer can provide relief from serious pain for up to 12 hours at a time. (*See* Dkt. No. 91-4, at App.1259; JX-2181; JX-2199; JX-2185-0010).

In the early 1980's, Purdue developed its first controlled-release morphine drug which it marketed as "MS Contin" (also called "MSContin" and "MS-Contin"). (JX-2181; *see* JX-2199; JX-2180-0030, 0084). MS Contin solved many of the difficulties associated with immediate-release opioids, and it was marketed, largely without abuse, throughout the 1980's and 1990's. (JX-2180-0015, 0078; Dkt. No. 91-4, at App.1262). However, morphine's stigma as an addictive narcotic caused patients and physicians alike to avoid it. (*See* JX-2180-0030).

So Purdue concentrated on the research, development, and testing of a non-morphine drug: its controlled-release semisynthetic opioid analgesic named "OxyContin." (*See* JX-2181; JX-2199; Dkt. No. 91-4, at App.1261-62). In December 1995, the Food and Drug Administration ("FDA") approved OxyContin for use. (*Id.*). OxyContin's formulations were labeled as "extended release" or "time release" doses

because the active ingredients continuously enter into a patient's system over time; a single dose could provide relief from serious pain for up to 12 hours. (*See* JX-2181). ***42** A 2000 *Time* Magazine article explains that OxyContin was quickly "hailed as a miracle" after its introduction in 1995, because "it eases chronic pain because its dissolvable coating allows a measured does of the opiate oxycodone to be released into the bloodstream." (JX-2147).

For years, Purdue contended that OxyContin, due to its "time release" formulation, posed virtually no threat of either abuse or addiction – as opposed to other pain relief drugs, such as Percocet or Vicodin, which are not controlled-release painkillers. *See the Purdue Frederick Company, Inc.*, No. 1:07-cr-00029, Dkt. No. 5-1, at ¶¶20-27 ("Agreed Statement"); (Dkt. No. 91-4, at App.1268-1269). Purdue delivered that message to prescribing physicians and patients alike.

But time-release OxyContin proved to have an efficacy and safety profile similar to that of immediate-release opioid pain relievers. (*See* JX-2195.0027, 48-49, 59). Indeed, in 2001, the FDA required that Purdue remove from its drug label the claim that OxyContin had a very low risk of iatrogenic addiction; Purdue was ordered to add instead the highest level of safety warning that the FDA can place on an approved drug product. (*See* JX-2181; JX-2199; JX-2220).

IV. Purdue's Deceptive Marketing of OxyContin

To promote its new product OxyContin, Purdue launched an aggressive marketing campaign. (*See* JX-2153). That campaign was multi-fold, aiming in part to combat concerns about the abuse potential of opioids and to encourage doctors to prescribe OxyContin for more and different types of pain. (*See* Dkt. No. 91-4, at App.1268-1269; Agreed Statement, at ¶20; JX-2181.0002).

Before OxyContin, opioid pain relievers were usually prescribed for cancer patients and patients with chronic diseases whose pain was "undertreated." (*See* JX-2181.0002). But Purdue pushed OxyContin as a treatment for many types of pain patients, including those with "noncancer pain" and other "nonmalignant" pain. (*Id.*; *see id.* at 0023, 0044). Purdue repeatedly published advertisements claiming, for example, that OxyContin can be an effective "first-line therapy for the treatment of arthritis" and safely used for "osteoarthritis pain" (JX-2218) and in many cases "mak[ing] unsubstantiated efficacy claims promoting the use of OxyContin for pain relief," "promoting OxyContin for a much broader range of patients with pain than are appropriate for the drug," "overstat[ing] the safety profile of OxyContin," and repeatedly omitting OxyContin's "abuse liability" (JX-2221) – all of which was contemporaneously documented in FDA warning letters to the company throughout the early 2000's. (*See, e.g.*, JX-2218; JX-2221).

By its marketing campaign, Purdue sought to eliminate concerns regarding "OxyContin's addictive potential." (*See* Agreed Statement, at ¶¶19-20; Dkt. No. 91-4, at App.1268-1269). To do this, Purdue needed to encourage doctors and patients to overcome their reservations about the use of opioids. For this purpose, Purdue created a website called "*In The Face of Pain*," which promoted OxyContin pain treatment and urged patients to "overcome" their "concerns about addiction." *See* Petition, *State of Kansas, ex rel. Derek Schmidt, Attorney General v. Purdue Pharma L.P., et al.*, Case No. 2019-cv-000369, at ¶89 (Shawnee Cnty. Dist. Ct. May 16, 2019). Testimonials on the website were allegedly presented as personal stories of OxyContin patients who had overcome life-long struggles with debilitating pain, although they were allegedly written ***43** by Purdue consultants who were paid to promote the drug. *Id.*

Purdue also allegedly distributed pamphlets to doctors. *Id.* at ¶33. In one such pamphlet, *Providing Relief, Preventing Abuse: A Reference Guide To Controlled Substance Prescribing Practices*, Purdue wrote that addiction "is not caused by drugs." *Id.* In another, the "Resource Guide for People with Pain," Purdue explained, "Many people living with pain and even some healthcare providers believe that opioid medications are addictive. The truth is that when properly prescribed by a healthcare professional and taken as directed, these medications give relief – not a 'high.' " *Id.* at ¶35.

Purdue's marketing campaign proved successful. OxyContin was widely prescribed; bonuses to Purdue sales representatives for the sale of OxyContin increased from $1 million in 1996 to $40 million by 2001; and by 2001, annual sales of OxyContin reached $1 billion. (JX-2181.0007; JX-2151). By 2001, OxyContin was "the most prescribed brand-name narcotic medication" in the U.S. (JX-2181.0002, 0007).

V. The Opioid Crisis

But OxyContin's popularity as a pain reliever coincided with the scourge of widespread abuse of the drug

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around the country. (*See, e.g.*, JX-2147; JX-2148; JX-2149; JX-2180-0078; JX-2181). Many individuals who had been prescribed OxyContin by their doctors for legitimate pain conditions became addicted to the drug. (*See* JX-2181). And hundreds of thousands of seasoned addicts and novice drug abusers, including teenagers, quickly discovered that crushing an OxyContin tablet and then snorting or injecting it resulted in a quick "morphine-like high." (*See* JX-2148; JX-2149; JX-2183; JX-2195.0059).

By the early 2000's, rates of opioid addiction in connection with OxyContin use were skyrocketing throughout the country. (*See* JX-2147; JX-2148; JX-2149). In the early years, "remote, rural areas" were particularly hard hit, due in part to the fact that these areas are

> home to large populations of disabled and chronically ill people who are in need of pain relief; they're marked by high unemployment and a lack of economic opportunity; they're remote, far from the network of Interstates and metropolises through which heroin and cocaine travel; and they're areas where prescription drugs have been abused—though in much smaller numbers—in the past.

Foister v. Purdue Pharma, L.P., 295 F. Supp. 2d 693, 696 (E.D. Ky. 2003) (quotation and internal citation omitted).

However, the crisis was not limited to one type of community or part of the country. (*See* JX-2147). Pill mills opened in urban areas, as unscrupulous physicians began writing prescriptions for OxyContin to stooge purchasers (often drug addicts themselves), who were recruited to obtain and fill prescriptions, turning over the pills to drug dealers, who resold them on the street, making astronomical profits. (*See* JX-2175; JX-2176). This Court presided over the criminal trial of a doctor who ran such a pill mill in Hamilton Heights on the Upper West Side of Manhattan, through which he garnered millions of dollars in ill-gotten gains at the expense of desperate people who were addicted to OxyContin. *See United States v. Mirilashvili*, No. 14-cr-0810 (CM), Dkt. No. 1 (S.D.N.Y. Dec. 9, 2014).

Prosecutions like the one of Dr. Mirilashvili, coupled with enhanced regulatory oversight over both prescribers of opioids and pharmacies that had filled suspiciously high numbers of prescriptions, reduced the number of illicit prescriptions of OxyContin. ***44** But drying up the source. did not end the problem of addiction. Individuals who had been feeding an OxyContin habit turned to alternative sources to get their fix – including street drugs like heroin and its even stronger and more lethal cousin, fentanyl, which is fast acting and 100 times more potent than morphine. (*See* JX-2195.0050-52). The recent increase in overdose deaths in this country is driven in significant part by the increasingly widespread use of fentanyl. (*See* Dkt. No. 91-4, at App.1271).

In 2017, the U.S. Department of Health and Human Services ("DHHS") declared the opioid epidemic to be a national public health emergency.[14] According to the Centers for Disease Control and Prevention, from 1999 to 2019, nearly 247,000 people died in the United States from overdoses involving prescription opioids.[15] DHHS estimates the "economic burden" of prescription opioid misuse in the United States is between $53-72 billion a year, including medical costs, lost work productivity, addiction treatment, and criminal justice costs.[16]

14 *HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis*, DHHS (Oct. 26, 2017), https://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html.

15 *Drug Overdose: Overview*, Centers for Disease Control and Prevention (Mar. 17, 2021), https://www.cdc.gov/drugoverdose/deaths/prescription/overview.html.

16 DHHS, "Addressing Prescription Drug Abuse in the United States," *available at* https://www.cdc.gov/drugoverdose/pdf/hhs_prescription_drug_abuse_report_09.2013.pdf.

Today, it is estimated that between 21-29% of patients who are prescribed opioids for chronic pain misuse them.[17] Between 8-12% of people who are using an opioid for chronic pain develop an opioid use disorder. *Id*. An estimated 4-6% of those who misuse prescription opioids transition to using heroin. *Id*. About 80% of people who use heroin first misused prescription opioids. *Id*. OxyContin, it seems, is the ultimate "gateway" drug.

17 *Opioid Overdose Crisis*, National Institute on Drug Abuse (Mar. 11, 2021), https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis.

VI. Pre-Bankruptcy Litigation Involving Purdue and Members of the Sackler Family

With the swelling opioid crisis, Purdue began to face inquiries about and investigations into OxyContin.

In 2000, the U.S. Attorney of Maine alerted the company to widespread abuse of the drug in rural Maine. (*See* JX-2151; JX-2180-0078; JX-2181). In 2001, the Attorney General of Virginia Mark Earley requested a meeting with company officials regarding widespread abuse of the drug in Virginia. (*See* JX-2151). By 2002, the then-Purdue spokesman Tim Bannon confirmed that there were federal investigations into Purdue's marketing of OxyContin. (*Id.*).

Two decades of litigation, both civil and criminal, ensued.

A. The First Round of Lawsuit: 2001-2007

By 2001, plaintiffs across the country had begun to file individual and class actions against Purdue in state and federal courts, including in the U.S. District Court for the Southern District of New York and in the Supreme Court of the State of New York. (*See e.g.*, JX-2181; Dkt. No. 91-5, at App.2037-2038).[18] Members of the Sackler ***45** family were not named as defendants in these lawsuits. (*See* Dkt. No. 91-5, at App.2040).

18 *See Hurtado, et al. v. The Purdue Pharma Co.*, No. 12648/03 (Richmond Cnty., filed 2003); *Sara v. The Purdue Pharma Co.*, No. 13699/03 (Richmond Cnty., filed 2003); *Serafin v. Purdue Pharma, L.P.*, No. 103031/04 (New York Cnty., filed 2004); *Washington v. Purdue Pharma L.P.*, No. 107841/04 (New York Cnty., filed 2004); *Machey v. The Purdue Pharma Co.*, No. 1:04-cv-02098 (S.D.N.Y., filed 2004); *Pratt v. The Purdue Pharma Co.,* No. 1:04-cv-02100 (S.D.N.Y., filed 2004); *Wilson v. The Purdue Pharma Co.*, No. 1:04-cv-02103 (S.D.N.Y., filed 2004); *Ruth v. The Purdue Pharma Co.*, No. 1:04-cv-02101 (S.D.N.Y., filed 2004); *Terry v. The Purdue Pharma Co.*, No. 1:04-cv-02102 (S.D.N.Y., filed 2004); *Foister v. Purdue Pharma L.P.*, No. 6:01-cv-00268 (E.D. Ky., removed 2001); *Gevedon v. Purdue Pharma*, No. 7:02-cv-00008 (E.D. Ky., removed 2002); *Campbell v. Purdue Pharma, L.P.*, No. 1:02-cv-00163 TCM (ED Mo. removed 2002); *Howland et al. v. Purdue Pharma, L.P. et al.*, No. CV01 07 1651 (Butler Cnty. Ohio, filed 2001); *see also In re OxyContin Products Liability Litigation*, 268 F.Supp.2d 1380, 1380 (J.P.M.L 2003) (stating 20 actions then pending in five federal districts in South Carolina, Mississippi, Alabama, and Louisiana).

Plaintiffs in early cases plead a variety of theories of liability pursuant to which Purdue could be held liable as a result of its development, testing, manufacturing, distributing and marketing of OxyContin, including: negligence, strict product liability, failure to warn, breach of express and/or implied warranty, violation of state consumer protection statutes, conspiracy, fraud, and unjust enrichment. *See e.g.*, *Wethington v. Purdue Pharma LP*, 218 F.R.D. 577, 581 n. 1 (S.D. Ohio 2003).

Many of the early cases filed were class actions that sought certification of classes of people who had been prescribed OxyContin and suffered harm as a result. *See e.g.*, *Hurtado v. Purdue Pharma Co.*, No. 12648/03, 6 Misc.3d 1015A, 800 N.Y.S.2d 347, 2005 WL 192351, at **9-14 (Sup. Ct. Richmond Cnty. Jan. 24, 2005) (discussing cases). But given the stringent requirements for class certification, class certification motions in these cases were often denied. For example, in *Foister v. Purdue Pharma L.P.*, plaintiffs in the Eastern District of Kentucky sought unsuccessfully to certify class of "all persons who have been harmed due to the addictive nature of OxyContin." No. Civ.A. 01-268-DCR, 2002 WL 1008608, at *1 (E.D. Ky. Feb. 26, 2002); *see also Gevedon v. Purdue Pharma*, 212 F.R.D. 333, 336 (E.D. Ky. Oct. 17, 2002) (denying class certification); *Campbell v. Purdue Pharma, L.P.*, No. 1:02 CV 00163 TCM, 2004 WL 5840206, at *1 (ED Mo. June 25, 2004) (denying class certification). Class certification was generally deemed inappropriate because courts concluded that individual questions predominated ("addiction to the drug is an individualized question of fact"), thus precluding a finding of commonality. *See Howland et al. v. Purdue Pharma, L.P. et al.*, 104 Ohio St.3d 584, 821 N.E.2d 141, 146-147 (Oh. Sup. Ct. Dec. 15, 2004). When such motions were granted, the decisions were often reversed. *See id.*

Absent class certification, the sheer number of individual cases that were filed meant that cases had to be sent to judicial coordinating panels. In New York, for example, five state cases were transferred to the New York Litigation Coordinating Panel in 2005 – after which 1,117 additional lawsuits were filed and coordinated. *See Hurtado*, 2005 WL 192351, at *15, 6 Misc.3d 1015(A), 800 N.Y.S.2d 347; *Matter of OxyContin*, 15 Misc.3d 388, 390, 833 N.Y.S.2d 357 (Sup. Ct. Richmond Cnty. 2007). Within these coordinated cases, after much discovery, settlements were pursued. *See e.g.*, *Matter of OxyContin II*, 23 Misc.3d 974, 975, 881 N.Y.S.2d 812 (Sup. Ct. Richmond Cnty. 2009) (discussing efforts in 2006-2007 to reach a "universal settlement" of the thousands of New York cases).

Discovery in these lawsuits proved useful to state and federal regulatory agencies ***46** that were also investigating

Purdue's role in the opioid crisis. Attorney Jayne Conroy, who testified at the Confirmation Hearing on behalf of the AHC, explained that the discovery taken by her firm in hundreds of New York cases against Purdue was later subpoenaed by the Justice Department as part of the federal government's 2006-2007 investigation into Purdue. (Dkt. No. 91-5, at App.2038-2039).

B. The 2007 Settlement and 2007 Plea Agreement

1. Purdue's 2007 Settlements with 26 States and the District of Columbia

In 2007, twenty-six states[19] and D.C. settled investigations into Purdue's promotional and marketing practices regarding OxyContin for $19.5 million ("2007 Settlement").[20] (Dkt. No. 91-4, at App.1269-70; *see* JX-2152). As part of the 2007 Settlement, Purdue entered into a consent judgment with each government party. (Dkt. No. 91-4, at App.1270); *see, e.g.*, Consent Judgement, *Washington v. Purdue Pharma L.P.*, Cause No. 07-2-00917-2 (Sup. Ct. Wash. Thurston Cnty. May 9, 2007), at Section I(M), ¶25 ("Consent Judgment").

19 Settling states were Arizona, Arkansas, California, Connecticut, Idaho, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, and Wisconsin. This includes all State Appellants except Delaware and Rhode Island.

20 Purdue is defined in the Consent Judgment as Purdue Pharma, PPI, The Purdue Frederick Company, and all of their United States affiliates, subsidiaries, predecessors, successors, parents and assigns, who manufacture, sell, distribute and/or promote OxyContin.

Pursuant to the Consent Judgment, Purdue agreed to "establish, implement and follow an OxyContin abuse and diversion detection" ("ADD") program which "consist[ed] of internal procedures designed to identify potential abuse or diversion of OxyContin" for a minimum of ten years. (*See* Dkt. No. 91-4, at App.1270; Consent Judgment, ¶¶13-14). Purdue also agreed to submit "annual compliance certifications to a multistate group of attorneys general for three years." (Dkt. No. 91-4, at App.1270).

In exchange for Purdue's payment and compliance, the settling States agreed to:

> release[ ] and forever discharge[ ], to the fullest extent permitted by law, *Purdue and its past and present officers, directors, shareholders,* employees, co-promoters, affiliates, parents, subsidiaries, predecessors, assigns, and successors (collectively, the "Releasees"), of and from any and all civil causes of action, claims, damages, costs, attorney's fees, or penalties that the Attorney General could have asserted against the Releasees under the State Consumer Protection Law by reason· of any conduct that has occurred at any time up to and including the Effective Date of this Judgment relating to or based upon the Subject Matter of this Judgment ("Released Claims").

(Consent Judgement, Section VI) (emphasis added). According to Judge Drain, these 2007 releases covered about seventy-seven members of the Sackler family. *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *31. The release covered only claims that could have been asserted by the Attorneys General of the settling states; among the claims that were not released were: (1) private rights of action by consumers, (2) claims relating to best price, average wholesale price or wholesale acquisition cost reporting practices or Medicaid fraud or abuse; (3) claims asserting antitrust, environmental or tax liability; ***47** (4) claims for property damage; (5) claims to enforce the terms and conditions of the judgment; and (6) any state or federal criminal liability that any person or entity, including Releasees, has or may have to the settling state.

Some of the states did not participate in this 2007 Settlement. Several had already entered into individual settlements with Purdue, while others entered into separate settlements subsequently. (*See* Dkt. No. 91-4, at App.1270). For example, in 2002, Florida settled an investigation into Purdue for $500,000 (*id.*); in 2004, West Virginia settled an action against Purdue for $10 million (*id.*); in 2006, Mississippi settled its investigation into Purdue for $250,000 (*id.*). In 2015, New York signed an assurance of discontinuance of its investigation in exchange for Purdue's payment of a $75,000 penalty and certain promises, including ongoing implementation of the ADD program in New York and submission to annual reviews and monitoring by the Attorney General. *Id.*; *In the Matter of Purdue Pharma L.P.*, Attorney General of the State of New York Assurance No. 15-151, at ¶¶8, 28, 38, 40, 49 (Aug. 19, 2015). In 2016, Kentucky settled an action against Purdue for $24 million. (Dkt. No. 91-4, at App.1270). And in March 2019, Purdue agreed to pay the State of Oklahoma $270 million to settle that state's opioid claims. (*Id.* at App.1278); *see* Consent Judgment, *Oklahoma*

v. Purdue Pharma et al., No. CJ-2017-816, § 4.1 (Dist. Ct. Cleveland Cnty. Mar. 26, 2019).

The releases in these separate cases generally extinguished the claims of the respective state against Purdue for opioid-related misconduct. For example, the West Virginia settlement released "any and all claims and demands" of the Attorney General of West Virginia (on behalf of the state and state agencies) against Purdue and its affiliates, shareholders, officers, directors, and others[21] that were "sustained or incurred as a result of the manufacture, marketing and sale of OxyContin" in West Virginia. (*See* JX-2225). Similarly, the Oklahoma settlement released "any and all claims of any nature" of the Attorney General (the state and its subdivisions) against Purdue, its officers, directors, shareholders, direct and indirect owners, beneficiaries of the owners, and enumerated others, arising out of the conduct alleged in the complaint, including conduct related to the marketing and sale of opioids in Oklahoma. *See* Consent Judgment, *Oklahoma v. Purdue Pharma et al.*, No. CJ-2017-816, §§ 1.1, 5.1, 5.2 (Dist. Ct. Cleveland Cnty. Mar. 26, 2019).

21 "all ... present, former, or future masters, insurers, principals, agents, assigns, officers, directors, shareholders, owners, employees, attorneys, representatives. subsidiaries, divisions, affiliates, associated companies, holding companies, partnerships, and joint ventures ..." (JX-2225).

2. Purdue Frederick Company, Inc.'s 2007 Plea Agreement and Related Civil Settlements

Also in 2007, Purdue Frederick Company[22] pled guilty to one felony count of misbranding OxyContin, with the intent to defraud or mislead, in violation of 21 U.S.C. §§ 331(a), 333(a)(2). (Dkt. No. 91-4, at App.1268-69; *see* JX-2153–JX-2168); *see* JX-1899. Purdue Frederick's President and CEO Michael Friedman, its Executive Vice President and Chief Legal Officer Howard R. Udell, and its Chief Scientific Officer Paul D. Goldenheim, in their capacity as corporate officers, each pled guilty to a misdemeanor charge of misbranding. ***48** (Dkt. No. 91-4, at App.1268); *see The Purdue Frederick Company, Inc.,* No. 1:07-cr-00029, at Dkt. Nos. 7-9.

22 Purdue Frederick Company is an affiliate of Purdue that manufactures and distributes OxyContin. (Dkt. No. 91-4, at App.1268).

As part of the Agreed Statement of Facts, the Purdue Frederick Company admitted that:

> [b]eginning on or about December 12, 1995, and continuing until on or about June 30, 2001, certain PURDUE supervisors and employees, with the intent to defraud or mislead, marketed and promoted OxyContin as less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications ...

(Agreed Statement, at ¶20; *see* Dkt. No. 91-4, at App.1268-1269).

As part of the 2007 Plea Agreement, Purdue Frederick agreed to pay over $600 million dollars in fines and various other payments.[23] (Dkt. No. 91-4, at App.1269; JX-1899, at § 3). This included $160 million to the United States and the states to settle various civil claims that had been asserted by governments – over $100 million to the United States and over $59 million to "Each state that elects to participate in this settlement ..." (JX-1899, at § 3(b)). In the federal government's settlement agreement, the United States and its various departments agreed to release "*Purdue and its current and former directors, officers, employees, affiliates, owners*, predecessors, successors and assigns from any civil or administrative monetary claim the United States has or may have" under federal statutes creating causes of action for civil damages or penalties, as well as from administrative actions under various federal departments and programs. (*See id.* at Dkt. No. 5-4, at § IIII). The participating states' settlement agreement and release were limited to Medicaid fraud claims:

> release and forever discharge [the] Company *and its current and former directors, officers, employees, affiliates, owners,* predecessors, successors and assigns from any civil or administrative monetary claim that the State has or may have for any claim submitted or caused to be submitted to the State Medicaid Program for the Covered Conduct ...

See The Purdue Frederick Company, Inc., et al., No. 1:07-cr-00029, Dkt. No. 5-14, at § III(2)) (emphasis added).

23 The fine and payments include: approximately $276.1 million forfeited to the United States; approximately $160 million paid to federal and state government agencies to resolve liability for false claims made to Medicaid and other government healthcare programs; approximately $130 million set aside to resolve private civil claims; approximately $5.3 million paid to the Virginia Attorney General's Medicaid Fraud Control

Unit; approximately $20 million paid to fund the Virginia Prescription Monitoring Program; approximately $3 million to Federal and State Medicaid programs for improperly calculated Medicaid rebates; approximately $5 million in monitoring costs; and a $500,000 maximum statutory fine.

All states except Kentucky opted into the federal settlement. *See id.* at Dkt. No. 141, at 5.

An additional $130 million was set aside to settle private civil liability claims related to OxyContin. (*Id.* at § 3(d)). Ms. Conroy of the AHC testified in the Confirmation Hearing that her approximately 5,000 clients received a total of $75 million out of this settlement fund. (Dkt. No. 91-5, at App.2039).

As part of the resolution of the criminal case, Purdue agreed to a five-year corporate integrity program with the DHHS, pursuant to which DHHS was to monitor Purdue's compliance with federal healthcare law. This monitoring period expired on July 30, 2012. (Dkt. No. 91-4, at App.1269); ***49** *see The Purdue Frederick Company, Inc.*, No. 1:07-cr-00029, at Dkt. No. 5-5. In 2013, Purdue completed the corporate integrity program with no significant adverse findings. (Dkt. No. 91-4, at App.1269).

The Honorable James P. Jones approved the 2007 Plea Agreement in July of that year. *See The Purdue Frederick Company, Inc.*, No. 1:07-cr-00029, at Dkt. No. 77.

C. The Second Round of Lawsuits: 2014-2019

The 2007 Settlement and Plea Agreement were intended to resolve for all time issues relating to Purdue's misrepresentations about OxyContin. (Dkt. No. 91-5, at App.2039). The corporate integrity agreement with DHHS meant ongoing monitoring (*see The Purdue Frederick Company, Inc.*, No. 1:07-cr-00029, at Dkt. No. 5-5), and the ADD program agreed to with the 26 states and D.C. was meant to create internal procedures that would identify and interrupt abuse or diversion related to OxyContin. (Consent Judgment, ¶14). Purdue, for its part, insisted in its Informational Brief before the Bankruptcy Court that it "accepted responsibility for the misconduct in 2007 and has since then strived never to repeat it." (Dkt. No. 91-4, at App.1268).

However, if Purdue's admissions in its 2020 Plea Agreement are believed, this purported acceptance of responsibility was a charade, and the oversight mechanisms built into the settlements were a conspicuous failure. Judge Drain found that the Sacklers had an "evident desire to continue to drive profits from the products' sale," *In re Purdue Pharma L.P., 2021 WL 4240974, at *33*, and as they did so, the opioid crisis not only continued, it worsened. (*See* Dkt. No. 91-5, at App.2039-2040; JX-2185). As Mortimer D.A. Sackler testified in the Confirmation Hearing, "overdose deaths ... continued to rise ... The overdose deaths kept going up and up." (Confr. Hr'g Tr. Aug. 19, 2021, at 52:7-12).

Starting in about 2014, new lawsuits began to be filed against Purdue concerning its promotion and marketing of OxyContin. (*See e.g.*, JX-2411). But this time, members of the Sackler family were named as defendants. (*See, e.g.*, Confr. Hr'g Tr. Aug. 16, 2021, at 69: 4-15).

1. The Federal Multi-District Litigation in the Northern District of Ohio

At the end of 2017, sixty-four federal cases that had been brought in nine districts across the country by various government entities (state, cities, and counties) against Purdue and other defendants – including pharmacies (like Rite Aid), pharmaceutical companies (like Johnson & Johnson), and pharmaceutical distributors (like McKesson Corporation) – were sent to coordinated multi-district litigation in the Northern District of Ohio ("Opioid MDL"). *See IN RE: National Prescription Opiate Litigation*, MDL-2804, Dkt. No. 1, at Schedule A. The cases in the Opioid MDL asserted a variety of claims against Purdue and others for their role in the opioid crisis, under theories of liability including: (1) public nuisance, (2) false representations, (3) unjust enrichment, (4) common law *parens patriae*, (5) negligence, (6) gross negligence, and (7) consumer protection act claims. (Dkt. No. 91-4, at App.1276); *see e.g.*, Complaint, *County of San Joaquin, et al. v. Purdue Pharma L.P., et al.*, No. 2:17-cv-01485, Dkt. No. 1, Ex. 1 (E.D. Ca. May 24, 2017); Complaint, *Everett v. Purdue Pharma LP et al.*, No. 2:17-00209, Dkt. No. 1-1 (W.D. Wa. Jan. 18, 2017).

The Opioid MDL was assigned to The Honorable Dan A. Polster. At the time of ***50** Purdue's filing for bankruptcy, approximately 2,200 actions against Purdue related to the opioid crisis were pending before Judge Polster. (*See* Dkt. No. 91-4, at App.1273).

Judge Polster put the cases before him on a settlement track and litigation track and assigned a Special Master to assist in

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their management. (*See* MDL Dkt. No. 2676, at 3). Given "the immense scope of the opioid crisis" Judge Polster was "very active from the outset of [the] MDL in encouraging all sides to consider settlement." (MDL Dkt. No. 2676, at 11).

Within the litigation track, Judge Polster designated attorneys to coordinate discovery in related state and federal cases (MDL Dkt. No. 616) and issued a case management order meant to "facilitate, to the maximum extent possible, coordination with parallel state court cases." (MDL Dkt. No. 876, at ¶I(b)). Judge Polster ordered the establishment of a joint database of all prescription opiate cases filed in state and federal courts, so that information and documents could be tracked and discovery cross-noticed. (*Id.* at ¶¶III-V). Over 450 depositions were taken under the Opioid MDL umbrella, and over 160 million pages of documents were produced. (MDL Dkt. No. 2676, at 5; *see* Dkt. No. 91-4, at App.1276).

The extensive discovery in the Opioid MDL, and the discovery coordination it facilitated, revealed for the first time the involvement of certain members of the Sackler family in acts that Purdue had agreed not to commit as part of the 2007 Plea Agreement. Schedule A to the 2020 Plea Agreement – to which facts the corporation has stipulated, so they are deemed proved[24] – chronicles Purdue's extensive violation of the 2007 Plea Agreement, which began almost from the time the ink was dry on the papers. (*See* JX-2094.0006, 0015-18). Unable to deny what was apparent from the Opioid MDL discovery, the corporation admitted that Purdue had engaged in aggressive efforts to boost opioid sales, including: offering payments to induce health care providers to write more prescriptions of Purdue opioid products, offering "prescription savings cards" for health care providers to give patients to encourage them to fill prescriptions for opioids, and failing to maintain effective controls against diversion, which included failing to inform the United States Drug Enforcement Administration that health care providers flagged for abuse filled over 1.4 million OxyContin prescriptions. (*Id.*).

24 The Sacklers do not concede the truth of Purdue's admissions.

Evidence produced in discovery also "subjected the Sacklers to increasing scrutiny and pointed towards culpability of certain members of the family ..." (Dkt. No. 91-5, at App.2040). This evidence demonstrated that members of the Sackler family were heavily involved in decisions on how to market and sell opioids (*see* JX-2944-45, JX-2952, JX-3013-14, JX-1652). Certain Sacklers, notably Richard, Mortimer D.A., and Theresa, aggressively set and pushed sales targets for OxyContin that were higher than those recommended by Purdue executives (*see* Confr. Hr'g Tr., Aug. 18, 2021, at 84:2-6; Dkt. No. 91-4, at App.1350-51); accompanied sales representatives on "ride along" visits to health care providers to promote "the sale of Purdue's opioids" (Confr. Hr'g Tr., Aug. 18, 2021, at 70:2-7); approved countless settlements related to Purdue's culpable conduct (*id.* at 126:2-18); and oversaw sales and marketing budgets and corresponding upward trends in OxyContin prescribing. (Confr. Hr'g Tr., Aug. 19, 2021, at 106:15-109:6).

As discovery turned up evidence of the involvement of members of the Sackler ***51** family in Purdue's misconduct, those family members were added as defendants in a number of cases pending against Purdue. For example, attorney Jayne Conroy testified that, as a result of information disclosed during the Opioid MDL discovery, she added the Sacklers as defendants in the lawsuits her firm was pursuing against Purdue in New York State Supreme Court. (Confr. Hr'g Tr. Aug. 16, 2021, at 70:16-25; *see also* Dkt. No. 91-5, at App.2040). Peter Weinberger, another attorney with AHC, similarly acknowledged to the Bankruptcy Court that, "State complaints naming Sackler family members relied on MDL documents extensively." (Bankr. Dkt. No. 3449, at ¶¶ 36-37, 40).

2. <u>State Multi-District Litigations</u>

In addition to the Opioid MDL, over 390 parallel actions against Purdue proliferated in state courts, as well as in local courts in D.C., Puerto Rico, and Guam. (Dkt. No. 91-4, at App.1273). The causes of actions asserted in these various litigations included: (1) violations of state false claims acts; (2) violations of state consumer protection laws; (3) public nuisance; (4) fraud; (5) negligence; (6) unjust enrichment; (7) civil conspiracy; (8) violations of state controlled-substances acts; (9) fraudulent transfer; (10) strict products liability; and (11) wrongful death and loss of consortium. (*Id.*, at App.1276).

In some states, these lawsuits were consolidated in coordinated state proceedings. (*Id.* at App.1273-1274; *see e.g.*, Dkt. No. 91-5, at App.2039-2040). Such coordination occurred in Connecticut, Illinois, New York, Pennsylvania, Texas, and South Carolina. (Dkt. No. 91-4, at App.1273). In New York, cases brought by 58 counties and two dozen cities

against Purdue were transferred to and coordinated in Suffolk County. (Dkt. No. 91-5, at App.2040).

While members of the Sackler family were not originally named as defendants in these state court coordinated actions, once their role in the marketing of OxyContin post-2007 was revealed in the Opioid MDL discovery, complaints in many state litigations were amended to name members of the Sackler family as defendants. (*See, e.g.*, Dkt. No. 91-5, at App.2040; *see* Bankr. Dkt. No. 3449, at ¶¶ 36-37, 40). Specifically, Richard Sackler, Jonathan Sackler, Mortimer D.A. Sackler, Kathy Sackler, Ilene Sackler Lefcourt, Beverly Sackler, Theresa Sackler, Mariana Sackler, and David Sackler were named as defendants in various lawsuits. (*See e.g.*, Dkt. No. 91-7, at App.2402-2597). In at least three of these cases, state courts denied the Sackler defendants' motions to dismiss the claims against them. (*See* Dkt. No. 94, at 5; Dkt. No. 91-5, At App.2041); *see e.g.*, Order, *In re Opioid Litigation*, No. 400000/2017, Dkt. No. 1191 (Sup. Ct. Suffolk Cnty. June 21, 2019).

Thus, when Purdue filed for bankruptcy in September 2019, "... the threat of liability for at least some members of the [Sackler] family was real and [ ] without the protections of bankruptcy, individual family members were at risk of substantial judgments against them." (*See* Dkt. No. 91-5, at App.2040). As explained by the UCC in the Confirmation Hearing, it was estimated that "... litigating against the Sacklers could eventually lead to a judgment or multiple judgments greater than $4.275 billion." (Bankr. Dkt. No. 3460, at 33; *see also* Bankr. Dkt. No. 3449, at ¶ 10).

3. The Renewed Lawsuits Against Purdue and Members of the Sackler Family by the Individual States

But private litigation was far from the only game in town. By the middle of 2019, forty-nine states' Attorneys General had filed new or amended lawsuits against Purdue, all of which named specific members of the Sackler family and/or Sackler-related entities. (*See* App.1274); *see e.g.*, ***52** Amended Complaint, *New York v. Purdue Pharma L.P., et al.*, No. 400016/2018 (Sup. Ct. Suffolk Cnty. Mar. 28, 2019). For example, in March 2019, the New York Attorney General amended its earlier complaint against Purdue to add claims against the same eight members of the Sackler family and various Sackler entities.[25] *Id.* at ¶¶814-900. The newly-asserted claims included claims for public nuisance, fraud, gross negligence, willful misconduct, unjust enrichment, fraudulent conveyances, violations of state finance laws and social services laws, and "repeated and persistent" fraud and illegality in violation of Executive Law § 63(12). *Id.* Against the "Sackler entities," the complaint asserted claims for unjust enrichment and fraudulent conveyance. *Id.*

25 The entities were described as those "known and unknown entities" that the Sacklers allegedly "used as vehicles to transfer funds from Purdue directly or indirectly to themselves," including Rosebay and Beacon. *Id.* at ¶¶49-54.

The Attorneys General of all but one of the State Appellants – California, Connecticut, Delaware, Maryland, Oregon, Rhode Island, Vermont, and D.C. – filed or amended complaints that include a range of charges against both Purdue and members of the Sackler family. (*See, e.g.*, Dkt. No. 103-7, at A-1553; Dkt. No. 95-1, at A0008; Dkt. No. 91-7, at App.2598; Dkt. No. 91-8, at App.2661; Dkt. No. 91-9, at App.3153; Dkt. No. 121-2, at MDA-008; JX-1647; JX-0946). The State of Washington did not assert claims against members of the Sackler family specifically but asserted claims against "Does 1 through 99" and "Doe Corporations 1 through 99" who – although not yet named – allegedly acted with Purdue "in committing all acts" in their complaint. (*See* Dkt No. 103-3, at App-630; JX-0944). This left open the possibility of naming members of the Sackler family and Sackler family entities.

The State Appellants' asserted claims included:

- fraudulent transfer (*see e.g.*, Dkt. No. 91-7, at App. 2649; Dkt. No. 91-9, at App.3194);
- fraud and fraudulent misrepresentation (*see e.g.*, Dkt. No. 91-9, at App.3184);
- unjust enrichment (*see e.g.*, Dkt. No. 91-9, at App.3192; Dkt. No. 103-7, at A-1752; JX-1647.0199);
- negligence (*see e.g.*, Dkt. No. 91-8, at App.2766; Dkt. No. 91-9, at App.3187; JX-0944.0123);
- public nuisance (*see e.g.*, Dkt. No. 91-8, at App.2768-69; Dkt. No. 91-9, at App.3175; Dkt. No. 103-7, at A-1749; Dkt. No. 95-1, at A0068; JX-1647.0197; JX-0944.0120); and
- violation of state consumer protection statutes by deceptive and unfair acts and practices. (*see e.g.*, Dkt. No. 91-7, at App.2642-2648; Dkt. No. 91-8, at App.2764; Dkt. No. 103-7, at A-1746-47; Dkt. No.

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95-1, at A0066-67; Dkt. No. 121-2, at MDA-110; JX-1647.0194; JX-0944.0118).

For example, California asserted two claims for violations of its False Advertising Law (Cal. Bus. & Prof. Code § 17500 *et seq.*), and Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*), as well as a public nuisance claim (Cal. Civ. Code § 3494 *et seq.*), against Purdue and nine individual members of the Sackler family, including Mariana Sackler.[26] (***53** Dkt. No. 95-1, at A0066-68; JX-0947). California sought, *inter alia*, the assessment of civil penalties against each defendant and an order directing Purdue and the Sacklers to abate the public nuisance.

26 A California court recently issued a "tentative decision" rejecting the public nuisance theory of liability against Johnson & Johnson and other pharmaceutical companies, including Teva, Allergan, Endo and Janssen. *See* Tentative Decision, *California v. Purdue Pharma, L.P., et al.*, No. 30-2014-00725287-CU-BT-CXC, Dkt. No. 7939 (Cal. Sup. Ct. Nov. 1, 2021). The same theory of liability was thrown out by the Oklahoma Supreme Court in a case against Johnson & Johnson. *See State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. Sup. Ct. Nov. 9, 2021). However, also last month, an Ohio jury found three major pharmacy chains liable for damages on the theory that their filling of pill mill prescriptions for opioids created a public nuisance. *See Ohio jury holds CVS, Walgreens and Walmart liable for opioid crisis*, NPR (Nov. 23, 2021), *available at* https://www.npr.org/2021/11/23/1058539458/a-jury-in-ohio-says-americas-big-pharmacy-chains-are-liable-for-the-opioid-epide.

Connecticut – the state where Purdue's headquarters are located – asserted four claims for violations of its Unfair Trade Practices Act (Conn. Gen. Stat. § 42-110a *et seq.*) and one claim for fraudulent transfer against Purdue and eight individual members of the Sackler family. (Dkt. No. 91-7, at App.2642-49; JX-0840). Connecticut sought, *inter alia*, civil penalties, restitution, and disgorgement from all defendants, including the Sacklers.

Delaware – where Purdue Pharma's limited partnership was formed – asserted three claims for violations of Delaware's Consumer Fraud Act (6 Del. C. § 2511 *et seq.*) as well as claims for negligence and public nuisance against seven individual members of the Sackler family.[27] (Dkt. No. 91-8, at App.2764-2768; JX-0945; JX-1646). Delaware sought, *inter alia*, civil penalties and abatement.

27 Beverly Sackler was not sued in Delaware or Maryland. Mariana Sackler was only sued in California.

Maryland asserted a claim for violation of the state's consumer protection laws (Md. Code Ann., Com. Law §§ 13-301 *et seq.*) against the same seven individual members of the Sackler family. (*See* Dkt. No. 121-2, at MDA-008). Maryland, like the other opposing states, sought civil penalties against the Sackler defendants, among other relief.

Oregon asserted three claims against Purdue and eight individual members of the Sackler family – the first seeking a declaratory judgment that Purdue and related entities are the alter egos of the Sacklers and that the state may pierce the corporate veil; the other two asserting claims for fraudulent conveyance. (*See* JX-1647). Oregon sought, *inter alia*, a judgment restraining the Sackler defendants from disposing of property and ordering a return of the conveyed funds.

Rhode Island asserted six claims against Purdue and the eight individual members of the Sackler family for public nuisance, fraud and fraudulent misrepresentation, fraudulent and voidable transfers, violations of Rhode Island's State False Claims Act (R.I. Gen. Laws § 9-1.1-1 *et seq.*), negligence, and unjust enrichment. (Dkt. No. 91-9, at App.3175-94; JX-1648; JX-2214). Rhode Island sought, *inter alia*, civil penalties, treble damages, disgorgement, and restitution.

Vermont asserted four claims against the eight individual members of the Sackler family: two violations of the Vermont Consumer Protection Act (9 V.S.A. § 2451 *et seq.*), unjust enrichment, and public nuisance. (Dkt. No. 103-7, at A-1746-52; JX-1649). Vermont also sought civil penalties, among other relief.

Washington State brought an action against Purdue, "Does 1 through 99," and "Doe Corporations 1 through 99" for violating the Washington's Consumer Protection Act (Wash. Rev. Code § 19.86), for causing a public nuisance, and for breaching ***54** Washington's common law of negligence. (JX-0944). The Complaint sought abatement, restitution, and statutory penalties, among other relief.

D.C. brought two claims against Purdue and Richard Sackler for violations of its consumer protection statutes (D.C. Code § 28-3904(f)). (*See* JX-0946). D.C. sought, like the others and among other relief, statutory civil penalties against each defendant.

Each State Appellant filed its claims before Purdue filed for bankruptcy in September 2019. None of the cases had been litigated to judgment.[28] (*See* Dkt. 91-4, at App.1278). These cases were not subject to the automatic stay that stopped private litigation in its tracks once Purdue filed, (11 USCA § 362(b)), but the Bankruptcy Court preliminarily enjoined all litigation against Purdue and the Sacklers; that order was affirmed by this court, *In re Purdue Pharms. L.P.*, 619 B.R. 38 (S.D.N.Y. 2020). As a result, no activity has taken place in any of these lawsuits since shortly after Purdue's filing.

28 Prior to bankruptcy, the lawsuit brought by North Dakota was litigated to judgment, and that judgment was in favor of Purdue. (*See* Dkt. No. 91-4, at App.1278).

4. Lawsuits in Canada

In Canada, a number of class actions were filed against certain of the Debtors with allegations similar to those made in the U.S. (*See* Dkt. No. 91-4, at App.1273, 1477; *see e.g.*, Dkt No. 98-1, at 13–102, 113–202). Prior to Purdue's Chapter 11 filing, the lead plaintiffs in ten of the Canadian class actions settled their claims for $20 million, and Purdue Pharma (Canada) ("Purdue Canada")[29] placed that amount in trust pending approval of the settlement by the Ontario Superior Court of Justice, the Superior Court of Quebec, the Supreme Court of Nova Scotia and the Saskatchewan Court of Queen's Bench (the "Canadian Settlement"). (Dkt. No. 91-4, at App.1477-1478). The Canadian Settlement, once approved and after funds are disbursed, "completely and unconditionally released, forever discharged, and acquitted [the Debtors] from any and all Settled Patient Claims against the Debtors and from any other Proof of Claim or portion thereof in respect of any Settled Patient Claim filed against any Debtor." (*Id.*). Under the Canadian Settlement, no member of the Canadian classes party to that settlement can recover from any source other than the Canadian Settlement trust, and every class member in a settling class bears the burden of proving in the U.S. bankruptcy that its claim was not released and discharged by the Canadian Settlement. (*Id.*).

29 Purdue Canada is an IAC. It is not a Debtor in this case. Purdue Canada as defined in the Shareholder Settlement Agreement, means Bard Pharmaceuticals Inc., Elvium Life Sciences GP Inc., Elvium Life Sciences Limited Partnership, Elvium ULC, Purdue Frederick Inc. (Canada), Purdue Pharma (Canada), Purdue Pharma Inc. (Canada), and Purdue Pharma ULC. (JX-1625.0027).

However, the Canadian Settlement did not cover the claims of the Canadian Appellants, which are Canadian municipalities and indigenous tribes. The Canadian Appellants' lawsuits concerned sales and distribution of OxyContin in Canada, affecting Canadian communities, by Purdue Canada, which the Canadian Appellants assert was controlled by Sackler family members. (Dkt. 98, at 5; Bank. Dkt. No. 3421, at 89-92). The Canadian Appellants' lawsuits against Purdue Canada assert, *inter alia*, claims for conspiracy, public nuisance, negligence, fraud, and unjust enrichment. (Dkt No. 98-1, at 18-19). The Canadian Appellants also stated at oral argument that that they "were barred by ***55** the imposition of the stay and the stay-related orders" – the preliminary injunction described above – "from actually naming [certain] Competition Act claim[s] against the Sacklers and the [Shareholder Released Parties]," which they would assert if given the opportunity. (Oral Arg. Tr., Nov. 30, 2021, at 80:11-16).

The Canadian Appellants do not include the Canadian federal government or any Canadian province – all of whom seem to be content with the fact that the Plan excludes claims against Purdue Canada. (*See* Plan, at 10). Indeed, the ten Canadian provinces for their part seem to believe their claims are excluded and have decided to pursue their claims in Canada instead. For example, in press on the topic, Reidar Mogerman, counsel for the British Columbia government, explained that the provinces gave up their claims (worth US$67.4 billion) before the Bankruptcy Court in the U.S. to protect lawsuits they filed against Purdue's Canadian entities.[30] "We didn't want to get swallowed in competition with the U.S. claims and lose our Canadian claims," he explained to the press. *Id.* To date, in Canada, the various Canadian provinces have asked the Ontario Superior Court of Justice to continue to pursue their separate class actions against Purdue Canada. *Id.*

30 *Provinces plan legal push against Purdue Pharma in wake of U.S. opioid deal*, The Globe and Mail (Sept. 3, 2021), https://www.theglobeandmail.com/canada/article-provinces-plan-legal-push-against-purdue-pharma-in-wake-of-us-opioid.

VII. Members of The Sackler Family Insulate Themselves Against Creditors

As Judge Drain found, the evidence indicates members of the Sackler family distributed significant sums of Purdue money to themselves in the years 2008-2016, during which

time those Sackler family members were closely involved in the operations of Purdue and aware of the opioid crisis and the litigation risk. *See In re Purdue Pharma L.P.*, 2021 WL 4240974, at *32. As detailed below, this "aggressive[ ]" (to use Richard Sackler's word, *see* JX-1703) pattern of distribution of earnings to shareholders represented a sharp departure from prior practice in two ways.

First, during the period 1996-2007, Purdue up-streamed on average 9% of its revenue per year to the Sacklers; but during the period 2008-2016, Purdue up-streamed on average 53%, and as much as 70%, of its revenue to the Sacklers. (*See* JX-2481).

Second, during the earlier period (1996-2007), the Sacklers kept less than 10% of the money that was distributed by Purdue for themselves, while using over 90% of those distributions to pay taxes on Purdue's earnings; but during the years between 2008-2016, the Sacklers retained, in one form or another, 56% of those distributed earnings, while using just 44% to pay taxes. (Bankr. Dkt. 3410-2).

The 2008-2016 distributions to shareholders also contrasted with the practices of Purdue's peer pharmaceutical companies. (*See* JX 1703).

According to the Sacklers' own expert, this pattern of upstreaming corporate earnings substantially depleted Purdue's treasury during that eight-year period. (JX-0431, p. 77, Fig. 10).

A. The Sacklers Cause the Transfer of Billions of Dollars from Purdue to Themselves

In March 2007, Richard, Jonathan, Kathe, and Mortimer Sackler exchanged emails noting that the "future course [for the business] is uncertain" (JX-2976) and identified the "emergence of numerous new lawsuits" as a "risk[ ] ... we're not ***56** really braced for." (JX-2957). Just a few months later, in May, shortly after the 2007 guilty plea and settlement, David Sackler emailed Jonathan Sackler, Richard Sackler, and their financial advisor, expressing concern about the family's personal liability for the opioid crisis: "what do you think is going on in all of these courtrooms right now? We're rich? For how long? Until suits get through to the family?" (JX-2237; *see also* JX-2096, at ¶ 161). In his deposition, David Sackler agreed that his May 17, 2007, email reflects "concern[ ] that the family would be sued in connection with Purdue's sale of OxyContin." (JX-1989, at 183:14-184:20, 187:18-188:20). Less than a week after David Sackler sent his email, Richard and Jonathan Sackler met with a bankruptcy attorney, though Purdue was not in debt and not at risk of bankruptcy. (*See* JX-2985; JX-2986).

Thereafter, on July 26, 2007, a family financial advisor sent a confidential memorandum to Jonathan Sackler, in which he advised that Purdue faced "[u]ncapped liabilities" that posed "a huge valuation question" for Purdue at that very moment – the moment when the Plea and settlements were ostensibly ending any illegal behavior and putting further corporate liability – and potential shareholder liability – in the rear view mirror. (JX-1660, at 2-3). He added, "I presume the family has taken most of the appropriate defensive measures." (*Id.* at 3; *see also* JX-2241). One such measure, proposed in a separate memorandum, was "to distribute more free cash flow so [the owners] can purchase diversifying assets." (JX-2254; *see also* JX-2096, at ¶ 162).

By January 2008, the anxiety over impending lawsuits was apparent; Richard Sackler emailed Mortimer Sackler that, "I've been told by Silbert that I will be [sued] and probably soon." (JX-3001). Mortimer Sackler lamented in a later email in February 2008 that he wished to get out of the pharmaceutical business altogether "given the horrible risks, outlooks, difficulties, etc." (Bankr. Dkt. No. 2161, at Ex. 67). In this vein, in April 18, 2008, Richard Sackler warned in a memo that the business posed a "dangerous concentration of risk" and proposed that the family either sell the company or "distribute more free cash flow" to themselves. (JX-2214, ¶ 86; JX-3004; JX-3104). The family chose the latter course.

Beginning in 2008, Purdue began to make significant cash distributions to and for the benefit of the Sacklers. (JX-1988, at 226:13-19 (deposition of Richard Sackler); Confr. Hr'g Tr., Aug. 19, 2021, at 149:6-14 (testimony of Mortimer D.A. Sackler); Confr. Hr'g Tr., Aug. 18, 2021, at 65:8-17 (testimony of Richard Sackler); *see also* Dkt. No. 91-4, at App.1544). As noted above, about 44% of the money distributed went to pay taxes; a small fraction was invested in the IACs, which were owned by the Sacklers; and the rest went to Rosebay and Beacon, the Side A and B Sackler family trusts. (*See* JX-1987, at 156:8-158:4; Confr. Hr'g Tr., Aug. 19, 2021, at 27:7-28:1-12).

In the years leading up to the 2007 Plea Agreement and Settlement, the Sackler family had been content to leave most of Purdue's earnings in the company, except insofar as was necessary to pay taxes. In response to a question from this Court, Debtors acknowledged that, between January 1, 1995

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and December 31, 2007, distributions to the Sacklers totaled $1.322 billion, of which $1.192 billion (or 90.2%) was used to pay taxes. (Dkt. No. 177; *see* JX-3050.0042; JX-2481; Bankr. Dkt. 3410-2). In the twelve years prior to 2008, the Sacklers took personal distributions from Purdue that averaged 9% of Purdue's revenue. (*See* JX-2481).

***57** After 2007, Purdue went from distributing less than 15% of its revenue to distributing as much as 70% of revenue.[31] (*Id.*). It also jumped from distributing approximately 38% of its free cash flow in 2006 to distributing 167.4% of free cash flow in 2007 and continued to distribute free cash flow in the 90% range for the next decade. (*Id.*). These distributions totaled approximately $10.4 Billion. (*See* Dkt. No. 91-4, at App.1544; Bankr. Dkt. No. 3410-1, at ¶ 12; Confr. Hr'g Tr., Aug. 18, 2021, at 65:8-17 (testimony of Richard Sackler); Confr. Hr'g Tr., Aug. 19, 2021, at 27:7-28:1-12, 149:6-14 (testimony of Mortimer D.A. Sackler)).

31 The absolute amount of these distributions dwarfed distributions for the 1995-2007 period because concerns about the validity of Purdue's OxyContin patent capped its earnings until 2008, when it was definitively held that the patent was valid. (*See* Dkt. No. 241, at 6). After that, Purdue's earnings soared – as did both the amount owed in taxes and the amount that ended up in the Sackler family trusts.

Approximately $4.6 billion of that amount was used to pay pass through taxes (*see* Bankr. Dkt. 3410-2), which attests to the tremendous profitability of Purdue's OxyContin business during that same eleven-year period. In fact, the vast majority of Purdue's earnings between 2008-2017 came from OxyContin sales. (*See* JX-1984, at 40:24-41:5; JX-3275, at 338:6-9; JX-0999).

According to the Sacklers' own expert, the change in distribution pattern drained Purdue's total assets by 75% and Purdue's "solvency cushion" by 82% between 2008 and 2016. (JX-0431, p 77, Fig. 10). Richard Sackler later acknowledged in an email in 2014 that, "in the years when the business was producing massive amounts of cash, the shareholders departed from the practice of our industry peers and took the money out of the business." (JX 1703). In at least one email in 2014, Jonathan Sackler referred to this distributing of cash flow from OxyContin as a "milking" program. (JX-2974).

The obvious implication of this evidence was recognized by Judge Drain in his bankruptcy decision, discussed *infra* in Background Section XII. *See In re Purdue Pharma L.P.*, 2021 WL 4240974, at *27, 31, 32–33. In particular, Judge Drain noted, "I do have an extensive report and trial declarations as to the nature of the assertedly over $11 billion of avoidable transfers, when they occurred, what they comprised, and who they were made to," *id.* at 31; and found, "The record suggest[s] that at least some of the Sacklers were very aware of the risk of opioid-related litigation claims against Purdue and sought to shield themselves from the economic effect of such claims by causing Purdue to make billions of dollars of transfers to them and to shield their own assets, as well, from collection." *Id.* at 32. While he made no finding that these distributions qualified as fraudulent conveyances, or that they could be recouped by Purdue, Judge Drain also acknowledged that the estate had potential claims of "over $11 billon of assertedly avoidable transfers." *Id.* at 27.

As Judge Drain also acknowledged, the distribution of Purdue money to the Sackler family occurred during a time when members of the Sackler family, including those named in many pending cases, were closely involved in the operations of Purdue and well aware of the opioid crisis and the litigation risk. He said, "The testimony that I heard from the Sacklers tended to show, that as a closely held company Purdue was run differently than a public company and that its Board and shareholders took a major role in corporate decision-making, including Purdue's practices regarding its opioid products that was more ***58** akin to the role of senior management." *Id.* at 33. As Richard Sackler acknowledged in the Confirmation Hearing, he oversaw as director "many settlements," stating, "I was director, and I cannot count up all the settlements that the company entered into while I was a director. But there were many settlements, both private and public." (Confr. Hr'g Tr., Aug. 18, 2021, at 126:2-18). For example, as part of the Board, he approved the settlement of $24 million to the State of Kentucky to resolve unlawful and unfair deceptive trade practice allegations against Purdue in 2015. (*Id.* at 124:16-125:1).

The Sacklers vehemently deny any suggestion that any of these transfers would qualify as fraudulent conveyances. (*See* JX-2096, at ¶G). However, in Addendum A to the 2020 "Settlement Agreement" with the DOJ, the Government asserted its confidence that it could prove that: "From approximately 2008 to 2018, at the Named Sacklers' request, billions of dollars were transferred out of Purdue as cash distributions of profits and transfers of assets into Sackler family holding companies and trusts. Certain of these distributions and transfers were made with the intent to hinder

future creditors and/or were otherwise voidable as fraudulent transfers." (*Id.* at Addendum A, ¶6; *see also id.* at ¶¶158-159)

The fact of these extensive transfers of money out of Purdue and into the family coffers is not contested. For example, during the Confirmation Hearing, when Richard Sackler was asked if it were "true that during that time period generally [2008-2018] ... the Purdue Board of Directors transferred out billions of dollars to Sackler family trusts or holding companies," he answered, "Yes ... yes, that we did." (Confr. Hr'g Tr., Aug. 18, 2021, at 65:8-17). Only whether those transfers (or any of them) would qualify as fraudulent conveyances is in dispute. But while that presents an important and interesting question, I agree with Judge Drain that it was not one he needed to resolve in order to rule on the confirmability of the Plan. But at some point – certainly by 2018 – Purdue itself was in a precarious financial position in face of the lawsuits. At the time of the bankruptcy filing, Purdue represented that, while it had "no funded debt and no material past due trade obligations" – or even any "judgment creditors" – "the onslaught of lawsuits has proved unmanageable" and "will result only in the financial and operational destruction of the Debtors and the immense value they could otherwise provide ..." (Dkt. No. 91-4, at App.1237).

B. A Pre-Petition Settlement Framework Is Proposed That Would Release the Sackler Family From Liability.

In the months before Purdue filed for bankruptcy, Purdue, the Sackler family (now no longer represented on Purdue's Board) and Sackler entities were engaged in discussions about a potential framework for settlement of all claims against Purdue and the Sacklers with "the various parties in the MDL litigation" and certain "subgroups" of creditors and potential creditors. (*See* Confr. Hr'g Tr., Aug. 12, 2021, at 152:23-153:22). John Dubel testified in the Confirmation Hearing[32] that the pre-petition settlement framework discussions involved the concept of third-party releases *and* the concept of using the bankruptcy ***59** process to release all claims against the Sacklers in exchange for their contribution of funding to the settlement. (*Id.* at 154:1-5). Mr. Dubel explained:

> [I]t was very clear from the ... Sacklers that if they were going to post up X amount of dollars – and I believe at the time, the settlement framework was somewhere around $3 billion or so – that they were going to seek broad third party releases, and releases from the Debtors, releases of all the estate claims, etc., so that they could be able to put all of that – all of the litigation behind them ... *it was something that was a prerequisite or a condition to them posting the amount of money that was in the settlement framework* and then ultimately what is in the plan of organization we were seeking approval of.

(*Id.* at 155:25-156:1-12; *see id.* at 209:1-4, 214:8-19) (emphasis added).

32 Mr. Dubel served as the Chairman of the Special Committee of the Board. He was appointed to the Board in July 2019 and chaired the Special Committee investigating the potential claims of Purdue or its estates against the Sacklers. (*See* Bankr. Dkt. No. 3433, at ¶1).

So the Sacklers made it clear well before the Debtors filed for chapter 11 bankruptcy that they would contribute toward Purdue's bankruptcy estate only if they received blanket releases that would put "all of the litigation behind them." (*Id.* at 155:25-156:1-12). This was reported heavily in the press at the time of the bankruptcy filing.[33]

33 *See e.g., Purdue Pharma's bankruptcy plan includes special protection for the Sackler family fortune*, The Washington Post (Sept. 19, 2019), https://www.washingtonpost.com/business/2019/09/18/purdue-pharmas-bankruptcy-plan-includes-special-protection-sackler-family-fortune; *Where did the Sacklers move cash from their opioid maker?*, ABC News (Sept. 5, 2019), https://abcnews.go.com/US/wireStory/sacklers-move-cash-opioid-maker-65407504.

This pre-petition settlement framework was then imported into the bankruptcy process. As Mr. Dubel testified, once a pre-petition settlement framework was created, the plan was to "Us[e] the Chapter 11 process to enable us to then organize all of the various claimants into one group under ... the auspices of the Chapter 11 bankruptcy process." (*Id.* at 154:14-18). He further explained that, "It was the framework that would help us continue to bring all of the various creditor groups towards a decision as to whether it was better to litigate against the Sacklers or attempt to come up with a settlement that would be fair and equitable for all the creditors of the Debtor's estates." (*Id.* at 155:2-9). He testified that some 24 states "were supportive of us moving forward in the process of filing a Chapter 11 and using this [bankruptcy] as a means of coalescing all the parties into one organized spot to address the potential claims that the estates would have against the Sacklers." (*Id.* at 157:4-9).

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Purdue's bankruptcy was thus a critical part of a strategy to secure for the Sacklers a release from any liability for past and even future opioid-related litigation without having to pursue personal bankruptcy. David Sackler acknowledged as much in his testimony, "I don't know of another forum that would allow this kind of global solution, this kind of equitable solution for all parties." (Confr. Hr'g Tr., Aug. 17, 2021, at 35:4-6).

VIII. The Underlying Bankruptcy

Facing the mounting lawsuits against both Purdue and members of the Sackler family in the U.S. and abroad, certain U.S. based Purdue entities (Debtors) filed for bankruptcy relief on September 15, 2019. (Bankr. Dkt. No. 1). Members of the Sackler family and the Sackler entities – such as Rosebay and Beacon – did not file for ***60** bankruptcy, despite having been named as defendants in opioid-related lawsuits.

A. Pending Actions Against Purdue and Members of the Sackler Family Are Halted

Purdue quickly moved on September 18, 2019, before the Bankruptcy Court for an injunction halting all actions against Purdue as well as "against their current and former owners (including any trusts and their respective trustees and beneficiaries), officers, directors, employees, and associated entities." (Dkt. No. 91-4, at App.1471, 1562). This meant enjoining over 2,900 actions against Purdue and at least 400 civil suits against the Sacklers. (*Id.*, at App.1562).

Purdue argued that enjoining all litigation was necessary to facilitate the parties' work towards a global settlement in a single forum – the Bankruptcy Court. After an evidentiary hearing, on October 11, 2019, the Bankruptcy Court temporarily halted all such litigation until November 6, 2019 (*Id.* at App.1472), at which point it granted Purdue's motion enjoining all plaintiffs from continuing or commencing any judicial, administrative, or investigative actions, as well as any other enforcement proceeding, against Purdue or the non-debtor related parties, including against members of the Sackler family. (*Id.*; *see* Bankr. Dkt., No. 2983, at 171). This Court affirmed the Bankruptcy Court's grant of the preliminary injunction. *Dunaway v. Purdue Pharma. L.P. (In re Purdue Pharma. L.P.)*, 619 B.R. 38 (S.D.N.Y. 2020). The expiration date of the preliminary injunction has been extended 18 times, during which period the parties negotiated to come up with the Plan. (*See* Dkt. No. 91-4, at App.1402, 1429, 1472-73; Bankr. Dkt. Nos. 2897, 2488).

B. The Creditor Constituencies in the Bankruptcy

On September 27, 2019, the U.S. Trustee appointed nine creditors to the UCC, an independent fiduciary to represent the interests of all unsecured creditors in the Purdue bankruptcy. (Dkt. No. 91-1, at App.7).[34] The UCC's appointees are Blue Cross and Blue Shield Association; CVS Caremark Part D Services L.L.C. and CaremarkPCS Health, L.L.C.; Cheryl Juaire; LTS Lohmann Therapy Systems, Corp.; Pension Benefit Guaranty Corporation; Walter Lee Salmons; Kara Trainor; and West Boca Medical Center. (Bankr. Dkt. No. 1294; *see* Dkt. No. 115-1, at 5). The UCC also has several ex-officio, non-voting representatives: (i) Cameron County, Texas, on behalf of the MSGE; (ii) the Cheyenne and Arapaho Tribes, on behalf of certain Native American Tribes and Native American-affiliated creditors; and (iii) Thornton Township High School District 205, on behalf of certain public school districts. (*See* Bankr. Dkt. No. 1294).

34 See Official Committee of Unsecured Creditors of Purdue Pharma L.P. and Affiliated Debtors: General Information, KKC, available at http://www.kccllc.net/PurdueCreditors.

Between September and November 2019, various other creditor groups were formed to represent creditor constituencies in the bankruptcy, including as follows:

- The AHC was formed in September 2019 and is comprised of ten States, six counties, cites, parishes, or municipalities, one federally recognized American Indian Tribe (the Muscogee (Creek) Nation, as well as the court-appointed Co-Lead Counsel on behalf of the Plaintiffs' Executive Committee in the Opioid MDL (*see* Bankr. Dkt. No. 279);

- NAS Children was formed in September 2019 and is comprised of around 3,500 children, who born with "neonatal abstinence syndrome" due ***61** to exposure to opioids in utero, and/or their guardians (*see* Bankr. Dkt. No. 1582; Dkt. No. 115-1, at 3);

- The PI Ad Hoc Group was formed in October 2019 and is comprised of 60,761 personal injury claimants, each holding "one or more unsecured, unliquidated, opioid-related personal injury claims against one or more of the Debtors" (*see* Bankr. Dkt. Nos. 3939, 348);

- MSGE was formed in October 2019 and is comprised of 1,317 entities: 1,245 cities, counties and other governmental entities, 9 tribal nations, 13 hospital districts, 16 independent public school districts, 32 medical groups, and 2 funds across 38 states and territories (*see* Bankr. Dkt. No. 1794);

- The Ad Hoc Group of Non-Consenting States ("NCSG") was formed in October 2019 and is comprised of 25 states that did not reach a pre-petition agreement with Purdue or the Sacklers regarding "the general contours of a potential chapter 11 plan" to settle their claims – California, Colorado, Connecticut, Delaware, D.C., Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin (*see* Bankr. Dkt. No. 296);

- The Ratepayer Mediation Participants ("Ratepayers") was formed in October 2019 and is comprised of "proposed representatives of classes of privately insured parties who are plaintiffs and proposed class representatives in their individual and representative capacities in suits brought against [Purdue]" in 25 actions in 25 states (*see* Bankr. Dkt. No. 333; Dkt. No. 91-3, at App.1108); and

- The Ad Hoc Group of Hospitals ("Hospitals") was formed in November 2019 and is comprised of hundreds of hospitals that have treated and treat patients for conditions related to the use of opiates manufactured by Purdue (*see* Bankr. Dkt. 1536).

Other groups that formed during the pendency of the bankruptcy proceedings include:

- The Third-Party Payor Group ("TPP Group"), comprised of certain holders of third-party payor claims (*see* Dkt. No. 91-3, at App.1114);

- The Native American Tribes Group ("Tribes Group"), comprised of the Muscogee (Creek) Nation, the Cheyenne & Arapaho Tribes, an ex officio member of the Creditors' Committee, and other Tribes represented by various counsel from the Tribal Leadership Committee and the Opioid MDL Plaintiffs' Executive Committee (*see id.* at App.1096); and

- The Public School District Claimants ("Public Schools"), comprised of over 60 public school districts in the United States (*see id.* at App.1106; Bankr. Dkt. Nos. 2707, 2304).

Each of these groups was representative of certain creditor constituencies, whose "members" (there was no certified class) held similar types of claims against Purdue.

C. The Court Sets A Bar Date for Filing of Proof of Claims

On January 3, 2020, Purdue filed a "Motion for Entry of an Order (I) Establishing Deadlines for Filing Proofs of Claim and Procedures Relating Thereto, (II) Approving ***62** the Proof of Claim Forms, and (III) Approving the Form and Manner of Notice Thereof" (the "Bar Date Motion")." (*See* Dkt. No. 91-4, at App.1475). On February 3, 2020, the Bankruptcy Court approved the Bar Date Motion, setting June 30, 2020 as the deadline for all persons and entities holding a prepetition claim against Purdue, as defined in section 101(5) of the Bankruptcy Code (a "Claim"), to file a proof of claim. (*Id.*). On June 3, 2020, the Bankruptcy Court entered an order extending the Bar Date to July 30, 2020. (*Id.*; *see id.* at App.1298).

During the five months while the window for filing proofs of claims was open, over 614,000 claimants did so. Just 10% of the claims so filed would give rise to over $140 trillion in aggregate liability – more than the whole world's gross domestic product. (Dkt. No. 91-4, at App.1421; *see* Dkt. No. 91-1, at App.28).[35] The claimants included the federal government, states and political subdivisions, Native American Tribes, hospitals, third-party payors, ratepayers, public schools, NAS monitoring claims,[36] more than 130,000 personal injury victims, and others. (*See* Dkt. No. 91-4, at App.1425-1429; *see* Dkt. No. 91-1, at App.28).

35 As of October 21, 2021, 628,389 claims have been filed. *See* Bankruptcy Claim Report, *available at* https://restructuring.primeclerk.com/purduepharma/Home-DownloadPDF?id1=MTMwMjM2Mw%3D%3D&id2=0.

36 NAS monitoring claims are those of legal guardians of children born with neonatal abstinence syndrome due to exposure to opioids in utero. (Dkt. No. 91-4, at App.1404; *see* Dkt. No. 115-1 at 3).

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D. The Court Approves Mediation and Appoints Mediators to Facilitate Resolution

On February 20, 2020, Purdue filed an unopposed "Motion for Entry of an Order Appointing Mediators," seeking the appointment of mediators and mandating that the various creditor constituencies participate in mediation. (Dkt. No. 91-4, at App.1486). On March 2, 2020, the Bankruptcy Court approved Purdue's motion and appointed The Honorable Layn Phillips (ret.) and Mr. Kenneth Feinberg as co-mediators (*Id.*; Bankr. Dkt. No. 895). Both are among the most experienced and respected mediators in the country.

IX. The Negotiation of the Bankruptcy Plan

Through mediation, Purdue and stakeholders worked to negotiate a complex settlement framework that would ultimately direct the Debtors' assets and $4.275 billion from the Sackler families toward abating the opioid crisis and restoring victims of the crisis. (*See* Dkt. No.91-4, at App.1402, 1429; *see* Bankr. Dkt. 2488).

The parties involved in the negotiations included the Debtors and non-debtor related parties (*i.e.*, members of the Sackler family) and the various creditor constituencies. Together, as defined in the court's mediation order, the participating "Mediation Parties" were the Debtors, the UCC, the AHC, the NCSG, the MSGE, the PI Ad Hoc Group, NAS Children, the Hospitals, the TPP group, and the Ratepayers. (Dkt. No. 91-4, at App.1486). The Tribes Group, the Public Schools, the National Association for the Advancement of Colored People, and others also participated in mediation, although not as official Mediation Parties. (*Id.*; *see* Bankr. Dkt. No. 2548).

The mediation progressed in three phases (*id.* at App.1404), as follows:

***63** *A. Phase 1: March 2020-September 2020*

Phase one of the mediation addressed "the allocation of value/proceeds available from the Debtors' Estates" as disputed between the "Non-Federal Public Claimants" (the states, federal districts and U.S. territories, political subdivisions, and Native American tribes) and "Private Claimants" (hospitals, private health insurance carriers and third-party payors, and individuals and estates asserting personal injury, including NAS Children). (Dkt. No. 91-4, at App.1487; Bankr. Dkt. No. 855, at 6-7). It proceeded with a "series of rigorous formal mediation sessions during the period from March 6, 2020 to September 11, 2020." (Dkt. No. 91-4, at App.1487).

The mediation resulted in certain resolutions (*see generally* Bankr. Dkt. 1716), the most critical of which included value allocation between and among the various parties, such as:

> First, the Non-Federal Public Claimants agreed that all value received by them through the Chapter 11 Cases would be exclusively dedicated to programs designed to abate the opioid crisis ...
>
> Second, the Non-Federal Public Claimants addressed and resolved ... value allocation for all Native American Tribes ... and a default mechanism that, in the absence of a stand-alone agreement between a State or territory and its political subdivisions, provides a structure and process for applying funds to abate the opioid crisis ...
>
> Third, agreement was reached on written term sheets with certain individual Private Claimant groups that addressed allocation of estate value to each Private Claimant group. These agreements provided, among other things, that each class of Private Claimants will receive fixed cash distributions over time, the values and time periods varying for each class. Moreover, the Ad Hoc Group of Hospitals, the Third-Party Payors, and the NAS Committee (with regard to medical monitoring) each agreed to dedicate substantially all the distributions from their respective Private Creditor Trusts to abate the opioid crisis.

(*See* Dkt. No. 91-4, at App.1487). Ultimately, all participants except "the public school districts and the NAS children physical injury group" were able to achieve "agreement *inter se* as to their respective allocations as a result of the mediation process." (Bankr. Dkt. 2548, at 8).

Each of the term sheets with the private plaintiffs was conditioned on the confirmation of a plan of reorganization that includes participation by the Sackler Families in the plan of reorganization. (Bankr. Dkt. 1716, at 5).

However, not all issues were resolved. On September 23, 2020, while phase one of the mediation had reached "substantial completion" (Bankr. Dkt. 2548), the mediators' report indicated that "there remain terms to be negotiated by the parties with respect to each of the term sheets in order to reach final agreements ..." (Bankr. Dkt. 1716, at 5-6). With several open terms and the estate claims still to be negotiated, on September 30, the Bankruptcy Court entered a Supplemental Mediation Order, authorizing further mediation

to resolve the open issues and to mediate the estate claims (phase 2). (Dkt. No. 91-4, at App.1551; Bankr. Dkt. Nos. 1756).

B. Phase 2: October 2020-January 31, 2021

The Bankruptcy Court's Supplemental Mediation Order authorized the mediators "to mediate any and all potential claims or causes of action that may be asserted by the estate or any of the Non-Federal Public ***64** Claimants" against the Sackler families and entities "or that may otherwise become the subject of releases potentially granted to" members of the Sackler families and entities (defined as the "Shareholder Claims"). (*See* Bankr. Dkt. Nos. 1756, at 2; 2584, at 1; 518, at 4). This Order also "narrowed the number of mediating parties on the Shareholder Claims aspect of the mediation" to the Debtors, the UCC, the "Consenting Ad Hoc Committee,"[37] the NCSG, the MSGE, and representatives of the Sacklers. (Bankr. Dkt. Nos. 2584, at 1; 2548, at 2).

37 The Bankruptcy Court did not define what the "Consenting Ad Hoc Committee" was, but the mediators' March 23, 2021 report lists "the Consenting States and the Ad Hoc Committee" as consisting of the AHC plus the various consenting states listed there – notably Texas, Tennessee, and Florida. (*See* Bankr. Dkt. No. 2548, at 2). The Court assumes this is what is meant by the "Consenting Ad Hoc Committee."

In phase two, the mediators received presentations from the parties on their positions regarding the estate claims, including a presentation by the UCC of its "views and findings on its investigation of estate causes of action." (Dkt. No. 91-4, at at App.1551-52; Bankr. Dkt. No. 2584).[38] After the presentations, "numerical negotiation began," with offers and counteroffers proposed. However, no "mutually agreed resolution" was reached among all constituencies before the end of the phase two on January 31, 2021. (Bankr. Dkt. No. 2584).

38 Occurring contemporaneously with the mediation was a Special Committee's "comprehensive investigation into potential claims that the Debtors may have against the Sackler Families and Sackler Entities," led by attorneys from Davis Polk, who represent the Debtors in the bankruptcy. (Dkt. No. 91-4, at App.1537-1553). Throughout the mediation, the Special Committee was kept apprised of the "offers and counteroffers that had been communicated through the Mediators by the NCSG, on the one hand, and the Sackler Families, on the other hand." (*Id.* at App.1552).

C. Phase 2 Negotiations Continue with the Sackler families: January 2021 to March 2021

Although court-ordered mediation formally ended on January 31, 2021, settlement negotiations continued among the Sackler families and entities, the Debtors, the NCSG, the UCC, the ACH, and the MSGE regarding the "Sackler contribution" to the Debtors' estate. (*See* Bankr. Dkt. No. 2584, at 9; Dkt. No. 91-4, at App.1552-53). Eight more offers and counteroffers were exchanged between the end of January 2021 and February 18, 2021. (Dkt. No. 91-4, at App.1553).

Ultimately, the Sackler families and entities, the Debtors, the AHC, the "Consenting Ad Hoc Committee," and the MSGE reached an agreement in principle, which settled on a guaranteed amount that the Sackler families would be required to contribute to the Debtors' estate – $4.275 billion over nine years (or ten years if certain amounts were paid ahead of schedule in the first six years). (*Id.* at App.1552-53; *see* Bankr. Dkt. Nos. 2488, 2879). The principal consideration for this payment was the "Shareholder Release" that was to be included in the Debtors' plan of reorganization. (*See* Bankr. Dkt. 2487, at § 10.8). That plan, along with the Debtors' "Disclosure Statement" containing the "Sackler Settlement Agreement Term Sheet" reached in negotiation, were filed with the Bankruptcy Court on March 15, 2021. (*See* Bankr. Dkt. Nos. 2487, 2488).

D. Phase 3: May 7, 2021-June 29, 2021

Phase three of the mediation involved a final push to resolve the dispute of the ***65** NCSG[39] over the terms of the agreement reached in phase two of the mediation between and among the Sackler families and entities, the Debtors, the AHC, the "Consenting Ad Hoc Committee," and the MSGE. (Bankr. Dkt. Nos. 2820, 2879). To that end, on May 7, 2021, the Bankruptcy Court asked his colleague, the Honorable Shelley C. Chapman, to preside over a mediation between the NCSG and the Sackler Families with respect to the terms of the settlement. (Bankr. Dkt. No. 2820). Between May 7 and June 29, 2021, Judge Chapman conducted 145 telephone meetings and several in-person sessions between the NCSG and the Sackler families and entities. (*See* Bankr. Dkt. No. 3119).

39 At that time, the non-consenting states included Colorado, Connecticut, Delaware, the District of

> Columbia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin.

The result of the mediation was a modified shareholder settlement with the Sackler families and entities, which was agreed to in principle by a fifteen of the twenty-five non-consenting states – specifically, Colorado, Hawaii, Idaho, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New York, North Carolina, Pennsylvania, Virginia, and Wisconsin. (*Id.* at 2). Those states that reached agreement in principle also agreed to support and/or not object to the Plan.

The remaining non-consenting states – most of which are parties to this appeal – did not agree to the revised settlement. (*Id.*).

The new terms of the settlement included additional payments of $50 million by the Sackler families, and the acceleration of another $50 million in previously agreed settlement payments, resulting in total payments of $4.325 billion. In addition to the money, Judge Chapman induced the parties to agree to several non-monetary terms; specifically, a "material expansion of the scope of the public document repository" to be established under the Plan, and certain prohibitions on Sackler family demands for naming rights in exchange for charitable contributions, together with a few other, minor concessions. (*See* Bankr. Dkt. No. 3119).[40] The Shareholder Release was unchanged. (*See id.*).

40 The value of the "naming rights" concession is dubious, since institution after institution, both here and abroad, is taking the Sacklers' name off various endowed facilities, including the Louvre and the Metropolitan Museum of Art. *See Louvre Removes Sackler Family Name From Its Walls*, The N.Y. Times (Jul. 17, 2019), https://www.nytimes.com/2019/07/17/arts/design/sackler-family-louvre.html; *Met Museum Removes Sackler Name From Wing Over Opioid Ties*, The N.Y. Times (Dec. 9, 2021), https://www.nytimes.com/2021/12/09/arts/design/met-museum-sackler-wing.html

On July 7, 2021, Purdue filed the mediator's report in the bankruptcy proceeding, informing Judge Drain of the result of the mediation.

X. Confirmation of the Plan: Summary of the Order on Appeal

Purdue filed the first version of the Plan on March 15, 2021. (Bankr. Dkt. No. 2487). It has subsequently filed twelve amendments to the Plan, the last of which was dictated by Judge Drain as a condition of confirmation. (*See* Bankr. Dkt. No. 3787).

On August 9, 2021, the Confirmation Hearing began before the Bankruptcy Court (Dkt. No. 91-3, at App.651), a six-day event during which 41 witnesses testified (by declaration or otherwise), after which the parties engaged in extensive oral argument. *See In re Purdue Pharma L.P.*, 2021 WL 4240974, at *2.

***66** On September 1, 2021, the Bankruptcy Court rendered an oral ruling, stating it would confirm the proposed plan provided certain changes were made to it, the most relevant of which for purposes of this appeal was a modification of the Section 10.7 Shareholder Release:

> I ... require that the shareholder releases in paragraph 10.7(b) [the release of third-party claims against the shareholder released parties], by the releasing parties, be further qualified than they now are. To apply [only] where ... a debtor's conduct or the claims asserted against it [are] a legal cause or a legally relevant factor to the cause of action against the shareholder released party.

(Confr. Hr'g Tr., Sept. 1, 2021, at 134:18-135:2); *see also In re Purdue Pharma L.P.*, 2021 WL 4240974, at *45; *see* Plan, at § 10.7(b) (modifying the Plan in accordance with Judge Drain's instructions). Purdue filed the final version of the Plan the next day (Bankr. Dkt., No. 3726), and on September 17, 2021, Judge Drain issued his edited written decision confirming the Plan.

The salient features of the Plan are as follows:

Trusts to Administer Abatement and Distribution. Under the Plan, the majority of Purdue's current value will be distributed among nine "creditor trusts" that will fund opioid abatement efforts and compensate personal injury claimants, including the National Opioid Abatement Trust ("NOAT"), which will make distributions to qualified governmental entities. (Bankr. Dkt. No. 3456, at ¶¶ 5-6). Most of the creditor trusts are abatement trusts and may only make distributions for the purpose of opioid abatement or to pay attorneys' fees and associated costs. (*Id.* ¶¶ 5-6). Two trusts – the "PI Trust" and "PI Futures Trust" – are the only exceptions: those creditor

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trusts will make distributions to qualifying personal injury claimants. (*Id*.)

The Public Document Repository. Under the Plan the Debtors are required to create a public document repository of Purdue material available for public review. (Bankr. Dkt. No. 3440, at ¶ 7.) The AHC testified at the Confirmation Hearing that the establishment of this public document repository was among their highest priorities. (Confr. Hr'g Tr., Aug. 13, 2021, at 151:17-152:9 ("[O]f all the aspects of ... the injunctive relief part of [the Plan], [the public document repository] ... is extremely important from the standpoint of, not only what it is that we developed in terms of evidence, [but also] lessons to be learned from the conduct that was uncovered and revealed."); Confr. Hr'g Tr., Aug. 16, 2021, at 83:20-22, 84:12-23 ("[I]it could be that the document repository is actually the most valuable piece of this settlement.")). The public document repository will be hosted by an academic institution or library and will include more than 13,000,000 documents (consisting of more than 100,000,000 pages) produced in the chapter 11 case and tens of millions of additional documents, including certain documents currently subject to the attorney client privilege that would not have been produced in litigation. (Bankr. Dkt. No. 3440, at ¶ 7.) The Plan ensures that scholars and the public can have access to all of these materials.

Purdue Pharma Will Cease to Exist. Under the Plan, Purdue Pharma will cease to exist. Its current business operating assets will be transferred to and operated by a new entity, known as "NewCo" in the Plan (Plan, at 28), but to be named KNOA. (Oral Arg. Tr., Nov. 30, 2021, at 158:1-17). NewCo will be governed by a board of five or seven disinterested and independent managers initially selected by the AHC and the MSGE, in consultation with the ***67** Debtors and UCC, subject to a right of observation by the DOJ. (Plan, at § 5.4). NewCo will manufacture products, including Betadine, Denokot, Colace, magnesium products, opioids and opioid-abatement medications, and oncology therapies. (*See* Oral Arg. Tr., Nov. 30, 2021, at 157:19-159:23). Additionally, NewCo will continue the Debtors' development of opioid overdose reversal and addiction treatment medications, and it must deliver millions of doses of those medications at low or no cost when development is complete (these will be distributed to groups or entities to be determined post-emergence). (*Id.* at 159:19-160:7). NewCo will be subject to an "Operating Injunction" that prohibits it from, among other things, promoting opioid products and providing financial incentives to its sales and marketing employees that are "directly" (but not indirectly) based on sales volumes or sales quotas for opioid products. (Bankr. Dkt. No. 3456, at ¶10). It also is subject to "Governance Covenants" that ensure that NewCo provides all its products in a "safe manner," complies with settlement obligations, pursues public health initiatives, and follows pharmaceutical best practices. (*Id.* at ¶11). The Plan provides for the appointment of a monitor to ensure that NewCo complies with the Operating Injunction and Governance Covenants; the monitor will provide the public with regular updates and seek relief from the Bankruptcy Court to the extent necessary to carry out the monitor's obligations. (*Id.* at ¶13). Above all, NewCo is not intended to operate indefinitely: The Plan instruct the managers to use reasonable best efforts to sell the assets of NewCo by December 21, 2024. (*Id.* at ¶15).

Shareholder Settlement Agreement. The Plan incorporates the "Shareholder Settlement Agreement" and the transactions contemplated therein whereby, in exchange for the release of third-party claims against over 1,000 individuals and entities related to the Sackler family ("Shareholder Released Parties"), the Sackler family will give $4.275 billion toward the Purdue estate. (Plan, at 37; Dkt. No. 91-3, at App.1042, 1045-1046, 1050).

Section 10.7(b) of the Plan sets out the terms of the release that the Sacklers, from the inception of the bankruptcy and earlier, insisted on in exchange for contributing funds to Purdue's estate. The Plan "releases and discharges" certain claims that third parties (including states and personal injury claimants) have asserted or might in the future assert against the Shareholder Released Parties. The release of claims against the Shareholder Released Parties permanently enjoins third parties from pursuing their current claims against the Shareholder Released Parties and precludes the commencement of future litigation against any of the Sacklers and their related entities, as long as (i) those claims are "based on or related to the Debtors, their estates, or the chapter 11 cases," and (ii) the "conduct, omission or liability of any Debtor or any Estate is the legal cause or is otherwise a legally relevant factor." (Plan § 10.7(b)). The third-party releases under the Plan are non-consensual; they bind the objecting parties as well as the parties who consented. All present and potential claims connected with OxyContin and other opioids would be covered by the Section 10.7 Shareholder Release.

Channeling Injunction. Under the Plan, all enjoined claims against the Debtors and those against the Shareholder Released Parties are to be channeled to the nine creditor

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trusts for treatment according to the trust documents of each respective trust ("Channeling Injunction"). (Plan, at p. 10 and § 10.8). However – as the U.S. Trustee points out, and the Debtors do not contest (*see* Dkt. No. 91, at 19-20; Dkt. No. 151, at 23-24) – the claims against the Shareholder Released Parties are effectively ***68** being extinguished for nothing, even though they are described as being "channeled." (*See e.g.*, Oral Arg. Tr., Nov. 30, 2021, at 37:9-14; 29:16-17). The U.S. Trustee explains that the Plan documents expressly prohibit value being paid based on causes of action (whether pre-or post-petition) against the Sackler family or other non-debtors for opioid-related claims. (Dkt. No. 91, at 19-20; *see, e.g.*, Dkt. No. 91-2, at App.333 ("Distributions hereunder are determined only with consideration to a Non-NAS PI Claim held against the Debtors, *and not to any associated Non-NAS PI Channeled Claim against a non-Debtor party*.") (emphasis added); *id.* at App.392 ("Distributions hereunder are determined only with consideration to an NAS PI Claim held against the Debtors, *and not to any associated NAS PI Channeled Claim against a non-Debtor party*.") (emphasis added); *id.* at App.433 ("A Future PI Claimant may not pursue litigation against the PI Futures Trust for any Future PI Channeled Claim *formerly held or that would have been held against a non-Debtor party*.") (emphasis added)). And to assert any third-party claim against the trust, the claimant must have filed a proof of claim in the bankruptcy prior to the bar dates, but each of the bar dates passed by the time anyone was notified of the claims' extinguishment. (Dkt. No. 91, at 20). And to get an exception for an untimely filing, a party must proceed through multiple steps, after which the Bankruptcy Court – which serves as a gatekeeper – determines, in its discretion, that the untimely claim qualified under the Plan and granted leave to assert the claim. (*Id.*).

Debtors sidestepped the Plan's effective extinguishment of purportedly channeled third-party claims in its brief by not addressing the U.S. Trustee's points; they made no effort to clarify this in oral argument for the Court. (*See* Dkt. No. 151, at 23-27).

XI. Objections to the Plan

On June 3, 2021, the Bankruptcy Court approved Purdue's disclosure statement. (*See* Bankr. Dkt., No. 2988).

On July 19, 2021, the U.S. Trustee objected to confirmation of the Plan, arguing that the Section 10.7 Shareholder Release was unconstitutional, violates the Bankruptcy Code, and is inconsistent with Second Circuit law. (*See* Bankr. Dkt. No. 3256). Eight states – California, Connecticut, Delaware, Maryland, Oregon, Rhode Island, Washington, Vermont – and D.C. all filed objections, as did the City of Seattle, four Canadian municipalities, two Canadian First Nations and three *pro se* plaintiffs. (Bankr. Dkt. No. 3787, at 28; *see also* Bankr. Dkt. No. 3594). The U.S. Attorney's Office for this District on behalf of the United States of America filed a statement of interest supporting these objections to the Section 10.7 Shareholder Release. (*See* Bankr. Dkt. No. 3268).

The objectors argued, *inter alia* and as applicable to them, that the Section 10.7 Shareholder Release (1) violates the third-party claimants' rights to due process, (2) violates the objecting states' sovereignty and police power, (3) is not permitted under the Bankruptcy Code, and (4) the Bankruptcy Court lacks constitutional, statutory, and equitable authority to approve the Section 10.7 Shareholder Release.

XII. Judge Drain's Decision to Confirm the Plan

Judge Drain's opinion is a judicial *tour de force* – delivered from the bench only days after the end of a lengthy trial, it included extensive findings of fact and addressed every conceivable legal argument in great detail. Sixteen days later, on September 17, the learned bankruptcy judge ***69** filed a written version of that oral decision, running to 54 pages on Westlaw, which is the version summarized here. *See In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. Sept. 17, 2021).

Judge Drain began by describing the highly unusual and complex nature of the situation before him – a "massive public health crisis," with a potential creditor body that included "every person in the range of the Debtors' opioid products sold throughout the United States" – individuals, local, state and territorial governments, Indian tribes, hospitals, first responders, and the United States itself. *Id.* at 58. He noted that over 618,000 claims, in an amount exceeding two trillion dollars, had been filed in the bankruptcy. And he commended the parties for working in "unique and trailblazing ways to address the public health crisis that underlies those claims." *Id.*

In his opening remarks, Judge Drain also addressed the elephant in the room:

> These cases are complex also because the Debtors' assets include enormous claims against their controlling shareholders, and in some instances directors and officers, who are members of the Sackler family, whose aggregate

net worth, though greater than the Debtors', also may well be insufficient to satisfy the Debtors' claims against them and other very closely related claims that are separately asserted by third parties who are also creditors of the Debtors.

Id.

Judge Drain then announced the ultimate result:

First, he concluded that there existed no other reasonably conceivable means to achieve the result that would be accomplished by the Plan in addressing the problems presented by this case. Second, he found that well-established precedent – which he described as "Congress in the Bankruptcy Code and the courts interpreting it" – authorized him to confirm the Plan. *Id*. Insofar as is relevant to this appeal,[41] Judge Drain reached the following conclusions.

41 Many issues addressed by Judge Drain in his comprehensive opinion are not implicated by any of the appeals to this Court, and so will not be addressed in this decision. These include: objections from insurers that the Plan was not insurance neutral; from the U.S. Trustee to the Plan's treatment of certain attorney fees and expenses; to objections by certain prisoners who filed claims but challenged the sufficiency of notice and what they perceived as a compromising of their rights under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A; objections by certain states to their classification in the same voting class as their political subdivisions; an objection by the State of West Virginia to the allocation plan for states from the NOAT; and objections by certain Pro Se Appellants to the Plan's release of the Sacklers from criminal liability (it does not).

A. The Section 10.7 Shareholder Release and Settlement with the Sacklers

The meat of this case, both before Judge Drain and on this appeal, is the Bankruptcy Court's approval of the broad releases that the Plan affords to all members of the Sackler family and to their related entities, including businesses and trusts.

The Plan includes two settlements with every member of the Sackler family – whether or not that individual had anything to do with the management of Purdue or personally exercised any control over Purdue – and with a variety of entities related to the Sacklers, including various trusts, businesses, and IACs. Taken together these individuals and entities (not all of whom have been or apparently can ***70** be identified) are known as the "Shareholder Released Parties." *Id.* at 82-83.

The first settlement disposed of claims that the Debtors could assert against the Shareholder Released Parties for the benefit its creditors. *Id.* These included claims for (1) breach of fiduciary duty against those members of the Sackler family who were involved in – indeed, who drove – the business decisions that were the basis for Purdue's criminal and civil liability, and (2) fraudulent conveyance arising out of the Sackler family's removal of nearly $11 billion from the Debtor corporations over the course of a decade. *See id.* at 90-92.

The second settlement disposed of certain third-party claims that could not be asserted by the Debtors against the Shareholder Released Parties, but were particularized to others. Chief among these claims are claims asserted by the states – both the consenting states and the objecting states – arising under various unfair trade practices and consumer protection laws that make officers, directors and managers who are responsible for corporate misconduct personally liable for their actions. Judge Drain did not review on a state-by-state basis the various state laws applicable to these objector claims, including laws that might forbid insurance coverage or indemnification and contribution claims by those individuals, such that their personal assets are very much at risk. *Id.* at 107-108.

In exchange for these releases, the Shareholder Released Parties agreed to contribute $4.325 billion to a fund that would be used to resolve both public and private civil claims as well as both civil and criminal settlements with the federal government. *Id.* at 84-85. The Sacklers also agreed to the dedication of two charities worth at least $175 million for abatement purposes; to a resolution that barred them from insisting on naming rights in exchange for charitable contributions; to refrain from engaging in any business with NewCo and to dispose of their interest in the non-U.S. Purdue entities within seven years; to certain "snap back" provisions that were designed to ensure the collectability of their settlement payments; and to the creation of an extensive document repository that would archive in a comprehensive manner the history of the Debtors and their involvement in the development, production and sale of opioids. *Id.*

Judge Drain made three fundamental findings relating to these settlements: that the Sackler Settlements were necessary to the Plan; that they were fair and reasonable; and that it was necessary and appropriate for him to approve the non-

consensual release of certain third-party claims against the Sacklers, even though they are not debtors.

B. The Sackler Settlements Were Necessary

Judge Drain concluded that these settlements were necessary to the Plan. He noted that a variety of other settlements that were essential components of the Plan – including agreed-upon allocations of the pot of money to be created by the Debtors' estate and the Sackler contribution – would unravel for lack of funding if the Sacklers did not make their $4.325 billion contribution. And he found that they would not make that contribution unless they obtained broad releases from past and future liability. *Id.* at 105-07.

1. The Sackler Settlements Were Fair and Reasonable in Amount

[4] Judge Drain evaluated the fairness of the settlement in light of the factors laid out by the Second Circuit in ***71** *Motorola Inc. v. Official Committee of Unsecured Creditors & JP Morgan Chase Bank, N.A. (In re Iridium Operating LLC),* 478 F. 3d 452, 464-66 (2d Cir. 2007), which is controlling law in this Circuit on the questions. He made the following findings:[42]

42 Judge Drain considered all of the *Iridium* factors, but not in the order in which they are discussed in *Iridium*. I employ Judge Drain's framework in this decision.

(a) The Sackler settlements were the product of arms-length bargaining conducted by able counsel in two separate mediations presided over by three outstanding mediators and preceded by what he described as the "most extensive discovery process not only I have seen after practicing bankruptcy law since 1984 and being on the bench since 2002, but I believe any court in bankruptcy has ever seen." *In re Purdue Pharma L.P.*, 633 B.R. at 85-86. That process led to the production of almost 100 million pages of documents, through which all interested parties could learn "anything suggesting a claim against the shareholder released parties." *Id.*

(b) The settlements were negotiated by exceedingly competent counsel who were, as a result of the discovery process described above, well-informed about both the claims they might bring against the Shareholder Released Parties and the difficulties they would have in pursuing those claims. *Id.* at 86-88.

(c) Purdue's creditors overwhelmingly supported the settlement. *Id.* at 87-88. Some 120,000 votes were cast on the Plan – a number far exceeding the voting in any other bankruptcy case. *Id.* at 60-61. Over 95% of those voting in the aggregate favored the Plan: over 79% of the states and territories supported the Plan; over 96% of other governmental entities and tribes; and over 96% of the personal injury claimants; together with a supermajority of all other claimants. *Id.* at 87-88.

(d) The failure to approve the settlement was likely to result in complex and protracted litigation, with attendant cost and delay, while the settlement offered significant and immediate benefits to the estate and its creditors. *Id.* at 87-89.

[5] (e) Judge Drain focused particularly on the difficulty of collecting any judgments that might be obtained against the Sacklers. *Id.* at 88-89. Ordinarily this factor would rest on things like the paucity of assets available to satisfy judgments. But in this case the problems with collection were the result of what the Sacklers did with the money that they admittedly took out of the corporations between 2008-2016. The assets of family members are held principally in purportedly spendthrift trusts located in the United States and offshore – many of them on the Bailiwick of Jersey – and many of those assets cannot readily be liquidated. As Judge Drain correctly observed, spendthrift trusts can and often do insulate assets from the bankruptcy process. And while generally applicable law governing U.S. trusts allows those trusts to be invaded when they are funded by fraudulent conveyances, there is a substantial question whether the same is true under Jersey law. Additionally, he noted that many Sackler family members live abroad, raising a barrier to an American court's acquiring personal jurisdiction over them. Although the learned bankruptcy judge did not reach any final conclusion about these complicated issues, he readily drew the conclusion that collectability presented a significant concern, one that was obviated by the settlement.

***72** (f) Judge Drain also noted that the cost and delay attendant to the pursuit of the Sacklers – which was in and of itself substantial – would be compounded by the unraveling of the other settlements that were baked into the Plan. Judge Drain concluded that the unraveling of the Plan would inevitably result in the liquidation of Debtors under Chapter 7, which would in turn lead to no recovery for the unsecured creditors (including the personal injury plaintiffs), and no money for any abatement programs. *Id.*

at 89-90. This conclusion was reinforced by the fact that, absent confirmation of the Plan, the United States would have a superpriority administrative expense claim in an amount ($2 billion) that would wipe out the value of Purdue's business as a going concern ($1.8 billion). *Id.* at 74-75.

(g) Finally, Judge Drain considered the legal risks of the estates' pursuit of claims against the Sacklers against the benefits of settlement. *Id.* at 90-93.

Judge Drain first chronicled the problems Purdue would have in proving that the admitted conveyances qualified as fraudulent. He noted that over 40% of the purportedly avoidable transfers were used to pay federal and states taxes associated with Purdue, none of which was going to be refunded. *Id.* at 90-91. He identified various technical defenses that the Sacklers could assert to fraudulent conveyance claims, including statutes of limitations and the impact of prior settlements. *Id.* at 91-92. And while admitting that at least some of the Sacklers appeared to have been very much aware of the risk of opioid litigation to Purdue's solvency and their own, he also pointed to evidence that Purdue may not have been "insolvent, unable to pay its debts when due, or left with unreasonably small capital" – which would be necessary to make a conveyance fraudulent – until as late as 2017 or 2018, by which time most or all of the conveyances had been made. *Id.*

As for alter ego, veil-piercing and breach of fiduciary duty claims, Judge Drain noted that most of the Sackler family members had nothing to do with Purdue's operations, and that no one had identified any action taken by any of them in their capacity as passive shareholders that would make them liable on such claims. *Id.* He also identified the extensive government oversight of Purdue after its 2007 Plea Agreement and Settlement with the federal government and certain states, and the fact that neither DHHS nor various state reviews ever identified any improper actions. *Id.* at 92-93.[43]

[43] Given Purdue's admissions in connection with its 2020 Plea Agreement, this Court cannot assign much weight to the "oversight" factor.

Judge Drain made no findings about the actual merit of any of the estates' claims against any member of the Sackler family. But weighing these difficulties against the benefits that would be derived from the settlement, he concluded:

> I believe that in a vacuum the ultimate judgments that could be achieved on the estates' claims ... might well be higher than the amount that the Sacklers are contributing. But I do not believe that recoveries on such judgments would be higher after taking into account the catastrophic effects on recoveries that would result from pursuing those claims and unravelling the plan's intricate settlements. And as I said at the beginning of this analysis, there is also the serious issue of problems that would be faced in ***73** collection that the plan settlements materially reduce.

Id.

Judge Drain ended his discussion of the *Iridium* factors with a deeply personal reflection – dare I say, a *cri de coeur* – that is perfectly understandable coming from one who had labored so long and so hard to try to achieve a better result. Admitting that he had "expected a higher settlement," he said:

> This is a bitter result. B-I-T-T-E-R. It is incredibly frustrating that the law recognizes, albeit with some exceptions, although fairly narrow ones, the enforceability of spendthrift trusts. It is incredibly frustrating that people can send their money offshore in a way that might frustrate U.S. law. It is frustrating, although a long-established principle of U.S. law, that it is so difficult to hold board members and controlling shareholders liable for their corporation's conduct.
>
> It is incredibly frustrating that the vast size of the claims against the Debtors and the vast number of claimants creates the need for this plan's intricate settlements. But those things are all facts that anyone who is a fiduciary for the creditor body would have to recognize, and that I recognize.

Id.

Ultimately, however, the learned bankruptcy judge decided that the perfect was the enemy of the good:

> I am not prepared, given the record before me, to risk [the parties'] agreement. I do not have the ability to impose what I would like on the parties.

Id. at 94. And so, albeit with obvious reluctance, he concluded that the settlement was reasonable as that term is understood at law.

2. The Section 10.7 Shareholder Release Was In all Respects Legal

Having concluded that the settlements were fair and reasonable in amount, Judge Drain went on to address a

number of challenges to his legal authority to impose the most controversial element of those settlements: The Section 10.7 Shareholder Release. *Id.* at *35. He rejected each such challenge.

Subject matter jurisdiction. First, Judge Drain concluded that he had subject matter jurisdiction to impose the third-party releases and injunctions. Citing *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995) and *SPV OSUS, Ltd. v. UBS AG*, 882 F. 3d 333, 339-40 (2d Cir. 2018), he held that he had the undoubted power to enjoin the claims of third parties that had "any conceivable effect" on the Debtors' estates as part of a Bankruptcy Court's "related to" jurisdiction, conferred by Congress in 28 U.S.C. § 1334(b). *In re Purdue Pharma L.P.*, 633 B.R. at 95-98. He concluded that the third-party claims covered by the Section 10.7 Shareholder Release would directly affect the *res* of the Debtors' estates in three different ways: insurance rights, the Shareholder Released Parties' right to indemnification and contribution, and the Debtors' ability to pursue its own overlapping claims against the Sacklers. He concluded by saying, "Depending on the kinds of third-party claims covered by a plan's release and injunction of such claims, *I conclude, therefore, that the Court has jurisdiction to impose such relief, based upon the effect of the claims on the estate rather than on whether the claims are 'derivative ...'*" *Id.* at 98 (emphasis added).

Due process. Next, Judge Drain concluded that the Section 10.7 Shareholder Release did not violate the third-party ***74** claimants' right to due process. *Id.* at 97-99. He rejected the argument that a release constitutes a *de facto* adjudication of the claim, holding that such a release "is part of the settlement of the claim that channels settlement funds to the estate." *Id.* at 98. And he held that claimants had been provided with constitutionally sufficient notice of the proposed releases. Uncontroverted testimony that Judge Drain found credible established that messages tailored to reach persons who may have been harmed by Debtors' products had reached roughly 98% of the adult population of the United States and 86% of the adult population of Canada, with supplemental notice reaching an estimated 87% of all U.S. adults and 82% of Canadian adults, as well as audiences in 39 countries, with billions of hits on the internet and social media in addition to notice delivered by TV, radio, publications, billboards and outreach to victim advocate and abatement-centered groups. While references contained in the notices sent readers to complex lawyerly descriptions of the release provisions, the notices themselves were written in plain English and specifically mentioned that the Plan contemplated a broad release of civil (not criminal) claims against the members of the Sackler family and related entities.

Constitutional authority. Judge Drain next concluded that he had constitutional power to issue a final order confirming a plan that contains a third-party claims release. *Id.* at 99-100. He determined that a proceeding to determine whether a chapter 11 plan containing such a release was a "core" proceeding, so ordering the non-debtor releases and enjoining the prosecution of third-party claims against non-the Sacklers qualified as "constitutionally core" under *Stern v. Marshall*, 564 U.S. 462 (2011) and its progeny.

Statutory authority. Finally, Judge Drain concluded that he had statutory power to confirm and enter the third-party releases. *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *40-43. He started from the proposition that the Second Circuit, in *Deutsche Bank A.G. v. Metromedia Fiber Network, Inc., (In re Metromedia Fiber Network, Inc.)*, 416 F. 3d 136, 141 (2d Cir. 2005), had indicated that non-consensual third-party releases of claims against non-debtors could be approved, albeit only in "appropriate, narrow circumstances." *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *40. He noted that most of the Circuits were of that view and rejected the reasoning of those courts of appeal that held otherwise. Indeed, he asserted that the view of those Circuits (the Fifth, Ninth, and Tenth Circuits) – which is that Section 524(e) of the Bankruptcy Code precluded the grant of any such release in the context of a settlement – "has been effectively refuted." *Id.* at 101. He analogized the enjoining of third-party claims against non-debtors to his undoubted power to impose a preliminary injunction against the temporary prosecution of third-party claims in order to facilitate the reorganization process. And he asked rhetorically why such a stay could not become permanent if it was crucial to a reorganization process involving massive numbers of overlapping estate and third-party claims. *Id.* at 101-02.

Having concluded that Section 524(e) was not a statutory impediment to a Bankruptcy Court's approval of third-party releases, the Bankruptcy Judge then addressed the question of exactly what provision or provisions in the Bankruptcy Code conferred the necessary authority over claims against non-debtors on him. *Id.* at 101-03. He found such authority in the "necessary or appropriate" power in ***75** Section 105(a) of the Bankruptcy Code coupled with Section 1123(b)(6)'s grant of power to "include any other appropriate provision not inconsistent with the applicable provisions of this title"

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– what the Seventh Circuit referred to in *In re Airadigm Communications, Inc.*, 519 F. 3d 640, 657 (7th Cir. 2008) as a bankruptcy court's "residual authority." *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *43. He also cited Sections 1123(b)(5) and 1129 of the Bankruptcy Code.

Judge Drain carefully noted that the release in this case extended beyond so-called "derivative" claims – claims that the Debtors could bring against the Sacklers– which claims could assuredly be released by a bankruptcy court exercising *in rem* jurisdiction over the *res* of the estate. But he concluded – largely in reliance on *In re Quigley Co., Inc.*, 676 F.3d 45, 59-60 (2d Cir. 2012) – that he had statutory authority to authorize the release of non-derivative – direct or particularized – claims, because the third party claims to be released in this case were "premised as a legal matter on a meaningful overlap with the debtor's conduct." *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *43-47. Such a claim – one that "essentially dovetail[s] with the facts of the claimants' third-party claims against the Debtors" – was, in Judge Drain's view, "sufficiently close to the claims against the debtor to be subject to settlement under the debtor's plan if enough other considerations support the settlement." *Id.* at 105.

As noted above, Judge Drain did insist that the Section 10.7 Shareholder Release be modified so that it covered only third-party claims in which "a Debtor's conduct, or a claim asserted against the Debtor, must be a legal cause of the released claim, or a legally relevant factor to the third-party cause of action against the shareholder released party." *Id.* at 105. In other words, he insisted that there be substantial factual overlap between the released particularized claims and the derivative claims that no one disputes he had the power to release, such that the released non-derivative claims were "sufficiently close to the claims against the debtor."

***Metromedia* analysis.** Having disposed of all constitutional, jurisdictional, and statutory challenges to his authority to enter the Section 10.7 Shareholder Release (as modified), Judge Drain turned finally to whether this was the "unique" case in which it would be was appropriate to impose them. *Id.* at 105-06. He concluded that it was.

In this regard, he reviewed the law in the various circuits on the subject, viewing with special interest the Third Circuit's conclusion that:

> "To grant non-consensual releases a court must assess 'fairness, necessity to the reorganization' and make specific actual findings to support these conclusions." *In re Cont'l Airlines*, 203 F. 3d 203, 214 (3d Cir. 2001). Relevant consideration might include whether the non-consensual release is necessary to the success of the reorganization; whether the releasees have provided a critical financial contribution to the debtor's plan and whether that financial contribution is necessary to make the plan feasible; and whether the non-consenting creditors received reasonable compensation in exchange for the release, such that the release is fair." *In re Spansion, Inc.,* 426 B.R. 114, 144 (Bankr. D. Del 2010).

In re Purdue Pharma L.P., 2021 WL 4240974, at *46.

Judge Drain also cited with approval the Seventh Circuit's practice of engaging in a ***76** fact-based inquiry into such matters as whether the release is "narrowly tailored, not blanket" (unlike the Section 10.7 Shareholder Release, which releases all types of conduct, including fraud and willful misconduct); whether the release is an essential component of the plan; and whether it was achieved by the exchange of good and valuable consideration that will enable unsecured creditors to realize distributions (which is in fact going to happen in this case). *Id.* at 106.

Judge Drain also noted that the Fourth, Sixth and Eleventh Circuits apply a multi-factor test in deciding when it is appropriate to impose a non-consensual release of third-party claims. (*Id.* at 105-06).

Then, while recognizing that "this is not a matter of factors or prongs" (*id.* citing *Metromedia*, 416 F. 3d at 142), Judge Drain made a long list of findings about why this was the "rare" and "unique" case in which a nonconsensual third-party claims release was appropriate. *Id.* at 105-10. These include the following: (i) the Purdue bankruptcy was exceedingly complex; (ii) the Plan has overwhelming creditor support; (iii) without the Sackler payment the settlements would unravel; (iv) while not every Sackler would be making a specific payment toward the settlement,[44] the aggregate settlement payment hinged on each member of the family's being released; (v) the settlement amount was substantial; (vi) the release "is narrowly tailored;"[45] (vii) the settlement was fundamentally fair to the third parties; and (viii) for the reasons discussed at length *supra*, Background Section XII(B)(1), the cost and likelihood of success on the third party claims against the Sacklers – including both the merits and the impediments to collection of any judgment – was outweighed by the immediate and definite benefits of the settlement.

44 It is actually not clear what members of the Sackler family are contributing to the settlement and in what amounts. The record contains some suggestion that the various trusts that are contributing are for the benefit of all members of the family.

45 Judge Drain did not explain what he meant by that, except to say that the release would be further narrowed so that it was limited in the manner discussed above. I assume that he meant that the release was limited to claims involving the Debtor's conduct, and claims in which the Debtor's conduct is "a legal cause of the released claim, or a legally relevant factor to the third-party cause of action." *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *45.

"Best interests" analysis. Section 1129 of the Bankruptcy Code requires that a plan of reorganization may be confirmed only if a litany of requirements is met. One such requirement is found in Subsection (a)(7) of Section 1129, which provides that, for any impaired creditor or class of creditors, if all members of the class do not approve the plan, each member of the class "will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date." *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *50.

Judge Drain applied this so-called "best interests" test to conclude that the holders of claims against non-debtor third parties would receive, on account of the Plan (and taking into account their claims against the Debtors as well as the third parties), materially more than they would receive in a ***77** hypothetical chapter 7 liquidation.[46] *Id.* at 110-12.

46 Judge Drain also argued that the best interest test under section 1129(a)(7) requires that the amount that an objecting creditor stands to receive under the plan on account of its claim be at least as much it would receive if the debtor were liquidated under chapter 7. *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *50. Thus, he concluded, the best interest test does not require analysis of the claimant's rights against third parties. *Id.* He acknowledged that his reading of the statute was at odds with at least two of his colleagues' reading of the same statute. I mention this fact but it has nothing to do with the ultimate decision on this appeal.

State police powers. Judge Drain concluded that his ordering of the non-debtor releases did not violate state sovereignty or any state police power. *Id.* at 111-14. He concluded that actions exempted from the automatic stay by virtue of Section 362(b)(4) were nonetheless subject to court-ordered (*i.e.*, not automatic) injunctive relief, and that Congress' express power under the bankruptcy clause of the Constitution to enact uniform bankruptcy laws overrode any state regulatory or sovereignty argument.

The classification of the Canadians. Finally, Judge Drain addressed whether that the Canadian creditor's classification as Class 11(c) creditors, rather than as Class 4 and 5 creditors, was impermissible. Certain Canadian creditor groups objected to the confirmation of the Plan, arguing that they should be classified with the U.S. unsecured creditor groups in Classes 4 and 5 to participate in the opioid abatement trusts created under the Plan for those classes, rather than receiving their pro rata share of the cash payment to Class 11(c). But Judge Drain concluded that, because there were legitimate reasons for separately classifying the Canadian unsecured creditors from there domestic counterparts, the classification was perfectly permissible. First, the Canadian creditors operate under "different regulatory regimes ... with regard to opioids and abatement" than their domestic counterparts. *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *12. And second, "the allocation mediation conducted by Messrs. Feinberg and Phillips that resulted in the plan's division of the Debtors' assets ... involved only *U.S.-based* public claimants with their own regulatory interests and characteristics." *Id.* (emphasis added).

XIII. The Appeal

The U.S. Trustee, eight states,[47] D.C., certain Canadian municipalities and First Nation groups,[48] and five *pro se* individuals[49] filed notices of appeal of Judge Drain's Confirmation Order in September 2021. (*See* Bankr. Dkt. No. 3724 (amended by Dkt. No. 3812), 3725, 3774 (amended by 3949), 3775 (amended by 3948), 3776 (amended by 3799), 3780 (amended by Dkt. No. 3839), 3784 (amended by Dkt. No. 3818), 3810, 3813, 3832, 3849, 3851, 3853, 3877, 3878). The U.S. Trustee also appealed the Advance Order (Bankr. Dkt. No. 3777) and the Disclosure Order (Dkt. No. 3776).

47 California, Connecticut, Delaware, Maryland, Oregon, Rhode Island, Vermont, and Washington.

48 The City of Grande Prairie as Representative 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 and on behalf itself and the Lac La Ronge Indian Band.

49 Ronald Bass, Marie Ecke, Andrew Ecke, Richard Ecke, and Ellen Isaacs on Behalf of Patrick Ryan Wroblewski.

***78** Among those who did not appeal the Plan were the UCC, the ACH, MSGE, the PI Ad Hoc Group, and other creditors supporting the Plan.

ISSUES ON APPEAL AND CONCLUSIONS OF LAW

This Court's answers to the questions that are being decided on appeal are summarized as follows:

1. Does the Bankruptcy Court have subject matter jurisdiction to impose a release of non-debtor claims?

Yes. Under the law of this Circuit, as most recently set forth in *SPV OSUS Ltd. v. UBS*, 882 F.3d 333 (2d Cir. 2018), the Bankruptcy Court has broad "related to" jurisdiction over any civil proceedings that "might have any conceivable effect" on the estate. *Id.* 339-340. 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 approve the Section 10.7 Shareholder Release and release the claims against the non-debtor Shareholder Released Parties.

2. Does the Bankruptcy Court have statutory authority to approve the non-debtor releases?

No. The Bankruptcy Code does not authorize a bankruptcy court to order the non-consensual release of third-party claims against non-debtors in connection with the confirmation of a chapter 11 bankruptcy plan. The Confirmation Order fails to identify any provision of the Bankruptcy Code that provides such authority. Contrary to the bankruptcy judge's conclusion, Sections 105(a) and 1123(a)(5) & (b)(6), whether read individually or together, do not provide a bankruptcy court with such authority; and there is no such thing as "equitable authority" or "residual authority" in a bankruptcy court untethered to some specific, substantive grant of authority in the Bankruptcy Code. Second Circuit law is not to the contrary; indeed, the Second Circuit has not yet taken a position on this question.

3. Did the Bankruptcy Court fail to provide equal treatment between the Canadian Appellants and their domestic unsecured creditor counterparts?

No. Under the Plan, the Canadian Appellants belong to a different class than their domestic, unsecured creditor "counterparts" – the non-federal governmental claimants and tribe claimants – but legitimate reasons are proffered for that differentiation. The Code does not require that all creditor classes be treated the same – only that there be a reasonable basis for any differentiation between classes. *See Boston Post Rd. Ltd. P'ship v. FDIC (In re Boston Post Rd. Ltd. P'ship)*, 21 F.3d 477, 482-83 (2d Cir. 1994). Here, Judge Drain identified a reasonable basis for differentiating between the Canadian Appellants and the non-federal governmental claimants and tribe claimants. The Plan's classification of the Canadian Appellants thus does not violate the Bankruptcy Code.

It is not necessary to reach any of the other issues that were briefed. The issues identified above are dispositive of all the appeals that have been filed.[50] Nor is it ***79** necessary to reach either the various constitutional challenges to the Section 10.7 Shareholder Release (lack of due process, infringement on state police powers), or to decide whether, if there were no other legal impediment to approving the Section 10.7 Shareholder Release, it should be approved on the facts of this particular case.

50 Beyond the above issues, (1) the State Appellants asserts a further issue that the bankruptcy court improperly applied the best interest of creditors test; (2) the Canadian Appellants assert that the Bankruptcy Court does not have personal jurisdiction over their claims, and that the bankruptcy court's approval of the release violated their foreign sovereign immunity and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq.; and (3) the U.S. Trustee also asserts that the Bankruptcy Court erred by approving the Debtors' disclosure statement and plan solicitation materials and by authorizing the Debtors to advance funds under Advance Order.

STANDARD OF REVIEW

[6] [7] [8] [9] The Court has jurisdiction to hear bankruptcy appeals pursuant to 28 U.S.C. § 158(a). "Generally in bankruptcy appeals, the district court reviews the bankruptcy court's factual findings for clear error and its conclusions of law *de novo*." *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 482-83 (2d Cir. 2012) (citing Fed. R. Bankr. P.

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8013). Conclusions of law reviewed *de novo* include "rulings as to the bankruptcy court's jurisdiction" and "interpretations of the Constitution." *In re Motors Liquidation Co.*, 829 F.3d 135, 152, 158 (2d Cir. 2016). As to findings of fact, the "clear error standard is a deferential one." *Id.* at 158. A finding of fact is clearly erroneous only if this Court is "left with the definite and firm conviction that a mistake has been committed." *In re Lehman Bros. 3 Holdings Inc.*, 855 F.3d 459, 469 (2d Cir. 2017).

[10] **[11]** The standard of review of findings of act is far less deferential if a bankruptcy court is presented with something it cannot adjudicate to final judgment as a constitutional matter unless the parties consent. *Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). In such a circumstance, a bankruptcy judge has authority only to "hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for *de novo* review and entry of judgment." *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 34-36, 134 S.Ct. 2165, 189 L.Ed.2d 83 (2014). In that case, the findings of fact are reviewed *de novo* as well. If a bankruptcy court issues a final order in the mistaken belief that it has constitutional authority to do so, the district court can treat a bankruptcy court's order as a report and recommendation, but it "must review the proceeding *de novo* and enter final judgment." *Id.* at 34, 134 S.Ct. 2165.

[12] In this case, the Bankruptcy Court concluded that it had constitutional authority under *Stern* to enter a final order granting the release, because the issue arose in the context of confirming a plan of reorganization – the most "core" of bankruptcy proceedings. *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *40. Appellants urge that Judge Drain misreads *Stern* and argue that he lacked authority to give final approval to those releases, even though they were incorporated into a plan of reorganization.

I agree with Appellants.

[13] **[14]** **[15]** In 28 U.S.C. § 157(a), Congress divided bankruptcy proceedings into three types: (1) those that "arise under" title 11; (2) those that "arise in" a title 11 case; (3) and those that are "related to" a title 11 case. Cases that "arise under" or "arise in" a title 11 matter are known as core bankruptcy proceedings, while "related to" proceedings are non-core. 28 U.S.C. § 157(b)(1)-(2)(C). Every proceeding pending before a bankruptcy court is either core or non-core.[51]

51 "Non-core" proceedings are interchangeably referred to as "related to" proceedings.

***80** **[16]** **[17]** **[18]** The core vs. non-core distinction is critical when assessing a bankruptcy court's constitutional authority to enter a final judgment disposing of that proceeding.[52] In particular, a bankruptcy court lacks the constitutional authority to enter a final judgment in a proceeding over which it has only "related to" subject matter jurisdiction unless all parties consent. Any doubt on that score was put to rest by the United States Supreme Court in *Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). In that case, the Supreme Court held that a bankruptcy court lacked constitutional power to adjudicate and enter judgment on a counterclaim asserted by a debtor, Vickie Marshall (aka Anna Nicole Smith) in an adversary proceeding that a creditor (her stepson) had filed against her. The counterclaim (for tortious interference with an *inter vivos* gift from the debtor Marshall's late husband, who was also the creditor's father) did not arise under title 11, nor did it arise in a title 11 case. Even though the claim was asserted in the context of a bankruptcy proceeding, it existed prior to and was independent of debtor Marshall's bankruptcy case.

52 The core/non-core distinction is also critically important when assessing the bankruptcy court's subject matter jurisdiction, a topic that will be taken in that section.

The Supreme Court ruled that Congress could not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity, or in admiralty." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284, 18 How. 272, 15 L.Ed. 372 (1855). Because Marshall's counterclaim for tortious interference was just such a claim, it could only be adjudicated to final judgment by an Article III court; and Congress had no power to alter that simply because the counterclaim might have "some bearing on a bankruptcy case." *Stern,* 564 U.S. at 499, 131 S.Ct. 2594.

In this case, the learned Bankruptcy Judge improperly elided his authority to confirm a plan of reorganization (indubitably a core function of a bankruptcy court) with his authority to finally dispose of claims that were non-consensually extinguished pursuant to that plan over which – as he himself recognized – he has only "related to" jurisdiction over the third-party claims against the non-debtor Sacklers. *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *36-38. *Stern* itself illustrates that not every issue that is litigated under the umbrella of a core proceeding is, to use Judge Drain's phrase,

"constitutionally core." The stepson-creditor's claim against Marshall's estate was properly litigated to judgment by the bankruptcy court in a claims allowance adversary proceeding – a core proceeding – but because the debtor's counterclaim was not a "core" claim, it could not be adjudicated to final judgment by the Bankruptcy Court, even though it would impact how much the creditor was ultimately owed.

[19] Judge Drain reasoned that the non-consensual third-party releases that he was approving were "constitutionally core" under *Stern* because plan confirmation is a "fundamentally central aspect of a Chapter 11 case's adjustment of the debtor/creditor relationship." *Id.* at *40. But nothing in *Stern* or any other case suggests that a party otherwise entitled to have a matter adjudicated by an Article III court forfeits that constitutional right if the matter is disposed of as part of a plan of reorganization in bankruptcy. Were it otherwise, then parties could manufacture a bankruptcy court's *Stern* authority simply by inserting the resolution of some otherwise non-core matter into a plan.

***81** The learned bankruptcy judge relied on the Third Circuit's recent decision in *In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126, 139 (3d Cir. 2019), *cert. denied sub nom*. *ISL Loan Tr. v. Millennium Lab Holdings II, LLC*, ––– U.S. ––––, 140 S. Ct. 2805, 207 L.Ed.2d 142 (2020). In *Millennium*, the court, like Judge Drain in this case, concluded that the "operative proceeding" for purposes of *Stern* analysis was the confirmation proceeding, not the underlying third-party claim against a non-debtor that was being released pursuant to the plan. *In re Millennium Lab Holdings II, LLC*, 591 B.R. 559, 574 (D. Del. 2018), *aff'd sub nom. In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126 (3d Cir. 2019). The Third Circuit read *Stern* to allow a bankruptcy court to confirm a plan containing such releases "because the existence of the releases and injunctions" are " 'integral to the restructuring of the debtor-creditor relationship.' " *Millennium Lab Holdings II, LLC.*, 945 F.3d at 129 (quoting *Stern*, 564 U.S. at 497, 131 S.Ct. 2594).

[20] Perhaps they are, but that is beside the point. In *Stern*, the Supreme Court held that bankruptcy courts have the power to enter a final judgment only in proceedings that "stem[ ] from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Stern*, 564 U.S. at 499, 131 S.Ct. 2594. It did not say that a bankruptcy court could finally dispose of non-core proceedings as long as they were "integral to the restructuring of the debtor-creditor relationship." The counterclaim in the lawsuit between debtor Marshall and her stepson-creditor was integral to the restructuring of their debtor-creditor relationship, but it was not a core proceeding, so the bankruptcy court could not finally adjudicate it. The correct constitutional question, and the question on which the Bankruptcy Court should have focused in this case, is whether the third-party claims released and enjoined by the Bankruptcy Court either stem from the bankruptcy itself or would necessarily be resolved in the claims allowance process – not whether the release and injunction are "integral to the restructuring of the debtor-creditor relationship."

[21] **[22]** The third-party claims at issue neither stem from Purdue's bankruptcy nor can they be resolved in the claims allowance process. Yet those claims are being finally disposed of pursuant to the Plan; they are being released and extinguished, without the claimants' consent and without any payment, and the claimants are being enjoined from prosecuting them. Debtors and their affiliated non-debtor parties cannot manufacture constitutional authority to resolve a non-core claim by the artifice of including a release of that claim in a plan of reorganization. As Bankruptcy Judge Bernstein made clear in *In re SunEdison, Inc.*, 576 B.R. 453, 461 (Bankr. S.D.N.Y. 2017), "In assessing a court's jurisdiction to enjoin a third party dispute under a plan, the question is not whether the court has jurisdiction over the settlement that incorporates the third party release, but whether it has jurisdiction over the attempts to enjoin the creditors' unasserted claims against the third party." That proposition applies with equal force to a bankruptcy court's *Stern* authority.

[23] Appellees' argument that *Stern* only limits a bankruptcy court's authority to *adjudicate* claims – not its authority to enter judgments that terminate claims without adjudicating them on the merits – is also flawed. As the U.S. Trustee correctly points out, *Stern's* holding is to the contrary: "The Bankruptcy Court in this case exercised the judicial power of the United States by *entering a final judgment* on a common law tort claim, even ***82** though the judges of such courts enjoy neither tenure during good behavior nor salary protection." *Stern*, 564 U.S. at 469, 131 S.Ct. 2594 (emphasis added). A bankruptcy court's order extinguishing a non-core claim and enjoining its prosecution without an adjudication on the merits "finally determines" that claim. It is equivalent to entering a judgment dismissing the claim. It bars the claim under principles of former adjudication. Therefore, Congress may not allow a bankruptcy court to enter such an order absent

the parties' consent – and consent is lacking here. *See Stern* at 484, 131 S.Ct. 2594.

There really can be no dispute that the release of a claim "finally determines" that claim. It does so by extinguishing the claim, so that it cannot be adjudicated on the merits. A nonconsensual third-party release is essentially a final judgment against the claimant, in favor of the non-debtor, entered "without any hearing on the merits." *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 725 (Bankr. S.D.N.Y. 2019) (citing *In re Digital Impact*, 223 B.R. 1, 13 n. 6 (Bankr. N.D. Okla. 1998)) (noting that a third-party release has "the effect of a judgment – a judgment against the claimant and in favor of the non-debtor, accomplished without due process."). The fact that the releases are being ordered in the overall context of a plan confirmation that "settles" many disputed matters (against the Debtors, not against non-debtors) does not alter this. The Appellants in this case do not want to settle their claims against the non-debtors – at least, not on the terms set forth in the Plan. This "settlement" is non-consensual – which means that, under *Stern*, a bankruptcy court cannot enter the order that finally disposes of their claims against those non-debtors.

Nor is there any doubt that the entry of an order releasing a claim has former adjudication effects, which is a key attribute of a final judgment. The Supreme Court has twice held that non-consensual third-party releases confirmed by final order are entitled to *res judicata* claim preclusion barring any subsequent action bringing a released claim: First in *Stoll v. Gottlieb*, 305 U.S. 165, 171, 59 S.Ct. 134, 83 L.Ed. 104 (1938), and again in *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 155, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009).[53]

53 This court's decision in *In re Kirwan Offices S.à.R.L.,* 594 B.R. 489 (S.D.N.Y. 2018) does not stand for the proposition that *Stern* authorizes a bankruptcy court to release non-core claims because a release is not a final judgment on the merits of the third-party claim. In that case, *Stern* was of no moment because, as this court held and the Second Circuit affirmed, all parties had consented to the bankruptcy court's exercise of jurisdiction. *In re Kirwan Offices S.à.R.L,* 792 F. App'x 99, 103 (2d Cir. 2019).

Because the non-consensual releases and injunction are the equivalent of a final judgment for *Stern* purposes, Judge Drain did not have the power to enter an order finally approving them. To the extent of his approval of the Section 10.7 Shareholder Releases, his opinion should have been tendered as proposed findings of fact and conclusions of law, both of which this court could review *de novo*. 11 U.S.C. § 157(c)(1). *Stern*, 564 U.S. at 475, 131 S.Ct. 2594. If approved by this Court, those releases would of course be incorporated into the Plan.

So the standard of review in this case is *de novo* as to both the Bankruptcy Court's factual findings and its conclusions of law.[54]

54 The practical impact of this holding is non-existent, as no one has challenged any of Judge Drain's findings of fact – only the conclusions he drew from them – and the court has always had the obligation to review those conclusions *de novo*.

***83 DISCUSSION**

I. The Bankruptcy Court Has Subject Matter Jurisdiction Over Third-Party Claims Against Non-Debtors That Might Have Any Conceivable Effect on the Debtors' Estate.

[24] [25] A bankruptcy court is a creature of statute. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 307, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995). Its subject matter jurisdiction is *in rem* and is limited to the *res* of the estate. *Central Virginia Community College v. Katz*, 546 U.S. 356, 362, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006) ("Bankruptcy jurisdiction, at its core, is *in rem*."). Its jurisdiction is limited to "civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b).

[26] [27] [28] A proceeding "arises under" title 11 if the claims "invoke substantive rights created by" that title. *See In re Housecraft Industries USA, Inc.*, 310 F.3d 64, 70 (2d Cir. 2002). A proceeding "arises in" a title 11 case if for example "Parties ..., by their conduct, submit themselves to the bankruptcy court's jurisdiction" by litigating proofs of claim without contesting personal jurisdiction. *In re Millenium Seacarriers, Inc.*, 419 F.3d 83, 98 (2d Cir. 2005); *see In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702, 706 (2d Cir. 1995) ("*a claim filed against the estate ... could arise only in the context of bankruptcy*") (emphasis in original) (quotation omitted). And a proceeding is "related to" a title 11 proceeding if its "outcome might have any conceivable effect on the bankrupt estate." *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir.1992) *Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 579 (2d Cir. 2011); *SPV OSUS Ltd. v. UBS*, 882 F.3d 333, 339-340 (2d Cir. 2018).

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[29] **[30]** The release of most third-party claims against a non-debtor touches the outer limit of the Bankruptcy Court's jurisdiction. *See In re Johns-Manville Corp.*, 517 F.3d 52, 55 (2d Cir. 2008) ("*Manville III*"), *rev'd and remanded on other grounds sub nom. Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009). But the Second Circuit defines that limit quite broadly. *See SPV OSUS Ltd.*, 882 F.3d at 339-340. The standard is not that an action's outcome will certainly have, or even that it is likely to have, an effect on the *res* of the estate, as is the case in some other Circuits. It is, rather, whether it *might have any conceivable impact* on the estate. *Id.*

Bound to adhere to this broad standard, which has been consistently followed in this Circuit for almost three decades and was applied most recently in *SPV Osus*, I agree with the Debtors that the Bankruptcy Court had subject matter jurisdiction over the direct (non-derivative) third party claims against the Sacklers, under the "related to" prong of bankruptcy jurisdiction.

A. Governing Law

Decades ago, the Second Circuit concluded that the outer limit of a bankruptcy court's *in rem* jurisdiction was defined by whether the outcome of a proceeding asserting a particular claim "might have any conceivable effect" on the *res* of the estate. *See In re Cuyahoga Equipment Corp.*, 980 F.2d at 114. In that case, a liquor distillery and its site of operation containing hazardous wastes was sold to a purchaser that subsequently went bankrupt; the bankruptcy court was asked to resolve not only the proceedings in bankruptcy but approve a settlement that released a creditor bank from claims related to separate environmental cleanup litigation (brought by the ***84** creditor Environmental Protection Agency (the "EPA")). *Id.* at 111-112. The original owner of the liquor distillery site – a non-debtor third party and defendant in the environmental cleanup litigation – objected and appealed arguing, *inter alia*, that the court lacked jurisdiction to approve the settlement. The Second Circuit found that the court had related to jurisdiction because the bank's and the EPA's claims against the estate "bring into question the very distribution of the estate's property." *Id.* at 114. "[Section] 1334(b) undoubtedly vested the district court with the power to approve the agreement between the parties at least to the extent it compromised the bankruptcy claims asserted by the bank and the government." *Id.* at 115.

In *Celotex Corp. v. Edwards*, 514 U.S. 300, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995), the United States Supreme Court decreed that "related to" jurisdiction was "a grant of some breadth" and that "jurisdiction of bankruptcy courts may extend ... broadly" in "reorganization under Chapter 11." *Id.* at 308, 115 S.Ct. 1493. And while some courts of appeal have circumscribed the scope of "related to" jurisdiction in their circuits, *see e.g.*, *In re W.R. Grace & Co.*, 900 F.3d 126 (3d Cir. 2018), the Second Circuit has never backed away from its broad reading of "related to" jurisdiction. *See, e.g., In re Ampal-American Israel Corporation*, 677 Fed.Appx. 5, 6 (2d Cir. 2017) (summary order).

The Circuit's most recent discussion of the subject can be found in *SPV OSUS Ltd. v. UBS AG*, 882 F.3d 333 (2d Cir. 2018). SPV Osus Ltd. ("SPV") had sued UBS AG ("UBS") (among others) in the New York State Supreme Court for aiding and abetting Bernie Madoff ("Madoff") and Bernard L. Madoff Investment Securities LLC ("BLMIS") in perpetrating their massive Ponzi scheme. *Id.* at 337-338. If UBS was indeed a joint tortfeasor with Madoff, it had a contingent claim for contribution against the Madoff estate. *Id.* at 340. However, it had not yet asserted such a claim (it was not yet ripe), and the unwaivable bar date for filing claims against the Madoff estate under the Securities Investor Protection Act ("SIPA") had already passed. *Id.* Moreover, there was no realistic possibility that there would be any money available at the end of the day to fund a claim for contribution. *Id.* SPV argued that these facts meant there was no possibility that the outcome of UBS' contribution case "might have any conceivable effect" on the *res* of the Madoff estate. *Id.* It is indeed hard to quarrel with that factual analysis.

But Judge Pooler, writing for a unanimous panel, concluded that UBS's contingent claim for joint tortfeasor contribution against the Madoff estate "might" have an effect on the Madoff estate if there were any "reasonable legal basis" for its assertion. *Id.* at 340-41 (quotation omitted). She explained that the broad jurisdictional standard reflects Congress' intent " 'to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.' " *Id.* at 340 (quoting *Celotex*, 514 U.S. at 308, 115 S.Ct. 1493). While recognizing that " 'related to' jurisdiction is not 'limitless,' " Judge Pooler indicated that "it is fairly capacious." *Id.* And she said, " 'An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the

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bankrupt estate.' " *Id.* (quoting *Celotex*, 514 U.S. at 308, n. 6, 115 S.Ct. 1493).

The fact that UBS and the debtor (Madoff) were alleged to be joint tortfeasors – who, as a matter of state law, have a right ***85** of contribution against one another – provided a "reasonable legal basis" why UBS might someday be able to assert its contingent claim. And while Judge Pooler recognized that "... a payout by the estate to defendants may be improbable, it is not impossible." *Id.* at 342. Since "any claim by defendants potentially alters that distribution of assets among the estates' creditors," *id.*, that was all it took to make the contingent claim "conceivably related" to the Madoff bankruptcy.

Finally – and of particular importance for the case at bar – Judge Pooler found that the "high degree of interconnectedness between this action and the Madoff bankruptcies" supported a finding of "related to" jurisdiction. *Id.* She explained that, "SPV can only proceed on [its claims against UBS] if it establishes that the Madoff fraud occurred" and "it is difficult to imagine a scenario wherein SPV would not also sue Madoff and BLMIS, given that SPV alleges that UBS aided and abetted in their fraud." *Id.*

[31] So in this Circuit, it is well settled that the only question a court need ask is whether "the action's outcome *might have* any conceivable effect on the bankrupt estate." *Id.* (emphasis added). If the answer to that question is yes, then related to jurisdiction exists – no matter how implausible it is that the action's outcome actually will have an effect on the estate.

B. Application of the Law to the Facts

[32] Under the broad standard set forth in *SPV Osus*, I find that the Bankruptcy Court had "related to" subject matter jurisdiction to approve the release of direct, non-derivative third-party claims against the Sacklers. There is absolutely no question that the answer to the question of whether the third-party claims *might have* any conceivable impact on the res of the debtors' estate is yes. Moreover, the intertwining of direct and derivative claims against certain members of the Sackler family, as well as the congruence between the only claim that anyone has identified against the other Sacklers and Purdue's own claim for fraudulent conveyance, justifies the assertion of "related to" jurisdiction under *SPV Osus*'s "interconnectedness" test.

First, the non-derivative third-party claims that are being or might be asserted against the Sacklers are, as in *In re Cuyahoga Equipment Corp.*, the type of claims that "bring into question the very distribution of the estate's property." 980 F.2d at 114. As the Debtors pointed out in oral argument, and as Judge Drain recognized in his opinion, pursuit of the third-party claims threatens to "unravel[ ] the plan's intricate settlements" and "recoveries on ... judgments" against the Sacklers would have a "catastrophic effect" on all parties' possible recovery under the Plan. *See In re Purdue Pharma L.P.*, 2021 WL 4240974, at *33; (Oral Arg. Tr., Nov. 30, 2021, at 124:14-16 ("Continued litigation against the Sacklers destroys all of the interlocking intercreditor settlements enshrined in the plan.")).

Second, as in *SPV Osus*, the claims raised against the Sacklers might have a conceivable impact on the estate, in that they threaten to alter "the liabilities of the estate" and "change" "the amount available for distribution to other creditors." *SPV Osus*, 882 F.3d at 341. This "is sufficient to find that litigation among non-debtors is related to the bankruptcy proceeding." *Id.*

Here, the non-derivative litigation against the Sacklers *might* alter the liabilities and change the amount available for distribution. If, for example, the Appellants were successful in their related claims against the Sacklers, the findings ***86** could alter, or even determine, Purdue's own liability on similar claims, as well as the amount owed to Appellants as creditors. Further, as the Debtors explained at oral argument, there also is the threat that the Appellants' claims could affect "the debtors' ability to pursue the estate's own closely related, indeed, fundamentally overlapping claims against the Sacklers"; this is so because, if the related third-party claims were litigated poorly, the debtor's estate might be less likely to recover on its own claims against the Sacklers, which are worth billions. (*See* Oral Arg. Tr., Nov. 30, 2021, at 123:17-124:13).

Judge Drain pointed out the conceivable effect that the potential alteration of liabilities and ultimate amounts owed creditors and the estate would have on the *res* in his opinion. *See In re Purdue Pharma L.P.*, 2021 WL 4240974, at *37. I agree that these potential effects support a finding of "related to" jurisdiction.

Third, as in *SPV Osus*, all the claims in this case have a high degree of interconnectedness with the lawsuits against the debtors and against the Sacklers – especially those members of the family who can be sued derivatively as well as directly.

As the *SPV Osus* Court explained, " 'The existence of strong interconnections between the third-party action and the bankruptcy has been cited frequently by courts in concluding that the third-party litigation is related to the bankruptcy proceeding.' " *SPV OSUS*, 882 F.3d at 342 (quoting *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 321 (S.D.N.Y. 2003)). Here, the Section 10.7 Shareholder Release only extends to those claims where the "debtor's conduct or the claims asserted against it [are] a legal cause or a legally relevant factor." (Confr. Hr'g Tr., Sept. 1, 2021, at 134:18-135:2); *see In re Purdue Pharma L.P.*, 2021 WL 4240974, at *45; Plan, at § 10.7(b)). This limitation alone supports a conclusion that any claim that could fall within the scope of the release would necessarily have a high degree of interconnectedness with the debtor's conduct.

Looking at the claims of the Appellants themselves, the interconnectedness of the claims against the Sacklers with those against the Debtors is patent. (*See, e.g.*, Dkt. No. 103-7, at A-1553; Dkt. No. 95-1, at A0008; Dkt. No. 91-7, at App.2598; Dkt. No. 91-8, at App.2661; Dkt. No. 91-9, at App.3153). In fact, the direct and derivative claims against the "insider" or "managerial" Sacklers are essentially congruent. The Appellants have asserted claims in multiple instances against both Purdue and the Sacklers, and in every case they rely on detailed and virtually identical sets of facts to make the claims. Because various state statutes authorize the assertion of direct claims against certain managerial personnel of a corporation who can be held independently liable for the same conduct that subjects the corporation to liability (and them to liability to the corporation for faithless service in their corporate roles), a determination in one of the State Appellants' cases would likely have preclusive impact on a case alleging derivative liability against the same people – a case over which the Bankruptcy Court has undoubted jurisdiction. As the Debtor pointed out at oral argument, there is an obvious inconsistency in bringing "lawsuits against the Sackler[s] alleging that they controlled Purdue, and that Purdue did terrible things, and 500,000 people's lives were maybe snuffed out by Purdue's conduct" yet arguing that those suits "will [not] affect the debtors in any conceivable way." (*See* Oral Arg. Tr., Nov. 30, 2021, at 123:12-17). Some things have not changed since this court decided *Dunaway v. Purdue Pharma. L.P.*, 619 B.R. 38 (S.D.N.Y. 2020); one that has not is this: "Appellants would rely on the same facts to establish ***87** the liability of both parties" and there would be "no way for the Appellants to pursue the allegations against Dr. Sackler without implicating Purdue, and vice versa." *Id.* at 51. The acts of the Sacklers that could form the basis of any released claim "are deeply connected with, if not entirely identical to, Purdue's alleged misconduct." *See id.*

In so holding, I acknowledge that in *In re Johns-Manville Corp.*, 517 F.3d 52 (2d Cir. 2008) ("*Manville III*"), *rev'd and remanded on other grounds sub nom. Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009) and *In re Johns-Manville Corporation v. Chubb Insurance*, 600 F. 3d 135 (2d Cir. 2010) ("*Manville IV*"), the Second Circuit said that the existence of shared facts between claims against the debtor and claims against the non-debtor arising out of an independent legal duty that was owed by the non-debtor to a third party was not sufficient to confer "related to" subject matter jurisdiction over the claims against the non-debtors. *Manville III*, 517 F.3d at 64-65. As a result, the Court of Appeals held that the bankruptcy court lacked jurisdiction to enjoin the prosecution of claims asserted by third parties against Travelers, Manville's erstwhile insurer, that arose out of Travelers' alleged failure to alert those third parties to the harmful properties of asbestos, about which Travelers had allegedly learned during its long relationship with Manville. *Id.* at 65. However, while there was a substantial factual overlap between defective product claims against Manville and the failure to disclose claims asserted against its insurer Travelers that were discussed in *Manville III*, there was absolutely no basis for asserting that there could be any impact on the res of Manville's bankruptcy estate if the third party claims were not enjoined. For that reason, *Manville III/IV* is not inconsistent with *SPV OSUS*.

The fact that the release extends to members of the Sackler family who played no role in running the affairs of the company does not alter the analysis. At the present time, the court is not aware of any lawsuits that have been brought against any of those individuals; and despite months of my asking, no one can identify any claim against them that would be released by the Section 10.7 Shareholder Release, other than as the recipients of money taken out of Purdue and up-streamed to the family trusts. But any claims relating to those transfers rightfully belong to the Debtors, whose claims against the world either "arise under" or "arise in" the bankruptcy. And those claims are not implicated by the Section 10.7 Shareholder Release.

Fourth, it is more than conceivable that Purdue's litigation of the question of its indemnification, contribution, or insurance obligations to the director/officer/manager Sacklers could burden the assets of the estate.

Appellants – most particularly the State and Canadian Appellants – insist that their claims lie beyond the "related to" jurisdiction of the Bankruptcy Court in part because their laws bar indemnification, contribution, or insurance coverage for actions like those of the Sacklers (*see* Dkt. Nos. 224, 228-231), and so the claims cannot be extinguished by that court. Without viable claims for indemnification, contribution, or insurance claims, the Appellants argue that their claims against the Sacklers will not have any conceivable effect on the Debtors' estate, thereby depriving the Bankruptcy Court of subject matter jurisdiction.

I begin by noting that this is precisely the type of reasoning that Judge Pooler rejected in *SPV Osus* – a case, I submit, in which the actual possibility that a contingent ***88** contribution claim would have any impact on the *res* of the Madoff estate was far less likely than it is in this case. The issue is not whether, at the end of the day, the Sacklers would lose on their contingent claims; it is whether they have a reasonable legal basis for asserting them. (*See* Dkt. Nos. 154, 156).

[33] And the Sacklers do have a reasonable legal basis to assert those claims. The Sacklers named in the State Appellants' suits served as officers, directors or managers of Purdue. As a result, they have claims against Purdue for indemnification and contribution, as well as a call on any D&O insurance proceeds that cover Purdue's officer and directors. As this court noted almost two years ago in *Dunaway*, Purdue's current and former directors and officers of the company are covered by various Limited Partnership Agreements ("LPA"), which provide that Purdue shall indemnify these directors and officers "so long as the Indemnitee shall be subject to any possible Proceeding by reason of the fact that the Indemnitee is or was ... a director, officer or Agent of [the Purdue entities]." (JX-1773; *see also* JX-1806; JX-1049). The various state unfair trade practices laws that have been cited to this court all subject the Sacklers to the potential for liability because of their status as officers, directors or managers of the corporation – even though that liability is direct, not derivative. Moreover, the LPAs are governed by Delaware law, which allows for indemnification (*see* 6 Del. C. § 17-108; 8 Del. C. § 145), and the states as a general matter look to the state of incorporation for the availability of indemnity. (*See, e.g.*, Dkt. No. 230, at 3, 8–9, 13, 17). Similarly, the Purdue insurance policies that cover the Sackler former directors could be depleted, *inter alia*, if a Sackler former director prevailed in litigation or a plaintiff prevailed in litigation on a non-fraud claim. (*See* Dkt. No. 156, at 15).[55] Under various state laws, the Sacklers parties can also seek an advance against defense costs; even if those costs are ultimately recouped, those defense funds will, for at least some time, leave the estate. *See* CT Gen Stat § 33-776; 8 Del. C. § 145. The law governing insurance coverage is generally the law governing the policy – not the law of the objecting state. Only one state has an exception to that – California, whose law specifically prohibits indemnity or insurance coverage for losses resulting from a violation of its false advertising law or unfair competition law, and under which law an insurer has no duty to defend or advance costs. (Dkt. No. 95, at 3-4); *see* Cal. Ins. Code § 533.5; *Adir International, LLC v. Starr Indemnity and Liability Co.*, 994 F.3d 1032, 1045 (9th Cir. 2021).

55 The debtors clarified at oral argument that for the relevant periods of time "like 2017 when the claims were made and those policies got triggered" there are applicable claims-made insurance policies, as well as "over a billion dollars of general liability policies" and other policy language that "creates the risk that all Sackler-owned entities could assert claims under those policies." (Oral Arg. Tr., Nov. 30, 2021, at 125:21-12614).

And while each objecting state asserts that its laws would bar one or more of indemnification, contribution or insurance in certain instances, no state's law bars all three – not even California's. (*See* Dkt. Nos. 228-231; *see also* Dkt. No. 224).

Recognizing this, the states argue that there can be no indemnification, contribution, or insurance on these facts, including on public policy grounds, because the Sacklers acted in bad faith. (*See e.g.*, Dkt. No. 230, at 2). However, the question of bad faith in this case is hotly disputed. There is no doubt that the Shareholder Released Parties' right to indemnification, ***89** contribution, and/or insurance will be vigorously litigated, as Judge Drain rightly pointed out below. *See In re Purdue Pharma L.P.*, 2021 WL 4240974, at *38. That litigation will cost money. And so it very well *might have* an impact on the estate; in fact, it likely *will have* such an impact.

Given the breadth of the Second Circuit law under *SPV Osus*, I must and I do find that the claims asserted against the Shareholder Released Parties *might have* some conceivable effect on the estate of a debtor, for each of the foregoing reasons, and thus fall within the "related to" jurisdiction of the Bankruptcy Court.

But that only gets us to the next question. And it is the next question that is, in my view, dispositive.

II. The Bankruptcy Court Does Not Have Statutory Power to Release Particularized Third-Party Claims Against Non-Debtors.

[34] Appellants argue that the Bankruptcy Court has no statutory authority to approve a release of third-party claims against non-debtors.

One would think that this had been long ago settled.

It has not been.

There is a long-standing conflict among the Circuits that have ruled on the question, which gives rise to the anomaly that whether a bankruptcy court can bar third parties from asserting non-derivative claim against a non-debtor– a matter that surely ought to be uniform throughout the country – is entirely a function of where the debtor files for bankruptcy.

And while the Second Circuit long ago identified as questionable a court's statutory authority to do this outside of asbestos cases, *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005), it has not yet been required to identify any source for such authority.

Lacking definitive guidance from our own Court of Appeals, Judge Drain consulted the law in every Circuit. He concluded that he was statutorily authorized to approve the Section 10.7 Shareholder Release because it is "subject to 11 U.S.C. 1129(a)(1), 1123(a)(5) & (b)(6), 105, and 524(e)." *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *43. "In other words," he stated, "those releases flow from a federal statutory scheme." *Id.*

I appreciate that this Court has, on a prior occasion, said exactly the same thing, using exactly the same language – albeit in the context of affirming a plan that contained an easily distinguishable injunction that barred third parties (one in particular) from bringing one specific type of claim against non-debtors (his former partners) in order to protect the integrity of bankruptcy court orders. *In re Kirwan Offices S.à.R.L.*, 592 B.R. 489, 511 (S.D.N.Y. 2018*), aff'd sub nom. In re Kirwan Offices S.a.R.L.*, 792 F. App'x 99 (2d Cir. 2019). But in *Kirwan,* this Court did not analyze whether there was a statutory (as opposed to a jurisdictional or constitutional) basis for the injunction that was at issue in that case. Indeed, no statutory argument was made.[56]

56 In *Kirwan*, the appellant chalked up his failure to raise the issue of statutory authority to his belief that the U.S. Trustee ought to have done so. *In re Kirwan Offices S.à.R.L.*, 592 B.R. at 501. The U.S. Trustee, for perfectly understandable reasons that will be noted when *Kirwan* is discussed below, had no particular interest in using that case as a vehicle to mount such an attack.

In this case, however, Appellants – most particularly, the U.S. Trustee, with the United States Attorney for this District appearing as *amicus* – have mounted a ***90** full-throated attack on a court's statutory authority to release third-party claims against non-debtors in connection with someone else's bankruptcy.

With the benefit of full briefing and extensive argument from experienced counsel, it is possible to decide whether a court adjudicating a bankruptcy case has the power to release third-party claims against non-debtors. Moreover, it is necessary to reach a conclusion on this subject before delving into constitutional issues that need not be reached if Appellants are correct.

I conclude that the sections of the Code on which the learned Bankruptcy Judge explicitly relied, whether read separately or together, do not confer on any court the power to approve the release of non-derivative third-party claims against non-debtors, including specifically the Section 10.7 Shareholder Release that is under attack on this appeal.

As no party has pointed to any other section of the Bankruptcy Code that confers such authority, I am constrained to conclude that such approval is not authorized by statute.

A Caveat and Some Definitions: I begin this discussion with a caveat. The topic under discussion is a bankruptcy court's power to release, on a non-consensual basis, *direct/particularized* claims asserted *by third parties* against *non-debtors* pursuant to the Section 10.7 Shareholder Release. This speaks to a very narrow range of claims that might be asserted against the Sacklers.

[35] **[36]** For these purposes, by derivative claims, I mean claims that would render the Sacklers liable because of Purdue's actions (which conduct may or may not have been committed because of the Sacklers). "Derivative" claims are those seek to recover from the estate indirectly "on the basis

of [the debtor's] conduct," as opposed to the non-debtor's own conduct. *Manville III*, 517 F.3d at 62 (quoting *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988)). Derivative claims in every sense relate to the adjustment of the debtor-creditor relationship, because they are claims that relate to injury to the corporation itself. If the creditor's claim is one that a bankruptcy trustee could bring on behalf of the estate, then it is derivative. *Madoff*, 40 F.3d at 90.

[37] By direct claims, I mean claims that are not derivative of Purdue's liability, but are based on the Sacklers' own, individual liability, predicated on their own alleged misconduct and the breach of duties owed to claimants other than Purdue. "Direct" claims are based upon a "particularized" injury to a third party that can be directly traced to a non-debtor's conduct. *Id*.

The release of claims against the Sacklers that are derivative of the estate's claims them is effected by Section 10.6(b) of the Plan, which is not attacked as being beyond the power of the Bankruptcy Court.

[38] The Section 10.7 Shareholder Release under attack is different. It releases all members of the Sackler families, as well as a variety of trusts, partnerships and corporations associated with the family and the people who run and advise those entities,[57] from liability for claims that ***91** have been brought against them personally by third parties – claims that are not derivative, but as to which Purdue's conduct is a legally relevant factor. Example: nearly all of the State Appellants have a law under which individuals who serve in certain capacities in a corporation are individually and personally liable for their personal participation in certain unfair trade practices. As Judge Drain recognized (*see In re Purdue Pharma L.P.*, 2021 WL 4240974, at *44), the liability imposed by these statutes is not derivative; the claims arise out of a separate and independent duty that is imposed by statute on individuals who, by virtue of their positions, personally participated in acts of corporate fraud, misrepresentation and/or willful misconduct. Liability under those laws is limited to persons who occupied the roles of officer, manager or director of a corporation – which means that there is considerable *factual* overlap, perhaps even complete congruence, between those claims and the derivative claims against the same individuals that Judge Drain had undoubted authority to release and enjoin. But it is undisputed that these laws impose liability, and even penalties, on such persons independent of any corporate liability (or lack of same), and independent of any claim the corporation could assert against them for faithless service as a result of those same acts.[58]

57 The Section 10.7 Shareholder Release extends to every Sackler presently alive, to their unborn progeny, and to various trusts, partnerships, corporations, and enterprises with which they are affiliated or that have been formed for their benefit. Exhibit X to the Settlement Agreement, expressly incorporated into the Plan (*see* Dkt. No. 91-3, at App. 1112), identifies over 1,000 separate released parties, either by name or by some "identifying" feature, such as "the assets, businesses and entities owned by" the named released parties. (*See* Dkt. No. 91-3, at App.1041-1069).

58 While Judge Drain expressly found that these claims were not derivative (*In re Purdue Pharma L.P.*, 2021 WL 4240974, at *44), he was quite clear that the congruence between these claims and derivative claims against the same individuals was critically important to his conclusion that they could be released.

The discussion that follows, then, applies only to direct (non-derivative) claims – sometimes referred to as "particularized" claims – that arise out of the Sacklers' own conduct (*In re Purdue Pharma L.P.*, 2021 WL 4240974, at *45), and that either have been or could be asserted against the non-debtor members of the Sackler family and their affiliates (the Shareholder Released Parties) by parties other than the Debtors' estate.

The Text of the Bankruptcy Code

[39] As one always should when assessing statutory authority, we turn first to the text of the statute.

[40] All parties agree that one and only one section of the Bankruptcy Code expressly authorizes a bankruptcy court to enjoin third party claims against non-debtors without the consent of those third parties. That section is 11 U.S.C. § 524(g), which was passed by Congress in 1994. It provides for such an injunction solely and exclusively in cases involving injuries arising from the manufacture and sale of asbestos. And it sets out a host of conditions that must be satisfied before any such injunction can be entered, including all of the following:

(i) the injunction is to be implemented in connection with a trust the is to be funded in whole or in party by the securities of the debtor and that the debtor will make

future payments, including dividends, to that trust 524(g)(2)(B)(i)(I);

(ii) the extent of such alleged liability of a third party arises by reason of one of four enumerated relationships between the debtor and third party (524(g)(4)(A)(ii));

(iii) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might ***92** subsequently assert demands of such kind (524(g)(4)(B)(i)); and

(iv) the court determines the injunction is fair and equitable to persons that might subsequently assert such demands, and, in light of the benefits provided to such trust on behalf of such third parties. § 524(g)(4)(B)(ii)).

Section 524(g) injunctions barring third party claims against non-debtors cannot be entered in favor of just any non-debtor. They are limited to enjoin actions against a specific set of non-debtors: those who have a particular relationship to the debtor, including owners, managers, officers, directors, employees, insurers, and financiers. 11 U.S.C. § 524(g)(4)(A).

The language of the statute plainly indicates that Congress believed that Section 524(g) created an exception to what would otherwise be the applicable rule of law. Subsection 524(g)(4)(A)(ii) says: "Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor." 11 U.S.C. § 524(g)(4)(A)(ii). Section 524(e) provides: "Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). The word "notwithstanding," suggests that the type of injunction Congress was authorizing in § 524(g) would be barred by § 524(e) in the absence of the statute.

A. Legislative History of the Statute

Section 524(g) was passed after the United States Court of Appeals for the Second Circuit had affirmed the entry of an unprecedented injunction barring claims against certain non-debtors in connection with the bankruptcy of the nation's leading manufacturer of asbestos, the Johns Manville Corporation. *MacArthur Co. v. Johns–Manville Corp.* (*In re Johns–Manville Corp.*), 837 F.2d 89, 91 (2d Cir. 1988) ("*Manville I*"). The permanent injunction in that case extended to actions against Manville's insurers, all of whom had dedicated the entire proceeds of their policies – proceeds on which parties other than Manville were additional insureds and had a call – to a settlement fund into which the claims of asbestos victims would be channeled, valued, and resolved. The Second Circuit concluded that the bankruptcy court could permanently enjoin and channel lawsuits against a debtor's insurer relating to those insurance policies because those policies were "property of the debtor's estate." *Id.* at 90. The Court of Appeals did not cite to a single section of the Bankruptcy Code as authorizing entry of the injunction.

Despite the Second Circuit's affirmance of the *Manville I* injunction, questions continued to be raised about its legality. Congress passed Sections 524(g) and (h) of the Bankruptcy Code to remove any doubt that those injunctions were authorized. *See* H.R. Rep. 103-835 at *41 (noting that Subsection (g) was added to Section 524 "in order to strengthen the Manville and UNR trust/injunction mechanisms and to offer similar certitude to other asbestos trust/injunction mechanisms that meet the same kind of high standard with respect to regard for the rights of claimants, present and future, as displayed in the two pioneering cases").

That Section 524(g) applies only to asbestos cases is clear. The statute explicitly states than the trust that "is to assume the liabilities of a debtor" be set up in connection ***93** with "actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products" (11 U.S.C. § 524(g)(B)(i)(I)). If that were not clear enough, Congress passed another section to provide that injunctions that had previously been entered *in asbestos cases* – not in any other kind of case – would automatically be deemed statutorily compliant, even if those injunctions did not have all the features required by § 524(g). *See*, 11 U.S.C. § 524(h) ("Application to Existing Injunctions"). The limitation of § 524(h) to asbestos injunctions is important because, prior to the statute's passage, injunctions releasing third party claims against non-debtors had been entered by a few courts in cases involving other industries. *See e.g.*, *In re Drexel Burnham Lambert Grp.*, Inc., 960 F. 2d 285 (2d Cir. 1992) (securities); *In re A.H. Robins Co., Inc.*, 880 F.2d 694 (4th Cir. 1989) (medical devices). The revisions to the Bankruptcy Code neither extend to those injunctions nor deem them to be statutorily compliant.

At the same Congress passed Sections 524(g) and (h), it passed Public Law 111, which provided a rule of construction for Section 524(g). It states that nothing in the 1994 amendments to the Bankruptcy Code, including 524(g), "shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." Pub. L. 103–394 § 111(b) (uncodified). Congress made this statement because the parties in non-asbestos bankruptcy cases took the position that Sections 524(g) and (h) were unnecessary, in that bankruptcy courts already authorized the entry of such injunctions and corresponding approval of non-debtor releases – viz, *Robins* and *Drexel*. But the passage of Public Law 111 did not mean that Congress agreed with that position. As the House Committee on the Judiciary noted in the legislative history of these new provisions:

> Section 111(b) ... make[s] clear that the special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts *may* already have to issue injunctions in connection with a plan [of] reorganization. Indeed, [asbestos suppliers] Johns–Manville and UNR firmly believe that the court in their cases had full authority to approve the trust/injunction mechanism. And other debtors in other industries are reportedly beginning to experiment with similar mechanisms. *The Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind.*

Vol. E., *Collier on Bankruptcy,* at App. Pt. 9–78 (reprinting legislative history pertaining to the 1994 Code amendments) (emphasis added). P.L. 111 was not incorporated into the Bankruptcy Code.

Congress' used of the word "may" indicates that a bankruptcy court's authority to enter such an injunction was at best uncertain. And in light of the last sentence – in which the Committee made it clear that Congress expressed no opinion on that subject – one cannot read this tidbit of legislative history as indicating that Congress had concluded that a bankruptcy court already had such authority under its "traditional equitable powers."

During the course of this appeal, it has been suggested that P.L. 111 expresses Congress' intent to pass a limited law and then allow the courts to work out the contours of whether and how to extend § 524(g)-style authority outside the asbestos context.[59] The very next sentence from ***94** that statute's legislative history reveals that nothing could be further from the truth:

> The Committee has decided to provide explicit authority in the asbestos area because of the singular cumulative magnitude of the claims involved. How the new statutory mechanism works *in the asbestos area* may help the Committee judge whether the concept should be extended into other areas.

Id. (Emphasis added)

59 I can only assume that this argument derives from Congress' mention of the fact that courts dealing with non-asbestos bankruptcies were "reportedly beginning to experiment with similar mechanism."

Plainly, Congress made a decision to limit the scope of the experimenting that was "reportedly" to be happening (and that was in fact happening) in other industries. And it left to itself, not the courts, the task of determining whether and how to extend a rule permitting non-debtor releases "notwithstanding the provisions of section 524(e)" into other areas.

Since 1994, Congress has been deafeningly silent on this subject.

B. Survey of the Relevant Case Law

1. Supreme Court Law

The United States Supreme Court has never specifically considered whether the non-consensual release of non-derivative claims asserted by third parties against non-debtors can be approved in the context of a debtor's bankruptcy. Indeed, on *certiorari* to the Second Circuit from one of its orders in the ongoing *Manville* saga, the High Court announced that its opinion did "not resolve whether a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing." *Travelers Indem. Co. v. Bailey*, 557 U.S. at 155, 129 S.Ct. 2195.

The Court has, however, spoken on several occasions about issues that are germane to the consideration of that question.

For one thing, the Court has indicated that the Bankruptcy Code was intended to be "comprehensive." *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639,

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645, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012) ("Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions") (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 519, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) (Thomas, J., dissenting)).

For another, it has held that the "traditional equitable power" of a bankruptcy court "can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988).

And in two recent cases, the Supreme Court has held, albeit in contexts different from the one at bar, that a bankruptcy court lacks the power to award relief that varies or exceeds the protections contained in the Bankruptcy Code – not even in "rare" cases, and not even when those orders would help facilitate a particular reorganization.

For example, in *Law v. Siegel*, 571 U.S. 415, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014), the Supreme Court unanimously held the bankruptcy court does not have "a general, equitable power" to order that a debtor's statutorily exempt assets be made available to cover attorney's fees incurred by an estate's trustee in the course of the chapter 7 bankruptcy case. Section 522 of the Bankruptcy Code, by reference to applicable state law, entitled the debtor in ***95** that case to exempt equity in his home from the bankruptcy estate. *See* 11 U.S.C. § 522(b)(3)(A). A dispute arose between the debtor and the trustee of the estate, causing the trustee to incur substantial legal fees, purportedly as a result of the debtor's "abusive litigation practices." *Law v. Siegel*, 571 U.S. at 415-16, 134 S.Ct. 1188. Seeking to recoup the cost of resolving the dispute with the debtor, the trustee asked the bankruptcy court to order that the otherwise exempt assets be made available to cover his attorney's fees. He argued that such an order was authorized by the "inherent power" of the Bankruptcy Court and by Section 105(a) of the Bankruptcy Code, which provides:

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

11 U.S.C. § 105(a).

[41] The High Court disagreed, stating flatly, "A bankruptcy court may not exercise its authority to 'carry out' the provisions of the Code" by taking an action inconsistent with its other provisions. *Law v. Siegel*, 571 U.S. at 425, 134 S.Ct. 1188. It announced that there is "no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code," because the Bankruptcy Code was intended to be a *comprehensive* statement of the rights and procedures applicable in bankruptcy. *Id.* at 416, 134 S.Ct. 1188. The Code explicitly exempts certain debtor assets from the bankruptcy estate and provides a finite number of exceptions and limitations to those asset exemptions. *See* 11 U.S.C. § 522. To the Supreme Court, "comprehensive" means precisely that: "The Code's meticulous – not to say mind-numbingly detailed – enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions." *Law v. Siegel*, 571 U.S. at 424, 134 S.Ct. 1188.

[42] **[43]** More recently, in *Czyzewski v. Jevic Holding Corp.*, ––– U.S. ––––, 137 S. Ct. 973, 197 L.Ed.2d 398 (2017), the Court held that the protections explicitly afforded by the Bankruptcy Code could not be overridden in a "rare" case, even if doing so would carry out certain bankruptcy objectives. In chapter 11 bankruptcies, a plan that does not follow normal priority rules cannot be confirmed over the objection of an impaired class of creditors. 11 U.S.C § 1129(b). Notwithstanding that, the bankruptcy court in *Jevic* approved the structured dismissal[60] of a chapter 11 case in which unsecured creditors were prioritized over non-consenting judgment creditors – a violation of ordinary priority rules. The bankruptcy court and the proponents of the structured dismissal argued that the Bankruptcy Code did not specifically state whether normal priority rules had to be followed in chapter 11 (as opposed to chapter 7) cases – that is, the statute was "silent" on the subject – so the court could exercise such authority in "rare" cases in which there were "sufficient reasons" to disregard priority. But the Supreme Court disagreed that any such power existed. It observed that the priority system applicable to those distributions had long been considered fundamental to the Bankruptcy ***96** Code's purposes and held that the "importance of the priority system leads us to expect more than simply statutory silence if, and when, Congress were to intend a major departure." *Jevic Holding Corp.*, 137 S. Ct. at 984. To the argument that a bankruptcy court could disregard priority if there were "sufficient reasons" to do so, Justice Breyer aptly noted: "It is difficult to give precise content to the concept 'sufficient

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reasons.' That fact threatens to turn a 'rare case' exception into a more general rule." *Id.* at 986.

60 In a structured dismissal, the debtor obtains an order that simultaneously dismisses its chapter 11 case and provides for the administration and distribution of its remaining assets.

It is with these holdings in mind that I examine the law in the various Circuits on the subject of non-consensual release of third-party claims against non-debtors.

I begin, of course, with our own.

2. Second Circuit Law

Manville I: The relevant law in the Second Circuit begins with *Manville I*, which has already been discussed. *Manville's I*'s injunction was subsequently codified in §§ 524(g) and (h)[61] – which, as noted above, are plainly in the Bankruptcy Code, and are limited to the asbestos context, and have never been extended by Congress to other areas of endeavor. It is, moreover, significant that the injunction authorized by the Second Circuit in *Manville I* extended only to claims against parties (insurance companies) holding property that was indisputably part of the *res* of the debtor's estate (policies covering Manville for the manufacture and sale of asbestos). As will be seen when we get to *Manville III/IV*, when the non-debtor was seeking a release in exchange for contributing property to the debtor's estate – as opposed to surrendering property that already was part of the debtor's estate – the result, even in a statutorily authorized asbestos case, was different.

61 The Court is advised that the *Manville I* injunction did not conform in every particular to the rules set out in Section 524(g), and that Section 524(h) was included in the Bankruptcy Code to be sure that the *Manville I* injunction was deemed to be Code-compliant notwithstanding that fact.

Drexel: The debtor in *In re Drexel Burnham Lambert Grp.*, Inc., 960 F.2d 285 (2d Cir. 1992) was the investment bank Drexel Burnham Lambert Group ("DBL"), which filed for bankruptcy in 1990. DBL's principal creditor was the Securities and Exchange Commission, which was owed $150 million pursuant to a prior settlement. But over 15,000 creditors filed proof of claims against the estate, alleging fraud in connection with four different types of securities transactions.

Judge Milton Pollack of this district withdrew all of these securities claims from the bankruptcy court pursuant to 28 U.S.C. § 157(d) in order to facilitate their settlement. The parties negotiated a settlement that had as its key feature the certification of all the securities claimants into a single, mandatory, non-opt-out class (Rule 23(b)(1)(B)), which was itself divided into two subclasses: A and B. The members of Subclass B – comprised of securities fraud class action plaintiffs – were, as part of the settlement, enjoined from bringing any future actions against the former officers and directors of DBL; while not themselves debtors, those individuals had contributed to DBL's estate.

The district court certified the classes and approved the settlement over the objections of 8 of the 850 proposed class members. Three of the objectors filed appeals, contending in relevant part that the district court had erred by approving the settlement with it the mandatory injunction against the pursuit of third-party claims by non-consenting plaintiffs.

The Second Circuit affirmed the settlement of the securities fraud cases. It noted ***97** in passing that, "In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided this injunction plays an important part in the debtor's reorganization plan." *Drexel*, 960 F. 2d at 293 (citing *In re A.H. Robins Co.*, 880 F.2d 694, 701 (4th Cir.)). But it cited no section of the Bankruptcy Code that authorized this proposition. In its brief discussion of the objectors' challenge to the provision in the settlement agreement that barred members of subclass B from bringing or maintaining suits against DBL's officers and directors, the Court of Appeals, reasoning tautologically, said this:

> The Settlement Agreement is unquestionably an essential element of Drexel's reorganization. In turn, the injunction is a key component of the Settlement Agreement. As the district court noted, the injunction limits the number of lawsuits that may be brought against Drexel's former directors and officers. This enables the directors and officers to settle those suits without fear that future suits will be filed. Without the injunction, the directors and officers would be less likely to settle. Thus, we hold that the district court did not abuse its discretion in approving the injunction.

In re Drexel Burnham Lambert Grp., Inc., 960 F. 2d at 293. In other words, the Circuit held that the district court had discretion to approve non-debtor releases as part of the

settlement of numerous securities fraud class actions in the context of a bankruptcy, simply and solely because funds were being funneled to the estate that would not otherwise be contributed.

There are numerous reasons why *Drexel* does not answer the question about a court's statutory authority under the Bankruptcy Code to release non-debtors over the objection of third parties who have direct claims against them. Two, however, are dispositive.

First and foremost, the Second Circuit simply did not address this question in *Drexel*. *Drexel* mentioned in passing something about a bankruptcy court's power to enjoin claims but did not identify any source of that power in the Bankruptcy Code. It appears to have assumed *sub silentio* that such authority existed.

Second, *Drexel* was decided two years before Congress passed Sections 524(g) and (h). The opinion's passing mention of a bankruptcy court's power to enjoin a creditor from suing a non-debtor became far less persuasive after Congress (1) amended the Bankruptcy Code to authorize such injunctions, but only in asbestos cases; (2) expressed agnosticism about whether any such authority existed outside of its new legislation; and (3) indicated its intent to consider at some later time whether to extend this authority to industries that were "reportedly experimenting" with such injunctions – which it never has.[62]

[62] It bears reiterating that *Drexel* was one of those cases to which the Judiciary Committee referred when it said that debtors in other industries were "reportedly experimenting" with non-debtor injunctions in the years prior to the passage of Section 524(g). *See supra*, note 59.

There are other reasons to question the continuing viability of *Drexel*. Whether its reasoning can be extended to mass tort cases like this one is highly dubious. Seven years after the Second Circuit's opinion in *Drexel,* the Supreme Court expressed grave doubt about whether the Rule 23(b)(1)(B) "limited fund class action" device that was employed in *Drexel* could ever be employed in the mass tort context like this one, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). Subsequent to *Ortiz*, courts have consistently rejected attempts to apply the limited fund mandatory class action ***98** device to mass torts. *See, e.g., In re Simon II Litig.*, 407 F.3d 125, 137-38 (2d Cir. 2005) (tobacco punitive damages litigation); *Doe v. Karadzic*, 192 F.R.D. 133, 140-44 (S.D.N.Y. 2000) (actions by victims of war crimes committed by Bosnia–Herzegovina brought under the Alien Tort Claims Act).

Moreover, the Supreme Court also said in *Ortiz* that a fund which is "limited" only because the contributing party keeps a large portion of its wealth (*a la* the Sacklers) is "irreconcilable with the justification of necessity in denying any opportunity for withdrawal of class members whose jury trial rights will be compromised, whose damages will be capped, and whose payments will be delayed." *Ortiz v. Fibreboard Corp.*, 527 U.S. at 860, 119 S.Ct. 2295. The exact same thing could be said of the third parties whose claims are being extinguished as part of the Debtors' Plan.

Subsequent Second Circuit law in the *Manville* cases also casts doubt on a bankruptcy court's subject matter jurisdiction to authorize the release of third-party claims against the officers and directors of DBL simply because they would not otherwise have made a contribution to the debtor's estate. *Manville III*, 517 F.3d at 66. In *Manville III/IV*, the Second Circuit concluded that "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate," and held that claims asserted against non-debtors that sought "to recover directly from [the] debtor's insurer for the insurer's own independent wrongdoing" did not have such impact. *Manville III*, 517 F.3d at 65-66. In so ruling the Second Circuit held it of no moment for jurisdictional purposes that the non-debtor was making made a financial contribution to a debtor's estate (*id.*), saying: "It was inappropriate for the bankruptcy court to enjoin claims brought against a third-party non-debtor *solely on the basis of that third-party's financial contribution to a debtor's estate*." *Id.* (Emphasis added) For this proposition, the *Manville III* panel cited with approval the Third Circuit's warning from *In re Combustion Engineering*, where the court had observed that:

> a debtor could create subject matter jurisdiction over any on-debtor third-party [simply] by structuring a plan in such a way that it depended upon third party contribution. As we have made clear, subject matter jurisdiction cannot be conferred by consent of the parties. Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization.

In re Combustion Engineering, 391 F. 3d 190, 228 (3d Cir. 2004).

Finally, changes in class action law since *Drexel* was decided have rendered its facile analysis of the Rule 23(a) factors, especially commonality and typicality, highly

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suspect. *Amchem Products, Inc., v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). I strongly suspect that the *Drexel* class certification, and so the *Drexel* settlement, would not and could not be approved today.[63]

63 It is, of course, for the Second Circuit to make that call – not a district court in the Second Circuit.

But one thing is clear: *Drexel* sheds no light whatsoever on the issue of whether releases like the one at bar are authorized *by the Bankruptcy Code*. That statute was never mentioned.

[44] **New England Dairies/Metromedia**: ***99** In *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc., (In re Dairy Mart Conveniences Stores),* 351 F. 3d 86, 92 (2d Cir. 2003), the Court of Appeals for this circuit definitively rejected the argument that § 105(a) of the Bankruptcy Code (*see supra*, at p. 94-95) could "create substantive rights that are otherwise unavailable under applicable law." As the author of the opinion (Judge Jacobs) recognized:

> The equitable power conferred on the bankruptcy court by section 105(a) is the power to exercise equity in carrying out the *provisions* of the Bankruptcy Code, rather than to further the purposes of the Bankruptcy Code generally, or otherwise to do the right thing. This language "suggests that an exercise of section 105 power be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective." 2 *Collier on Bankruptcy* ¶ 105.01[1].[64]

In re Dairy Mart Conveniences Stores, 351 F. 3d at 92.

64 *In re Dairy Mart* was hardly the first time this settled principle had been recognized by the Second Circuit. *See, e.g.*, *FDIC v. Colonial Realty Co.,* 966 F.2d 57, 59 (2d Cir. 1992) ("105(a) limits the bankruptcy courts equitable powers, which 'must and can only be exercised within the confines of the Bankruptcy Code") (quoting *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206, 108 S.Ct. 963, 99 L.Ed.2d 169, (1988)).

In re Dairy Mart did not involve the confirmation of a plan containing non-debtor releases of third-party claims, so technically it did not speak to the question pending before this Court. But two years later, Judge Jacobs authored *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005), which did.

Metromedia Fiber Network, Inc. and its subsidiaries declared bankruptcy. *See* *Metromedia*, 416 F.3d 136, 138 (2d. Cir. 2005). The company's founder, John W. Kluge, did not. However, as part of the plan of reorganization, Kluge, as grantor, established the "Kluge Trust." *Id.* at 141 n.4. Under the plan of reorganization proposed to the court, the Kluge Trust was to make "a 'material contribution' to the estate" in the bankruptcy, (*id.* at 143), by "[i] forgiv[ing] approximately $150 million in unsecured claims against Metromedia; [ii] convert[ing] $15.7 million in senior secured claims to equity in the Reorganized Debtors; [iii] invest[ing] approximately $12.1 million in the Reorganized Debtors; and [iv] purchas[ing] up to $25 million of unsold common stock in the Reorganized Debtors' planned stock offering." *Id.* at 141. Metromedia itself would continue to exist after its reorganization – albeit under a new name, AboveNET – and to engage in the business of providing high bandwidth telecommunications circuits, which was its historic business model.

In exchange for the Kluge Trust's contributions, the Kluge Trust and certain "Kluge Insiders" were to receive 10.8% of the Reorganized Debtors' common stock and something called the "Kluge Comprehensive Release." *Id.* The Kluge Comprehensive Release provided:

> the Kluge Trust and each of the Kluge Insider shall receive a full and complete release, waiver and discharge from ... any holder of a claim of any nature ... of any and all claims, obligations, rights, causes of action and liabilities arising out of or in connection with any matter related to [Metromedia] or one or more subsidiaries ... based in whole or in part upon any act or omission or transaction taking place on or before the Effective Date.

Id.

The release was broad and did not carve out any exception – even for claims that could not be discharged against a debtor in ***100** bankruptcy, such as those predicated on fraud or willful misconduct.

Following confirmation of the plan, appellant creditors Deutsche Bank AG (London Branch) and Bear, Stearns & Co., Inc. challenged the "largely implemented" plan of reorganization and argued that the releases in the plan of reorganization "improperly shield certain nondebtors from suit by the creditors." *Id.* at 138. On appeal, the district court both affirmed the plan of reorganization and ruled that the relief sought by the two banks was not "barred by the doctrine

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of equitable mootness because effective relief could have been afforded without 'unraveling the plan.' " *Id.* at 139.

The Second Circuit vacated the district court's affirmance of the plan, on the ground that the bankruptcy court had failed to make certain findings necessary to a determination that the non-consensual third-party releases should be approved. *Id.* at 143. But the plan had been substantially consummated by the time the appeal was heard, so the Circuit concluded that the matter was indeed equitably moot. As a result, it declined to remand so that a lower court could make the missing findings and reconsider the propriety of the releases. *Id.* at 145.

Before reaching this result, the panel discussed whether non-debtor releases were available in connection with someone else's bankruptcy. The Circuit identified "two considerations that justify ... reluctance to approve non-debtor releases." *Id.* at 141. It noted that such releases were not specifically authorized outside of the asbestos context:

> [T]he only explicit authorization in the Bankruptcy Code for nondebtor releases is 11 U.S.C. § 524(g), which authorizes releases in asbestos cases when specified conditions are satisfied, including the creation of a trust to satisfy future claims ...

Metromedia Fiber Network, Inc., 416 F.3d at 142. And it held, consistent with *In re Dairy Mart*, that Section 105(a) of the Bankruptcy Code did not authorize the approval of such releases:

> True, 11 U.S.C. § 105(a) authorizes the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]"; but section 105(a) does not allow the bankruptcy court "to create substantive rights that are otherwise unavailable under applicable law." *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.),* 351 F.3d 86, 92 (2d Cir.2003) (quotations and citation omitted). Any "power that a judge enjoys under § 105 must derive ultimately from some other provision of the Bankruptcy Code." Douglas G. Baird, Elements of Bankruptcy 6 (3d ed.2001); accord *Dairy Mart*, 351 F.3d at 92 ("Because no provision of the Bankruptcy Code may be successfully invoked in this case, section 105(a) affords [appellant] no independent relief.").

Metromedia, 416 F. 3d at 142.

The panel also cautioned that courts should be careful about approving a non-consensual non-debtor release because the device "lends itself to abuse." *Id.* One particular form of abuse identified by the panel manifests when the release, in effect, "operate[s] as a bankruptcy discharge arrange without a filing and without the safeguards of the Bankruptcy Code." *Id.* Indeed, "The potential for abuse is heightened when releases afford blanket immunity." *Id.*

After observing that, "No case has tolerated nondebtor releases absent a finding of circumstances that may be characterized ***101** as unique,." *Id.*, the panel listed circumstances in which such releases had been authorized in the past, and identified factors that a court should consider when evaluating such releases in the future: (1) the release is important to the plan, (2) the enjoined claims would be channeled to a settlement fund rather than extinguished, (3) the estate receives substantial consideration in return, (4) the released claims would otherwise indirectly impact the debtors' reorganization by way of indemnity or contribution, and (5) the plan otherwise provided for the full payment of the enjoined claims. *Id.* at 141–42. However, the Circuit insisted that the ultimate decision about whether to authorize such releases was "not a matter of factors and prongs." *Id.* 142.

Having said all that, the *Metromedia* court did not rule on whether any or all of the factors it had identified were satisfied in the particular case before it. Nor did it conclude that a non-debtor release should be approved if the factors were satisfied, or consider whether, in the case before it, there might be other reasons why the proposed non-debtor releases should not be approved.

Instead, as noted above, the Circuit vacated approval of the plan and declined to remand for further consideration because the matter had become equitably moot – thereby guaranteeing that those open questions – including the question about whether there was statutory authority for such releases – would not be answered.

So to summarize: No third-party releases were approved in *Metromedia.* The Court of Appeals did not conclude that such releases were consistent with or authorized by the Bankruptcy Code. It did not conclude that the case before it was one of the "unique" instances in which a court's reluctance to approve such releases might (assuming they were authorized) be overcome. And it did not decide whether the Kluge releases measured up to the level that might justify approving them if the case qualified as "unique." *In re Metromedia Fiber Network*, 416 F.3d at 142–143.

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In other words, while *Metromedia* said a great deal, the case did not hold much of anything.[65] Its relevance, for present purposes, is that Judge Jacobs cautioned that statutory authority for non-consensual non-debtor releases outside of the asbestos context was at best uncertain – and then disposed of the case on other grounds, without identifying what section or sections of the Bankruptcy Code might actually authorize such relief in non-asbestos bankruptcy.[66]

65 I disagree with Appellants that *Metromedia*'s discussion of non-consensual third-party releases is dictum. (*See id*.). The actual holding in the case is that the bankruptcy court failed to make the findings in order to justify approval of such a release. *Metromedia*, 416 F.3d at 143. A discussion of what type of findings would be necessary to approve a non-consensual third-party release was, at least arguably, a necessary predicate to that holding. The court's equitable mootness ruling only justified the decision not to remand so that the missing findings could be made. The court did not vacate approval of the releases on equitable mootness grounds, so it was not the actual holding in the case.

66 Further to the discussion of *Drexel* – the case was cited by a Second Circuit in *Metromedia*, but only for the proposition that a contribution to a debtor's estate from a released third party was one factor that had in the past been relied on by a court to justify a non-debtor release. That is true as a matter of simple fact. As far as this Court can tell, that is about all that can be said to be left of *Drexel.*

No subsequent Second Circuit case has filled in the blank.

***102 Manville III/IV and In re Quigley**[67]: These were asbestos cases, in which a court's statutory authority to impose such non-debtor injunctions is undoubted, as long as all the conditions listed in § 524(g) are met.

67 *Manville III*, 517 F.3d at 66; *Manville IV*, 600 F. 3d at 152; *In re Quigley Co.*, 676 F.3d 45 (2d Cir. 2012).

As discussed above, in *Manville III/IV*, the Second Circuit concluded that the bankruptcy court lacked subject matter jurisdiction over third party claims against Manville's non-debtor insurer that arose out of an alleged independent duty owed by the insurer to those third parties, rather than out of its contractual relationship as Manville's insurer. The court did not discuss any issue of statutory authority.

And in *Quigley*, the Circuit held that certain claims against the debtor's parent—claims based on the use of the parent's name on the debtors' asbestos products—could not be enjoined pursuant to § 524(g) because the alleged liability was not "by reason of" any of the four "statutory relationships" identified in that section. *Quigley*, 676 F.3d at 49, 60-61. Had the proposed injunction fallen within one of the express statutory relationships, it would have been authorized because the case involved asbestos.

Madoff: *In re Bernard L. Madoff Inv. Securities LLC*, 740 F.3d 81 (2d Cir. 2014) involved a chapter 7 liquidation under the Securities Investor Protection Act (SIPA). The debtor, Bernie L. Madoff Investment Securities ("BLMIS"), was an investment enterprise created to effect the Ponzi scheme of its principal, Bernie Madoff. The bankruptcy estate settled its claims against the estate of Jeffry M. Picower, an alleged Madoff co-conspirator, releasing its claims in exchange for a $5 billion dollar contribution to Madoff bankruptcy estate. In addition to approving that settlement and release, the bankruptcy court permanently enjoined two of the debtor's customers from pursuing putative state tort law class actions against the estate of Jeffry M. Picower in the United States District Court for the Southern District of Florida, to the extent those claims arose from or related to the Madoff Ponzi scheme.

The Second Circuit affirmed the non-debtor injunction because the customer's complaints were predicated on secondary harms flowing from to them from BLMIS, and so were derivative claims that a bankruptcy court had power to discharge pursuant to Section 105(a). The *Madoff* court explained that the Florida plaintiffs had not alleged any direct claim against Picower's estate, because they failed to allege that Picower took any actions aimed at BLMIS customers (such as making misrepresentations to them) that caused particularized injury to those customers. *Id*. at 93.

However, the Second Circuit was careful to note that factual congruence between an estate's claim and an individual creditor's claim against the same non-debtor was not what rendered the asserted claims derivative. It held that, "there is nothing illogical or contradictory" about factual overlap between the allegations asserted in direct claim and a derivative claim; a non-debtor "might have inflected direct injuries on both the [estate's creditors] and [the debtor estate] during the course of dealings that form the backdrop of both sets of claims." *Id*. at 91 (quoting *In re Seven Seas Petroleum, Inc.*, 522 F.3d 575, 587 (5th Cir. 2008)). A creditor could,

therefore, bring a direct claim against a non-debtor, even though the debtor might have ***103** suffered an identical injury – provided the creditor was not seeking to recover for injuries suffered by the debtor, but for injuries it suffered *directly*. *Id.*

Significantly for our purposes, the Second Circuit did not simply sweep away the Florida class actions; it permitted the creditors to amend their Florida complaints to assert direct claims if they could identify some direct injury that Picower caused them, as there was "conceivably some particularized claim" that the customers could assert against the non-debtor that could not also be asserted or released by the estate. *Id.* at 94.

Tronox: *In re Tronox, Inc.*, 855 F.3d 84 (2d Cir. 2017) was not an asbestos case, but it adds nothing to the above discussion, for two reasons. First and foremost, the Court of Appeals dismissed the appeal for lack of appellate jurisdiction. Second, in that case, the claims asserted against the non-debtors by the third party were again derivative, not direct, claims (*e.g.*, alter ego, piercing the corporate veil, and successor liability) – as in *Madoff*, the plaintiff alleged "no particularized injury" to the claimant. *Id.* Because success on a derivative claim benefits all creditors of the estate, the Circuit held that the bankruptcy "trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action." *In re Tronox Inc.*, 855 F.3d at 103 (internal quotation omitted).

But the court went on to say that, "when creditors have a claim for injury that is particularized as to them, they are exclusively entitled to pursue that claim, and the bankruptcy estate is precluded from doing so." *Id.* at 99 (internal citation omitted). There was no discussion of enjoining such particularized claims, let alone any discussion of statutory authority for doing so.

Kirwan (Lynch v. Lapidem): And so we come to *Lynch v. Lapidem* (*In re Kirwan Offs. S.à.R.L.*) 792 Fed. Appx. 99 (2d Cir. 2019) ("*Kirwan*").

In *Kirwan,* the Second Circuit affirmed a bankruptcy court injunction that was included in a plan of reorganization in order to prevent collateral attacks on prior orders of that court. The appellant in *Kirwan* (Lynch) was one of three shareholders in the bankrupt enterprise. He challenged the *bona fides* of the bankruptcy filed by his former partners but lost after trial. The dissident shareholder then absented himself from the hearing on the plan of reorganization, of which he had notice. He did so in the (mistaken) belief that he could avoid any *res judicata* effect of the bankruptcy court's orders as long as he did not participate. *See In re Kirwan Offs. S.à.R.L.*, 592 B.R. 489, 501 (S.D.N.Y. 2018), *aff'd sub nom. In re Kirwan Offs. S.à.R.L.*, 792 F. App'x 99 (2d Cir. 2019).

Anticipating that the dissident shareholder would try to mount a collateral attack on the bankruptcy court's order confirming the plan, the other two shareholders had included therein a provision enjoining any person, including Lynch, from suing anyone in any forum on a claim arising out of the bankruptcy proceeding and the court-approved reorganization. Judge Drain confirmed the plan containing that provision. At the time he entered the order confirming the plan, the Bankruptcy Judge made it clear that Lynch's "opposition to any reasonable restructuring ... scurried, if not crossed the line, over into bad faith" (*Kirwan,* 592 B.R. at 499), and said it was "in that context ... that I am prepared to approve the exculpation and injunction provisions of the plan." *Id*. He specifically found that the provision was narrowly tailored and necessary in order to forestall "back-door attacks and collateral litigation for their activities related to ***104** those things," which would impact the reorganized debtor as well the non-debtors who had proceeded in good faith throughout the bankruptcy. *Id*.

In short, the injunction affirmed in *Kirwan* was plainly one designed to preserve and protect the authority of the bankruptcy court and the integrity of its actions *vis a vis* the debtor's estate. Unlike the third-party claims in this case, Lynch's claims against his erstwhile partnership inherently involved the property of the estate – the relief sought would have redistributed *post hoc* the estate following the bankruptcy court's confirmation of the plan.

As noted earlier (*see* footnote 56), Lynch did not argue, either in this Court or in the Second Circuit, that the injunction was not statutorily authorized by the Bankruptcy Code. The grounds asserted and decided were jurisdictional and constitutional, not statutory. Neither this Court nor the Second Circuit analyzed the question of statutory authority, even in the context of the very limited and specially targeted injunction that was included in the debtor's plan.

Summary of Second Circuit Law: The only fair characterization of the law on the subject of statutory authority to release and enjoin the prosecution of third-party claims against non-debtors in a bankruptcy case is: unsettled,

except in asbestos cases, where statutory authority is clear. Because the Court of Appeals has decided every other case on non-statutory grounds, its only clear statement is that Section 105(a), standing alone, does not confer such authority on the bankruptcy court outside the asbestos context.

3. The Law in Other Circuits

All but three of the other Circuits have spoken directly to the issue of statutory authority. They have reached conflicting results – a most unfortunate circumstance when dealing with a supposedly uniform and comprehensive nationwide scheme to adjust debtor-creditor relations.

Three of the eleven Circuits – the Fifth, Ninth, and Tenth – reject entirely the notion that a court can authorize non-debtor releases outside the asbestos context. *See In re Pacific Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009); *In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re W. Real Estate Fund*, 922 F.2d 592, 600 (10th Cir. 1990). Those courts read § 524(e) as barring the granting of such relief – put otherwise, they under Congress' use of the phrase "Notwithstanding the provisions of § 524(e)" in § 524(g) as creating an exception to an otherwise applicable rule.

The Third Circuit also has not identified any section of the Bankruptcy Code that authorizes such non-debtor releases. Judge Drain points to *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 133-40 (3d Cir. 2019) (*In re Purdue Pharma L.P.,* 2021 WL 4240974, at *40), but as in the Second Circuit cases like *Manville III/IV* and *Tronox*, the Third Circuit does not discuss statutory authority in that case. Instead, the *Millennium* court concluded that the bankruptcy court had *constitutional* authority to extinguish certain third-party claims by confirming a chapter 11 plan. *In re Millennium Lab Holdings II, LLC*, 945 F.3d 139-40.

On those occasions when the Third Circuit did address a bankruptcy court's *statutory* authority to impose non-debtor releases, it overturned bankruptcy court orders granting them. For example, in *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000), the Court of Appeals *rejected as extra-statutory* the provision in a plan of reorganization that released claims against current and former directors of Continental, and that permanently enjoined shareholder actions against them, finding that the Bankruptcy Code "does ***105** not explicitly authorize the release and permanent injunction of claims against non-debtors, except in one instance not applicable here" – that being asbestos cases. *Id.* at 211; 11 U.S.C. § 524(g). And in *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004), the Third Circuit, like the Second Circuit in *Metromedia*, held that Section 105(a) does not give the court the power to create substantive rights that would otherwise be unavailable under the Bankruptcy Code, and vacated the channeling injunction. *Id.* at 238. Neither *Continental Airlines* nor *Combustion Engineering* has ever been overruled by the Third Circuit.

The First, Eighth, and D.C. Circuits have yet to weigh in on the question of whether statutory authority to impose non-debtor releases exists. Judge Drain contends that the First Circuit did decide that issue, in *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F. 3d 973 (1st Cir. 1995), but again, the First Circuit did not identify any statutory authority to impose non-debtor releases in that case. It declined to decide whether Section 105(a) authorized the imposition of a non-debtor release; and it did not cite any other section of the Bankruptcy Code as conferring that authority. *Id.* at 983-94.

Judge Drain cited *In re AOV Indus., Inc.*, 792 F.2d 1140, 1153 (D.C. Cir. 1986) for the proposition that the D.C. Circuit has approved the non-consensual release of third-party claims against non-debtors. But that is wrong. The *AOV Industries* court did not say a word about whether such relief was authorized by statute. The court simply found that the issue before it – whether the bankruptcy court had *constitutional* authority to enter an order releasing non-debtor claims – was equitably moot. *Id.*

The Fourth and Eleventh Circuits have concluded that Section 105(a), without more, authorizes such releases. *See Nat'l Heritage Found., Inc. v. Highbourne Found., Inc.*, 760 F.3d 344, 350 (4th Cir. 2014); *In re Seaside Eng'g & Surveying*, 780 F.3d 1070, 1076-79 (11th Cir. 2015). After *In re Dairy Mart* and *Metromedia,* we know that is not the law in the Second Circuit. So Fourth and Eleventh Circuit law contradict Second Circuit law, and cannot be relied on as authority for the proposition that such releases are statutorily authorized.

That leaves the Sixth and Seventh Circuits, both of which have concluded that Sections 105(a) and 1123(b)(6) of the Bankruptcy Code, read together, codify something that they call a bankruptcy court's "residual authority," and hold that a bankruptcy court can impose non-consensual releases of third-party claims against non-debtors in connection with a chapter 11 plan pursuant to that "residual authority."[68] As discussed in my summary of his opinion, Judge Drain adopted

the reasoning of these courts, and added two other sections of the Bankruptcy Code to buttress the analysis.

68 They get the phrase "residual authority" from *United States v. Energy Res. Co.*, 495 U.S. 545, 549, 110 S.Ct. 2139, 109 L.Ed.2d 580 (1990), which I discuss in detail below.

Summary of Extra-Circuit Law: A majority of the Circuits that have spoken to the statutory authority question either dismiss the idea that such authority exists or, as with the Second Circuit, (i) reject the notion that such authority can be found by looking solely to Section 105(a) and then (ii) fail to answer the question of where such authority can be found. Two Circuits rely solely on Section 105(a), and so have law that conflicts with the Second Circuit's pronouncement. Only two Circuits support the position taken by the learned Bankruptcy Judge.

***106** It is against that backdrop of higher court authority that I turn to the order on appeal.

C. The Statutory Provisions Upon Which the Bankruptcy Court Relied

Judge Drain was quite explicit about the statutory provisions that he believed gave him authority to approve these releases as "necessary or appropriate" to carry out the provisions of the Bankruptcy Code: Sections 105(a), 1123(a)(5) and (b)(6), and 1129, together with "residual authority." *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *43.

The question that arises is whether any of the sections other than Section 105(a) confers some substantive right such that a release to enforce that right could be entered pursuant to Section 105(a).

I conclude that they do not.

Rather, each of the cited sections, like Section 105(a), confers on the Bankruptcy Court only the power to enter orders that carry out other, substantive provisions of the Bankruptcy Code. None of them creates any substantive right; neither do they create some sort of "residual authority" that authorizes the action taken by the Bankruptcy Court.

Section 1123(b)(6): Subsections (a) and (b) of 11 U.S.C. § 1123, entitled "Contents of Plan," lay out in considerable detail what a plan of reorganization *must* (subsection (a)) and *may* (subsection (b)) contain in order to be confirmed.

We can quickly dispense with the notion that Section 1123(b)(6) provides the substantive authority for a Section 105(a) injunction or approval of a release.

[45] Section 1123(b)(6) provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C § 1123(b)(6). In form, Section 1123(b)(6) is substantively analogous to Section 105(a)'s authorization of "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). If the latter does not confer any substantive authority on the bankruptcy court – and that proposition is well settled, at least in this Circuit – then the former can in no way be read to do so.

That alone would be reason to conclude that Section 1123(b)(6) does not provide the statutory authorization we are seeking. But as Appellants point out, various aspects of the non-consensual Section 10.7 Shareholder Release are indeed inconsistent with certain other provisions of title 11.

[46] First and foremost, the Section 10.7 Shareholder Release is inconsistent with the Bankruptcy Code because it discharges a non-debtor from debts that Congress specifically said could not be discharged by a debtor in bankruptcy. The Section 10.7 Shareholder Release does not carve out or exempt claims for fraud or willful and malicious conduct, liabilities from which Purdue cannot be discharged in its own bankruptcy. *See* 11 U.S.C. §§ 523(a)(2), (4), (6). Reading the Bankruptcy Code as authorizing a bankruptcy court to discharge a non-debtor from fraud liability – something it is strictly forbidden from doing for a debtor – cannot be squared with the fact that Congress intended that the Bankruptcy Code "ensure that all debts arising out of fraud are excepted from discharge no matter what their form." *Archer v. Warner*, 538 U.S. 314, 321, 123 S.Ct. 1462, 155 L.Ed.2d 454 (2003) (internal citation omitted). In other cases in which the releases at issue called for relief from suit that encompassed otherwise non-dischargeable claims, courts either ensured fraud claims were exempt from the releases before approving them, ***107** *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 657 (7th Cir. 2008), or simply refused to approve the releases because they included otherwise non-dischargeable claims. *See e.g.*, *In re Fusion Connect, Inc.*, No. 20-05798, 2021 WL 3932346, at *7 (S.D.N.Y. Sept. 2, 2021) (reversing the bankruptcy court's decision to discharge a debtor from an outstanding civil penalty because liability "arising from fraud on consumers" and payable to a governmental entity is "nondischargeable"

in a chapter 11 bankruptcy under Section 523(a)(2)). Aside from *Drexel* – which, for all the reasons discussed above, is probably no longer good law – the Second Circuit has never approved a non-consensual release of claims against non-debtors of this sort, nor has it ever explained what provision of the Bankruptcy Code authorizes a bankruptcy court to do so.

[47] Second, as the State Appellants point out, a debtor's discharge cannot relieve him of "any debt ... to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty..." 11 U.S.C. § 523(a)(7). At least some of the claims asserted by the State Appellants seek relief in the nature of non-dischargeable civil penalties payable to and for the benefit of governmental units. Such claims could not be discharged if the Sacklers had filed for personal bankruptcy.

To the extent that Judge Drain held that the Section 10.7 Shareholder Release was not inconsistent with these sections, I respectfully disagree.

Appellants also argue that the Section 10.7 Shareholder Release and corresponding injunctions are inconsistent with Section 524(e) of the Bankruptcy Code, which provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). On the facts of this case, I cannot agree with that argument – but not because the Code is silent on the subject.

[48] Section 524(e) says, in sum and substance, that releasing a debtor on a debt owed to a creditor does not affect the liability that a non-debtor may have for the same debt. But the claims that would be released by the Section 10.7 Shareholder Release are not claims on which the Sacklers are jointly liable with Purdue. The various state statutes being invoked by Appellants give rise to Sackler liability *independent* of Purdue's liability – albeit for the very same violations of the very same laws – because those laws impose an independent duty on persons who occupy certain managerial positions in a corporation. We would not have this appeal if the Sackler debts being eliminated by the Section 10.7 Shareholder Release were also debts owed by Purdue; we would be back in Section 10.6 land, dealing with derivative claims, where the Bankruptcy Court's power is unchallenged.

It is true that, when passing Section 524(g), Congress stated explicitly that the non-debtor releases therein authorized were being allowed "notwithstanding the provisions of sect. 524(e)." 11 U.S.C. § 524(g). It is hard to read that phrase and not conclude that Congress thought it was creating an exception to Section 524(e) by authorizing the release of third-party claims against non-debtors in certain limited circumstances.

However, back when Congress was considering § 524(g), it had before it a specific situation: the claims being released were against non-debtor insurance companies whose liability was premised on the conduct of their insureds that fell within the terms of the policies they had issued. Everything ***108** that was being released was part and parcel of the bankruptcy estate; the debts owed by Manville and its insurers were the same debts; § 524(e) was obviously implicated. There is no indication, either in the text of the statute or in the legislative history, that Congress ever envisioned that a bankruptcy court could discharge the debts of non-debtors that were not also debts of the debtor. That being so, I cannot read the "notwithstanding" language to create an inconsistency on the facts of this case.

I am, therefore, constrained to conclude that the Section 10.7 Shareholder Release is not inconsistent with § 524(e), because it contains the discharge of debts that are not contemplated by § 524(e).

[49] **Section 1123(a)(5):** Section 1123(a)(5) of the Bankruptcy Code provides that a plan of reorganization must "provide adequate means for [its] implementation." 11 U.S.C. § 1123(a)(5). That section contains a laundry list of things that a plan can include in order to make sure that resources are available to implement the plan – any of which can be ordered by a bankruptcy court.

[50] Injunctions against the prosecution of third-party claims against non-debtors, and the release of such claims, are nowhere to be found on that list. Every single example listed in Subsections 5(A) through (J) authorizes the court to do something with the *debtor's assets* (retaining estate property; transfer of property; sale of property; satisfaction or modification of a lien; cancellation or modification of an indenture or similar instrument; curing or waiving defaults; extension of maturity dates; issuing securities; even amending the debtor's charter). Since the bankruptcy court has *in rem* jurisdiction over the *res* of the debtor's estate, none of that should be surprising. It is equally unsurprising that none of the types of relief listed in Section 1123(a)(5) involves disposing of property belonging to someone other than the debtor or

a creditor of the debtor. That is because it is the debtor's resources – not the resources of some third party – that are supposed to be used to implement a plan that will adjust the debtor's relations with its creditors.

Of course, this is not the first case in which the resources of non-debtors are being used to implement a plan; and § 1123(a)(5) does not pretend to contain an exhaustive list of all ways that a plan can provide means for its implementation. The Section begins, after all, with the words "such as." In this case, Debtors argue that the only way to get the resources necessary to implement a viable plan was to agree to the Sacklers' demand for broad releases in exchange for their contribution of money to the bankruptcy estate. They insist that the Section 10.7 Shareholder Release and corresponding injunctions carry out the requirements of Section 1123(a)(5) by ensuring that the Plan has the funding it needs – and if that funding was obtained from some third-party funder on condition of a release and an injunction, then those forms of relief are authorized because the money is needed to fund the Plan.

But the fact that Purdue needs the Sacklers to give the money back does not mean that Section 1123(a)(5) confers on the Debtors or the Sacklers any right to have the non-debtors receive a release from non-derivative third-party claims in exchange for a contribution to Purdue's estate. The Debtors' suggestion that this Section confers some substantive right is exactly the sort of circular reasoning that was rejected by Judge Jacobs where Section 105(a) was concerned. *See In re Dairy Mart,* 351 F.3d at 92 (any such power conferred by Section 105(a) must "be tied ***109** to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective") (quoting 2 *Collier on Bankruptcy* ¶ 105.01[1]). Getting to a confirmable plan is the general bankruptcy objective, nothing more.

[51] Nor does Section 1123(a)(5) confer any special power on the Bankruptcy Court. A court does not propose the plan; the debtor and its creditors put the plan together and present it to the court, which cannot approve the plan unless it contains the required provisions and need not approve it even then. To the extent that any court order is contemplated by Section 1123(a), it is the Confirmation Order – not an injunction and release of claims against non-debtors in order to obtaining funding for a plan, which is essentially what Debtors are proposing.

[52] **[53]** Finally, and most important, Section 1123(a)(5) does not authorize a court to give its imprimatur to something the Bankruptcy Code does not otherwise authorize, simply because doing so would ensure funding for a plan. Nothing in Section 1123(a)(5) suggests that a debtor has the right to secure sufficient funds for implementation by any means necessary. Section 1123(a)(5) would not, for example, authorize a court to enter an order enjoining a bank from suing a non-debtor employee who embezzled funds and then offered them to her bankrupt brother's estate in exchange for a release of all claims a third party could assert against her. That example is silly, of course, but the point is simple: the mere fact that the money is being used to fund implementation of the plan does give a bankruptcy court statutory authority to enter an otherwise impermissible order in order to obtain that funding. As was the case with Section 1123(b)(6), Judge Drain's reliance on Section 1123(a)(5) begs the ultimate question that must be answered: whether the court has some *independent* statutory authority to issue the non-debtor releases and enjoin third party claims against the Sacklers, such that the Bankruptcy Court can enter a "necessary and appropriate" order to obtain the funding.

[54] **<u>Section 1129(a)(1):</u>** Finally, Section 1129(a)(1) does not provide the substantive authority for a Section 105(a) injunction or approval of a release. Section 1129 is entitled "Confirmation of plan," and Subsection 1129(a)(1) provides that a bankruptcy court "shall confirm a plan only if ... the plan complies with the applicable provisions of this title." 11 U.S.C.A. § 1129. Like the cited sections of § 1123, § 1129(a) confers no substantive right that could be used to undergird a § 105(a) injunction. One highly general provision simply does not confer substantive authority that is required to invoke another highly general provision.

<u>Lack of Any Statutory Prohibition:</u> Having exhausted the statutory provisions on which Judge Drain relied and finding that none of them confers any substantive right as required by *Metromedia,* our exercise should be at an end. But it is not. The Debtors argue that the Bankruptcy Court must be statutorily authorized to approve these releases because no provision of the Bankruptcy Code – including but not limited to § 524(e) – expressly prohibits them.

The notion that statutory authority can be inferred from Congressional silence is counterintuitive when, as with the Bankruptcy Code, Congress put together a "comprehensive scheme" designed to target "specific problems with specific solutions." *RadLAX Gateway Hotel*, 566 U.S. at 645, 132

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S.Ct. 2065. In this particular case, a number of red flags suggest that Congressional silence (if indeed Congress ***110** was silent) was not intended to mean consent.

[55] The first is that silence is inconsistent with comprehensiveness, and the Bankruptcy Code "provides a *comprehensive* federal system ... to govern the orderly conduct of debtors' affairs and creditors' rights." *E. Equip. & Servs. Corp. v. Factory Point Nat. Bank, Bennington*, 236 F.3d 117, 120 (2d Cir. 2001) (emphasis added). "Comprehensive" means "complete, including all elements." Reading elements that do not appear in the text of the Code into the Code is the antithesis of comprehensiveness.

Then-District Judge Sullivan recognized as much in *In re Lehman Bros. Holdings Inc.*, 508 B.R. 283 (S.D.N.Y. 2014). There, the bankruptcy court granted a certain creditor's application for reimbursement of post-petition counsel fees over the U.S. Trustee's objection that the Bankruptcy Code only permitted reimbursement of post-petition administrative expenses. On appeal, Judge Sullivan was not persuaded by appellees' argument that reimbursement for professional fees was authorized by the Bankruptcy Code simply because nothing in the Bankruptcy Code expressly forbade it. He held that, "no such explicit prohibition is necessary" because the requested reimbursement clearly goes against the *purpose* of a reorganization – "Reorganization plans exist to pay claims ... [the] professional fee expenses were all incurred post-petition, and thus cannot be treated as 'claims.' " *Id.* at 293. He further noted that the federal bankruptcy scheme "cannot remain comprehensive if interested parties and bankruptcy courts in each case are free to tweak the law to fit their preferences." *In re Lehman Bros. Holdings Inc.*, 508 B.R. 283, 294 (S.D.N.Y. 2014) (internal citations omitted).

As I noted above, Justice Breyer recently wrote when discussing the priority scheme set out in the Bankruptcy Code, the importance of certain critical aspects of the bankruptcy scheme "leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure." *Jevic Holdings Corp.*, 137 S. Ct. at 984. Granting releases to non-debtors for claims that could not be released in favor of the debtors themselves is so far outside the scope of the Bankruptcy Code and the purposes of bankruptcy that the "silence does not necessarily mean consent" principle applies with equal force.

[56] Second, it is hard to infer consent from silence in circumstances when one would not expect Congress to speak. The Code was intended "to free the debtor of his personal obligations *while ensuring that no one else reaps a similar benefit*" *Green v. Welsh*, 956 F.2d 30, 33 (2d Cir. 1992) (emphasis added). It is counterintuitive to imagine that Congress would have thought it necessary to include language specifically forbidding things that that ran counter to that purpose. As one of Judge Drain's colleagues recently reminded us, the ordering of an involuntary release of third-party claims against non-debtors is "an extraordinary thing" that is "different ... from what courts ordinarily do." *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 723 (S.D.N.Y. 2019). That is especially true where, as is proposed here, we find ourselves in what Judge Wiles called "the odd situation where we are being asked to use an unwritten authority to release non-debtor officers and directors from claims when the Bankruptcy Code would bar us from giving similar relief to those persons if they were debtors in their own cases." *Id.* at 726 (citing *Metromedia*, 416 F.3d at 142).

Third, Congress has in fact spoken on this subject, and what it has said suggests that it intended Sections 524(g) and (h) to preempt the field where non-debtor releases ***111** were concerned. I will not repeat the extensive discussion about the law and its legislative history that appears above, except to say that Congress in its wisdom elected to limit Code-based authority to release third party claims against non-debtors to asbestos litigation – and it declined either to agree with those who argued that bankruptcy courts already had a broader power to authorize such releases. Congress was not unaware that there were non-asbestos bankruptcies with thousands of claimants and nationwide implications in the early 1990s. Other mass tort bankruptcies with thousands upon thousands of potential claimants were pending (*i.e.*, in *A.H. Robins/Dalkon Shield*), as was the highly publicized bankruptcy of a major investment bank (*Drexel*). The Judiciary Committee mentioned the "experimentation" with *Manville*-like relief that was beginning in other industries.

Yet Congress declined to make this extraordinary form of relief – relief that ran counter to the fundamental purpose of the Bankruptcy Code – available in circumstances other than asbestos bankruptcies. And it reserved for itself the right to change that.

So the silence that speaks volumes is not Congress' failure to say, "And you can't give involuntary non-debtor releases to anyone except in an asbestos case." The silence that speaks volumes is the twenty-seven years of unbroken silence that have passed since Congress said, "We are limiting this to

asbestos for now, and maybe, when we see how it works in that context, we will extend it later."

[57] Fourth, but by no means least, "it is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel*, 504 U.S. at 384. The Supreme Court of the United States has relied on that principle on multiple occasions in refusing to allow generalized provisions of the Bankruptcy Code to override specific directives on a particular subject.

Take, for example, *RadLAX* itself. The plan proposed by the debtors in *RadLAX* provided for the sale of unencumbered assets securing a bank creditor's claim free and clear of all liens. But, in contravention of the provision governing such a "cram down" plan under the Bankruptcy Code, the bid procedures proposed by the debtors precluded the bank holding the mortgage on the property from credit-bidding the amount of its claim, which the Bankruptcy Code specifically authorized the bank to do. 11 U.S.C. § 1129(b)(2)(A)(ii). Nonetheless, the bankruptcy court approved the plan. It agreed with the debtors that the bank did not need to be permitted to bid on the property as long as it was provided with the "indubitable equivalent" of its claim in some other fashion – in this particular case, the cash generated by the auction. 11 U.S.C. § 1129(b)(2)(A)(i)-(iii).

[58] The Supreme Court rejected the debtors' justification, holding that the "indubitable equivalents" subclause (subclause iii) was a general subclause that could not be used to circumvent the specific requirement of subclause (ii) that the bank be permitted to credit-bid at the sale. The Court stated that the debtors' reading of the statute – that clause (iii) permits precisely what clause (ii) proscribes – is "hyperliterally contrary to common sense." *RadLAX Gateway Hotel*, 566 U.S. at 640, 132 S.Ct. 2065. The Court called it "axiomatic" that specific statutory provisions control over general provisions and emphasized that the "general/specific canon" applies with particular force in bankruptcy, because "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *Id.*

***112** Where, as here, Congress has deliberately limited a specific targeted solution (the release of third-party claims against non-debtors) to a specific identified problem (asbestos bankruptcies) – and has even denominated that solution as an exception to the usual rule – *RadLAX* strongly suggests that the general/specific canon should apply with particular force.

Ginsberg & Sons v. Popkin, 285 U.S. 204, 52 S.Ct. 322, 76 L.Ed. 704 (1932) is a pre-Code case, but it illustrates the same principle. There, petitioner argued that Clause 15 of Section 2 of the Bankruptcy Act empowered district judges to issue orders directing the arrest of the former officers and directors of the debtor. Clause 15 provided, "The courts of bankruptcy are hereby invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings ... [t]o] make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title." Section 2, 11 USCA s 11(15). The reader will immediately appreciate that Clause 15 is the Bankruptcy Act's equivalent of Section 105(a) of the Bankruptcy Code – it was the "necessary and appropriate" clause in the old statutory scheme.

But Section 9(a) of the Bankruptcy Act specifically precluded "a court of bankruptcy" from directing the arrest of former directors and officers, except for contempt or disobedience of its lawful orders. And Section 9(b) prescribed in great detail the conditions to and procedures for invoking the exception under which the court could direct the arrest and detention of such former directors and officers who posed a flight risk.

The Supreme Court refused to read Clause 15 of Section 2 in a way that would render the specific prohibitions and procedures enumerated in Sections 9(a) and (b) superfluous: "In view of the general exemption of bankrupts from arrest under section 9a and the carefully guarded exception made by section 9b as to those about to leave the district to avoid examination, there is no support for petitioner's contention that the general language of section 2(15) is a limitation upon section 9(b) or grants additional authority in respect of arrests of bankrupts." *D. Ginsberg & Sons v. Popkin*, 285 U.S. at 207–08, 52 S.Ct. 322.

The Supreme Court's holdings in these cases old and new are instructive in the present context. Here, Debtors and their allies seek to apply general provisions – Sections 105(a) and 1123(a)(5) and (b)(6) – to justify expanding the express authority conferred by Congress under § 524(g) into a situation that is manifestly not comprehended by that statute. Because the specific controls the general, that reliance is misplaced.

For all these reasons, I cannot conclude that Congressional "silence" should be deemed consent to an expansion of Section 524(g). In fact, I do not believe that Congress has been silent at all. But to the extent it has, its silence supports the Appellants' position, not the Debtors'.

Residual Authority: Finally, I turn to the concept of "residual statutory authority." In these circumstances, I conclude that such authority simply does not exist.

Judge Drain framed the question before him as, "whether the court has statutory *or other power* to confirm a plan with a third-party claim release," and, if so, "what is the statutory *or other source of power* for such a release?" *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *40, *43 (emphasis added). He identified the "other source of power" as the residual power of bankruptcy courts.

***113 [59]** But such power, if it even exists, is of no help where, as here, it is being exercised in contravention of specific provisions of the Bankruptcy Code.

Debtors rely heavily on the Supreme Court's decision in *In re Energy Resources Co*, 495 U.S. 545, 110 S.Ct. 2139, 109 L.Ed.2d 580 (1990) for the proposition that a bankruptcy court has "residual authority" to approve reorganization plans that includes all "necessary and appropriate" provisions, as long as those provisions are not inconsistent with title 11. In that case, the Court concluded that two bankruptcy courts – which were forbidden by the Bankruptcy Code from discharging a tax debt[69] and required not to confirm a plan unless satisfied that the IRS would in all likelihood be able to collect taxes owed within six years[70] – had not "transgressed one of the limitations on their equitable power" by directing in a plan of reorganization that certain tax payments be credited in the first instance to so-called "trust fund" tax debt, and only when that debt was satisfied to so-called "non-trust fund" tax debt. *In re Energy Resources Co.*, 495 U.S. 499-50. Trust fund tax debt is guaranteed by third parties; an order directing that the guaranteed debt be paid first meant that if there were any unpaid taxes at the end of the plan period, the IRS could probably not look to third parties for payment. The IRS argued that this provision of the plan was inconsistent with the Bankruptcy Code, because requiring the debtor to pay non-trust fund taxes first would give the IRS a greater chance of recovering 100 cents on the dollar.

69 11 U.S.C. §§ 507(a)(7), 523(a)(1)(A).

70 11 U.S.C. § 1129(a)(9)(C).

But the Supreme Court ruled that the Bankruptcy Code did not require that a plan of reorganization be structured so that the unsecured tax debt was paid first. The bankruptcy court had found (as required by the Bankruptcy Code) that the plan of reorganization proposed by the debtors was likely to succeed. It further found that, if the plan did succeed, all taxes would be fully paid within six years. The express terms of the Bankruptcy Code required nothing more. Therefore, the order directing that tax payments be credited first to back taxes secured by the trust fund, and then to unsecured back taxes, was not inconsistent with any applicable provision of title 11. All the substantive guarantees that the Bankruptcy Code afforded to the IRS were baked into the court's approval of the plan.

No reference in *Energy Resources* to a bankruptcy court's "residual power" authorizes the learned Bankruptcy Judge's approval of the Section 10.7 Shareholder Release under any "residual power" theory. Just two years prior to the *In re Energy Resources* decision, the same Supreme Court – made up of the same nine justices – held that the bankruptcy court's residual equitable authority was bounded by the provisions of the Bankruptcy Code. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988) (holding "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code"). *Energy Resources* is consistent with this principle. Congress legislated a particular right into the Bankruptcy Code; the Supreme Court refused to allow lower courts to expand that right and held that the Bankruptcy Court had the power to authorize anything that was not inconsistent with that right. But the Bankruptcy Code conferred a specific right. In this case, there is nothing in the Bankruptcy Code that specifically authorizes the Section 10.7 Shareholder Release; ***114** the Bankruptcy Court (and this Court) is being asked to insert a right that does not appear in the Bankruptcy Code in order to achieve a bankruptcy objective. That is precisely what *In re Dairy Mart* and *Metromedia* prohibit.

Additionally, the *Energy Resources* Court, echoing its own holding of two years earlier, recognized that any residuary power enjoyed by a bankruptcy court must be exercised in a way that "is not inconsistent with the applicable provisions of this title." I have become convinced, for the reasons discussed in great detail above, that the Section 10.7 non-debtor releases are in fact inconsistent with applicable provisions of title 11 – with Sections 524 (g) and (h), with Section 523, and

with Section 1141(d), and possibly even with Section 524(e). Therefore, no residual power can authorize such an order.

As a corollary to the "residual authority" argument, several Appellees argue the release of claims against the non-debtor Sacklers and their related entities are proper because the Bankruptcy Code, taken as a whole, creates a "special remedial scheme" in which certain legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process. They cite *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) for their proposition.

In *Martin v. Wilks*, the Supreme Court announced that, as a general rule, "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." It affirmed the Eleventh Circuit's judgment allowing certain individuals who were *not* parties to an original action to challenge consent decrees entered in that original case. *Id*. at 762, 109 S.Ct. 2180. But, in a footnote, the Court acknowledged an exception to the general rule exists "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process." *Id*. at 762, 109 S.Ct. 2180, n. 2.

[60] [61] [62] Judge Drain did not adopt this reasoning or rest his view about his statutory authority on the Bankruptcy Code's "special remedial scheme" – and rightly so, because it is contrary to Second Circuit law. The "special remedial scheme" contemplated by the Bankruptcy Code addresses the rights of persons who have claims against a debtor in bankruptcy – not claims against other non-debtors. The Code lays out a claims allowance process so that creditors can file their claims against someone who has invoked the protection of the Bankruptcy Code; it provides a mechanism for those parties to litigate those claims against the debtor and to determine their value. In order to take advantage of this "special remedial scheme," debtors have to declare bankruptcy, disclose their assets, and apply them – all of them, with *de minimis* exceptions – to the resolution of the claims of their creditors.

Non-debtors have no such obligations, and so do not have any rights at all under the "special remedial scheme" that is bankruptcy – certainly not the "right" to have claims that are being asserted against them outside the bankruptcy process released. As the Second Circuit held in *Manville III*, the "special remedial scheme" due process exception relating to *in rem* bankruptcy proceedings simply does not give a bankruptcy court subject matter jurisdiction to release *in personam* third-party claims against a non-debtor. *In re Johns-Manville Corp.*, 600 F. 3d 135, 158 (2d Cir. 2010).

***115 Conclusion: No Statutory Authority.** In *Metromedia*, the Second Circuit signaled that a Bankruptcy Code could not order the non-consensual release of third-party claims against non-debtors unless some provision of the Bankruptcy Code aside from Section 105(a) authorized it to do so. For the reasons stated above, I conclude that there is no such section, and so no such authority.

It is indeed unfortunate that that this decision comes very late in a process that, from its earliest days in 2019, has proceeded on the assumption that releases of the sort contemplated in Section 10.7 of the Debtors' Plan would be authorized – this despite the language of the Bankruptcy Code and the lack of any clear ruling to that effect. I am sure that the last few years would have proceeded in a very different way if the parties had thought otherwise. But that is why the time to resolve this question for once and for all is now – for this bankruptcy, and for the sake of future bankruptcies. It should not be left to debtors and their creditors to guess whether such releases are statutorily authorized; and it most certainly should not be the case that their availability, or lack of same, should be a function of where a bankruptcy filing is made.

[63] I also acknowledge that the invalidating of these releases will almost certainly lead to the undoing of a carefully crafted plan that would bring about many wonderful things, including especially the funding of desperately needed programs to counter opioid addiction. But just as, "A court's ability to provide finality to a third-party is defined by its jurisdiction, not its good intentions" (*Manville III*, 517 F.3d at 66), so too its power to grant relief to a non-debtor from non-derivative third party claims "can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington*, 485 U.S. at 206, 108 S.Ct. 963.

Because the Bankruptcy Code confers no such authority, the order confirming the Plan must be vacated. Because the Advance Order is an adjunct of and follows from the Confirmation Order, it, too, must be vacated.[71]

71 The U.S. Trustee has also appealed from the Disclosure Order, asserting that it was inaccurate in certain respects.

(Dkt. No. 91, at 10; Dkt. No. 191, at 10). As the Confirmation Order has been vacated without reaching the notice/due process constitutional issues that were raised by the U.S. Trustee, I do not understand that any substantive ruling is needed with respect to the Disclosure Order. Like everything else connected with the Plan, it simply falls by the wayside.

III. The Plan's Classification and Treatment of the Canadian Appellants' Claims Does Not Violate the Bankruptcy Code.

Because the court reverses on the ground that there is no statutory authorization in the Bankruptcy Code for the Bankruptcy Court to impose a non-voluntary release of third-party claims against non-debtors, I do not reach the Canadian Appellants' separate attack on the Section 10.7 Shareholder Release. But part of the Canadian Appellants' argument on appeal is that the Plan as confirmed violates the Bankruptcy Code by treating the Canadian Appellants' unsecured claims unfavorably as compared to the claims of their domestic counterpart creditors. The Canadian Appellants explained at Oral Argument that this "inequality" issue must be decided, regardless of how the court ruled on the Section 10.7 Shareholder Release. (*See* Oral Arg. Tr., Nov. 30, 2021, at 71:6-21).

[64] Pursuant to the Plan, the Canadian Appellants are entitled to a share of the ***116** $15 million dollars distributed to a trust that will be divided among all of the general unsecured creditors of the Debtor. (Dkt. No. 59, at 47). At the same time, domestic government and tribe unsecured creditors are not classified as "general" unsecured creditors but are placed in classes 4 and 5 as "Non-Federal Domestic Governmental" claimants and "Tribe" claimants respectively. (*See* Plan, at 2). The Canadian Appellants argue that the Bankruptcy Code contains an "equal-treatment mandate" in Section 1129(a)(4) requiring that "all creditors within the same class enjoy the same 'opportunity' to recover." (Dkt. No. 59, at 47). Because, they argue, the domestic non-federal government claims (Class 4) and tribal claims (Class 5) are "indistinguishable" from theirs (*id.*), the Canadian Appellants posit that they are "similarly situated" to their "domestic counterparts" and thus should be part of the same creditor "class." Since the Plan does not allow the Canadian Appellants to "enjoy shares in trusts seeded with $4.5 billion —300 times as much" as would be available to the general unsecured creditors of Purdue (*Id.*) – the Canadian Appellants argue that there exists "an inequality that is independently fatal to the Plan's treatment of the Canadian Appellants' claims." (*Id.*).

[65] The Court disagrees. Under the Plan, the Canadian Appellants belong to a different class than their domestic, unsecured creditor "counterparts" for perfectly legitimate reasons. The Code does not require that all creditor classes be treated equally, only that there be a reasonable basis for any differentiation. *See Boston Post Rd. Ltd. P'ship v. FDIC (In re Boston Post Rd. Ltd. P'ship)*, 21 F.3d 477, 482-83 (2d Cir. 1994).

[66] [67] [68] First, the Bankruptcy Code expressly permits differentiation *between* classes of creditors and the Canadian Appellants rightly recognize that their "equal-treatment mandate" applies only to claims of "all creditors within the same class." (*See* Dkt. No. 59, at 47). The Canadian Appellants' argument that they are of the same "class" as the non-federal government and tribe claimants is unconvincing. It does not matter that the Canadian Appellants' claims are purportedly "indistinguishable" from those held by the domestic unsecured creditors in Classes 4 and 5; a chapter 11 plan may separately classify similar claims so long as the classification scheme has a reasonable basis for doing so. *See In re Boston Post Rd. Ltd. P'ship*, 21 F.3d at 482-83.

In *Boston Post Rd. Ltd. P'ship*, the chapter 11 plan classified unsecured claims against the insolvent Debtor, the Boston Post Road Limited Partnership ("BRP"), differently between the Federal Deposit Insurance Corporation ("FDIC") and BPR's other trade creditors. The classification treated the unsecured trade creditors more favorably than FDIC, while FDIC was BPR's largest unsecured creditor and an anticipated objector to the plan; the differentiation between these classes was done to achieve a "cramdown" of the plan over FDIC's objections. *Id.* at 479. The bankruptcy court denied confirmation of a chapter 11 plan on the basis that the plan impermissibly separately classified similar claims, holding that FDIC's unsecured claims should have been placed in the same class with other unsecured creditors, and the District Court affirmed. *Id.* On appeal, the Second Circuit found that the "Debtor was unable and failed to adduce credible proof of any legitimate reason for segregating the FDIC's unsecured claim from the unsecured claims of BPR's trade creditors." *Id.* at 483. The Debtor's only reasons were that the FDIC's claim purportedly "were created from different circumstances" and "BPR's future viability as a business depends on treating its trade ***117** creditors more favorably than the FDIC." *Id.* These reasons were "availing" to the Circuit. *Id.* In particular, the Circuit took issue with classifying similar claims differently "in order to gerrymander an affirmative

vote on a reorganization plan." *Id.* at 482-83 (quotation omitted). The Circuit explained, "approving a plan that aims to disenfranchise the overwhelmingly largest creditor through artificial classification is simply inconsistent with the principles underlying the Bankruptcy Code." *Id.*

[69] In this case, unlike in *Boston Post Rd.* Judge Drain identified a reasonable basis for separately classifying the Canadian Appellants from the domestic unsecured creditors: First, Judge Drain explained that the Canadian creditors operate under "different regulatory regimes ... with regard to opioids and abatement" than their domestic counterparts. *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *12. Second, Judge Drain explained that "the allocation mediation conducted by Messrs. Feinberg and Phillips that resulted in the plan's division of the Debtors' assets ... involved only *U.S.-based* public claimants with their own regulatory interests and characteristics." *Id.* (emphasis added). As the Debtors point out, the Canadian Appellants themselves differentiate themselves from the other classes in this manner, explaining (i) "[t]he Canadian Appellants are in Canada, [(ii)] the bulk of their legal claims arise in Canada, [(iii)] those claims concern the operations of Purdue Canada," and (iv) the Canadian Appellants' claims "bear no relation to the Shareholder Released Parties' control, direction, and oversight of the Debtors or their U.S. operations." (Dkt. No. 59, at 17-18; Dkt. No. 151, at 120-121). That very classification on the part of the Canadian Appellants accords with Judge Drain's findings that there is a reasonable basis for the separate classifications. And there is no argument that such separate classification was done for the purpose of disenfranchising a particular group in a manner inconsistent with the Bankruptcy Code, to engineer an assenting impaired class; or manipulate class voting, all of which must be carefully scrutinized by the court. Indeed, it was not.

Under the Plan, the Canadian creditors are classified in Class 11(c), while the domestic municipalities and domestic Indian tribes are classified as Class 4 and 5 creditors. These are perfectly legitimate classifications and the proffered reasons for doing so are reasonable. And the Canadian Appellants do not (and cannot) argue that under the Plan their claims will receive unequal treatment as compared to other claims in their class, Class 11(c), as indeed all claims classified as Class 11(c) are treated equally under the Plan. (Dkt. No. 59, at 44, 47-48).

[70] Finally, Canadian Appellants *cannot* argue that their Class 11(c) claims are treated unfavorably as compared the other creditor classes (like Class 4 and/or Class 5) because their class, Class 11(c), voted to accept the Plan. Under the Bankruptcy Code, only creditors of a *dissenting* class can object to the confirmation of a plan on the grounds that the plan discriminates against its creditor class. Pursuant to section 1129(b)(1) of the Bankruptcy Code, a plan shall be confirmed "if the plan does not discriminate unfairly ... with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). Because the Canadian creditors – as part of Class 11(c) – voted to accept the Plan, the Canadian Appellants cannot contend that they are being treated unfavorably.

The classification and treatment of the Canadian Appellants' claims under the ***118** Plan does not violate the Bankruptcy Code.

CONCLUSION

For the foregoing reasons, the Bankruptcy Court's Confirmation Order and related Advance Order must be vacated.

This decision leaves on the table a number of critically important issues that were briefed and argued on appeal – principal among them, whether the Section 10.7 Shareholder Release can or should be approved on the peculiar facts of this case, assuming all the other legal challenges to their validity were resolved in Debtors' favor.

But sufficient unto the day. This and the other issues raised by the parties can be addressed if they need to be addressed – which is to say, if this ruling is reversed.

This constitutes the decision and order of the court. This is a written opinion.

All Citations

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United States District Court, E.D. Virginia,
Richmond Division.

Joel PATTERSON, et al., Appellants,
v.
MAHWAH BERGEN RETAIL GROUP, INC., Appellee.

Civil No. 3:21cv167 (DJN)
|
Signed 01/13/2022

Synopsis

Background: United States Trustee, as well as lead plaintiffs designated in putative class action alleging securities fraud, appealed from order of the United States Bankruptcy Court for the Eastern District of Virginia, Kevin R. Huennekens, J., confirming debtors' joint Chapter 11 plan, challenging the plan's broad third-party releases and exculpation provision.

Holdings: The District Court, David J. Novak, J., held that:

[1] United States Trustee had standing to appeal Bankruptcy Court's order confirming debtors' joint Chapter 11 plan;

[2] lead plaintiffs lacked standing to appeal Bankruptcy Court's order;

[3] Bankruptcy Court failed to identify whether it had jurisdiction over claims in plan's broad third-party releases;

[4] Bankruptcy Court lacked jurisdiction over broadly released claims between non-debtors that had no connection to property of the estate or administration of the bankruptcy proceeding;

[5] Bankruptcy Court lacked knowing and voluntary consent of releasing parties in approving broad third-party, non-debtor releases;

[6] notice and opt-out forms with respect to third-party, non-debtor releases failed to afford due process;

[7] Bankruptcy Court's erred in failing to analyze factors under *Behrmann v. National Heritage Foundation*, 663 F.3d 704, when approving broad third-party, non-debtor releases;

[8] third-party, non-debtor releases failed to satisfy factors for approval of releases under *Behrmann*; and

[9] exculpation provision in Chapter 11 plan impermissibly extended beyond fiduciaries who performed necessary and valuable duties.

Vacated and remanded.

West Headnotes (111)

[1] **Constitutional Law** Notice and Hearing

Central meaning of "procedural due process" is that parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must first be notified. U.S. Const. Amend. 5.

[2] **Constitutional Law** Notice

Due process guarantee of the right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. U.S. Const. Amend. 5.

[3] **Compromise, Settlement, and Release** Nonparties in general

Parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement, because general rule provides that a person cannot be deprived of his legal rights in a proceeding to which he is not a party.

[4] **Bankruptcy** Scope of review in general

When reviewing a decision of the bankruptcy court rendered in a core proceeding, a district

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court functions as an appellate court and applies the standards of review in federal courts of appeal.

[5] **Bankruptcy** Conclusions of law; de novo review

District court reviews the bankruptcy court's legal conclusions de novo.

[6] **Bankruptcy** Clear error

District court reviews the bankruptcy court's factual findings for clear error.

[7] **Bankruptcy** Clear error

In reviewing bankruptcy court's decision, clear error exists when the district court is left with the definite and firm conviction that a mistake has been committed.

[8] **Bankruptcy** Conclusions of law; de novo review

Bankruptcy Clear error

In cases involving questions of law and fact, the district court reviews the bankruptcy court's findings of fact under the clearly erroneous standard and reviews de novo the legal conclusions derived from those facts.

[9] **Bankruptcy** Conclusions of law; de novo review

If proceeding before bankruptcy court constitutes a non-core proceeding and the parties did not consent to the bankruptcy court's jurisdiction, the district court undertakes de novo analysis of both factual findings to which appellant objected and the law.

[10] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

United States Trustee had standing to appeal Bankruptcy Court's order confirming debtors' joint Chapter 11 plan, challenging the plan's broad third-party releases and exculpation provision. 11 U.S.C.A. § 307.

[11] **Bankruptcy** Powers, Duties and Fiduciary Capacity

United States Trustee serves the role of protecting the public interest and ensuring that bankruptcy cases are conducted according to law. 11 U.S.C.A. § 307.

[12] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

To have standing to appeal a bankruptcy court's order to the district court, appellant must be a "person aggrieved" by the bankruptcy order.

[13] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

To be "person aggrieved" with standing to appeal a bankruptcy court's order, appellant must show that the order diminishes its property, increases its burdens, or impairs its rights.

[14] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

Securities litigation lead plaintiffs' capacity as putative class representatives did not confer standing to appeal Bankruptcy Court's order confirming debtors' joint Chapter 11 plan, challenging the plan's broad third-party releases and exculpation provision.

[15] **Federal Civil Procedure** Representation of class; typicality; standing in general

Class representative is an agent only if the class is certified. Fed. R. Civ. P. 23; Fed. R. Bankr. P. 7023.

[16] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

Speculation and conjecture do not give rise to bankruptcy appellate standing.

[17] **Bankruptcy** Right of review and persons entitled; parties; waiver or estoppel

Lead plaintiffs designated in putative class action alleging securities fraud lacked standing to appeal Bankruptcy Court's order confirming debtors' joint Chapter 11 plan, challenging the plan's broad third-party releases and exculpation provision; by objecting to the third-party releases, the securities litigation lead plaintiffs opted out of the release, and therefore it had no impact on them, and they lacked standing to challenge the third-party releases on behalf of others who were not parties.

[18] **Bankruptcy** Withdrawal or transfer to district court

District courts retain the authority to withdraw, in whole or in part, any case or proceeding that they referred to a bankruptcy court. 28 U.S.C.A. § 157(d).

[19] **Bankruptcy** Bankruptcy courts and other federal courts

While district courts were given jurisdiction over bankruptcy cases, Congress also delegated to the bankruptcy courts, as judicial officers of the district courts, adjudicatory authority, subject to the district courts' supervision and the limits imposed by the Constitution. U.S. Const. art. 3, § 1; 28 U.S.C.A. §§ 157, 1334.

[20] **Judges** Term and tenure of office in general

Judges Change in amount during term of office

District courts and Courts of Appeals are composed of judges who enjoy the protections of Article III, namely, life tenure and pay that cannot be diminished. U.S. Const. art. 3, § 1.

[21] **Judges** Term and tenure of office in general

Judges Change in amount during term of office

Protections of life tenure and against salary diminution that Article III provides help to ensure the integrity and independence of the Judiciary. U.S. Const. art. 3, § 1.

[22] **Bankruptcy** Core, Non-Core, or Related Proceedings in General; Nexus

Bankruptcy proceedings are divided into three categories: (1) those that arise under title 11, (2) those that arise in a title 11 case, and (3) those that are related to a case under title 11. 28 U.S.C.A. §§ 157, 1334.

[23] **Bankruptcy** Core or non-core proceedings

Proceedings that arise under title 11 or arise in a title 11 case constitute "core" proceedings, for purposes of bankruptcy jurisdiction. 28 U.S.C.A. §§ 157, 1334.

[24] **Bankruptcy** Core or non-core proceedings

Bankruptcy judge has the statutory authority to hear and enter final judgments in core proceedings. 28 U.S.C.A. §§ 157, 1334.

[25] **Bankruptcy** Core or non-core proceedings

Bankruptcy courts only have the constitutional authority to adjudicate core claims, even if Congress has granted them the statutory authority to resolve other claims; this constitutional limitation applies to a bankruptcy court's authority to grant releases. U.S. Const. art. 3, § 1 et seq.; 28 U.S.C.A. §§ 157, 1334.

[26] **Bankruptcy** Core or non-core proceedings

Bankruptcy court has responsibility to properly classify claims before it as core or non-core based on content of claims and adjudicate them

according to those classifications. 28 U.S.C.A. §§ 157, 1334.

[27] **Bankruptcy** Core or non-core proceedings

Cause of action is constitutionally core when it stems from bankruptcy itself or would necessarily be resolved in claims allowance process. U.S. Const. art. 3, § 1 et seq.; 28 U.S.C.A. §§ 157, 1334.

[28] **Bankruptcy** Counterclaims

Bankruptcy estate's claim against creditor would necessarily be resolved in claims allowance process, and thus would be constitutionally core, when it shares common questions of fact and law with creditor's claims and when it seeks to directly reduce or recoup amount claimed. U.S. Const. art. 3, § 1 et seq.; 28 U.S.C.A. §§ 157, 1334.

[29] **Bankruptcy** Core or non-core proceedings

Claim can become core, and thus be heard by bankruptcy judge under title 11, when it becomes integral to restructuring of debtor-creditor relationship. 28 U.S.C.A. §§ 157, 1334.

[30] **Bankruptcy** Core or related proceedings

Claims by the bankruptcy estate that seek to augment the estate but do not directly modify the amount claimed do not qualify as a core claim to be resolved in ruling on the proof of claim. 28 U.S.C.A. §§ 157, 1334.

[31] **Bankruptcy** Submission to district court for judgment

When confronted with a so-called *Stern* claim, a claim designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter, the bankruptcy court should proceed with the claim as it would for non-core claims and determine whether the claim is otherwise related to a case under title 11, and if it is, then hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for de novo review and entry of judgment. U.S. Const. art. 3, § 1 et seq.; 28 U.S.C.A. §§ 157, 1334.

[32] **Bankruptcy** Core or non-core proceedings

Courts should focus on the content of the proceeding rather than the category of the proceeding as core or non-core when determining whether a bankruptcy court has acted within its constitutional authority. U.S. Const. art. 3, § 1 et seq.; 28 U.S.C.A. §§ 157, 1334.

[33] **Bankruptcy** Core, Non-Core, or Related Proceedings in General; Nexus

Bankruptcy Settlement, adjustment, or enforcement of claims

In confirming debtors' joint Chapter 11 plan, Bankruptcy Court failed to identify whether it had jurisdiction over claims in plan's broad third-party releases; court did not parse the content of the claims that it purported to release to determine if each claim constituted a core claim, a non-core claim or a claim unrelated to the bankruptcy case, and enormity of the task did not absolve the court of its responsibility to properly identify the content of the claims before it and ensure that it had jurisdiction to rule on each of them. 28 U.S.C.A. §§ 157, 1334.

[34] **Bankruptcy** Issues between non-debtors

Bankruptcy Settlement, adjustment, or enforcement of claims

In confirming debtors' joint Chapter 11 plan, Bankruptcy Court lacked jurisdiction over broadly released claims between non-debtors that had no connection to the property of the bankruptcy estate or the administration of the bankruptcy proceeding, including third-party release that would bar securities claims against former directors and officers of debtor, even if the claims arose before debtor filed for

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bankruptcy and those directors and officers had no involvement in the bankruptcy proceeding, and hostile work environment claims by a former employee of debtor against another employee, and breach of contract action by an accountant of one of debtor's loan agents against the agent for failure to pay for work performed on the agent's transaction with debtor. U.S. Const. art. 3, § 1 et seq.; 28 U.S.C.A. §§ 157, 1334.

[35] **Indemnity** Contract liability

Federal courts disfavor indemnity for federal securities law violations, calling into question the enforceability of these obligations.

[36] **Bankruptcy** Conclusiveness

Once Chapter 11 plan became final, the provisions therein, including broad third-party releases, became res judicata for subsequent parties trying to bring the claims.

[37] **Bankruptcy** Carrying out provisions of Code

Although Bankruptcy Code permits bankruptcy court to issue orders necessary or appropriate to carry out provisions of Code, that does not provide independent source of federal subject matter jurisdiction. 11 U.S.C.A. § 105.

[38] **Bankruptcy** Determination of jurisdictional questions

Independent statutory basis must exist for bankruptcy court to exercise jurisdiction over claims.

[39] **Bankruptcy** Limited, in personam, and in rem jurisdiction

Without independent source of jurisdiction, bankruptcy court must rely on its own jurisdiction, which comes in form of in rem jurisdiction over debtor's property and disposition of that property.

[40] **Bankruptcy** Equitable powers and principles

Bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships.

[41] **Bankruptcy** Rights of Action; Contract Rights Generally

Third-party claims belong to third parties, not the debtor's estate. 11 U.S.C.A. § 541.

[42] **Bankruptcy** Bankruptcy Jurisdiction

As a general rule, a bankruptcy court has no power to say what happens to property that belongs to a third party, even if that third party is a creditor or otherwise is a party in interest.

[43] **Bankruptcy** Limited, in personam, and in rem jurisdiction

Although bankruptcy court's in rem jurisdiction gives it authority over claims against the estate, it has no in rem jurisdiction over third-party claims not against estate or property of estate.

[44] **Bankruptcy** Issues between non-debtors

Article III does not allow third-party non-debtors to bootstrap any and all of their disputes into a bankruptcy case to obtain relief. U.S. Const. art. 3, § 1 et seq.

[45] **Bankruptcy** Consent to or Waiver of Objections to Jurisdiction or Venue

Bankruptcy Court's determination that releasing parties received notice and an opportunity to opt out of third-party releases in debtors' joint Chapter 11 plan, in context of whether releasing parties consented to the third-party releases, could not support a finding of consent to having the Bankruptcy Court adjudicate the released claims.

[46] **Bankruptcy** 🔑 Consent to or Waiver of Objections to Jurisdiction or Venue

Courts can discern the implication of consent to adjudication by non-Article III court based on a party's actions, however, a finding of consent based on inaction is not permitted. U.S. Const. art. 3, § 1 et seq.

[47] **Bankruptcy** 🔑 Consent to or Waiver of Objections to Jurisdiction or Venue

Bankruptcy Court lacked knowing and voluntary consent of releasing parties in approving broad third-party, non-debtor releases when confirming debtors' joint Chapter 11 plan.

[48] **Bankruptcy** 🔑 Conclusions of law; de novo review

Bankruptcy 🔑 Determination and Disposition; Additional Findings

Where Bankruptcy Court exceeded its authority in approving broad third-party, non-debtor releases when confirming debtors' joint Chapter 11 plan, District Court would vacate the confirmation order and treat it as a report and recommendation with proposed findings of fact and conclusions of law, which the District Court would review de novo. 28 U.S.C.A. § 157(c)(1); Fed. R. Bankr. P. 8018.1.

[49] **Bankruptcy** 🔑 Confirmation; Objections

Bankruptcy 🔑 Particular cases and issues

Where Bankruptcy Court's decision confirming debtors' joint Chapter 11 plan lacked any meaningful factfinding, District Court reviewing the decision would set forth its own factual findings based on the record from the confirmation hearing. Fed. R. Bankr. P. 9033(d).

[50] **Bankruptcy** 🔑 Submission to district court for judgment

Bankruptcy 🔑 Settlement, adjustment, or enforcement of claims

Bankruptcy court should submit any third-party releases to the district court for approval via a report and recommendation in the rare and exceptional case that warrants the use of third-party releases, identifying with specificity the claims and individuals released and provide detailed proposed findings of fact and conclusions of law to ensure that the released claims are truly integral to the reorganization.

[51] **Bankruptcy** 🔑 Settlement, adjustment, or enforcement of claims

Use of third-party releases in confirming Chapter 11 plans should be utilized cautiously and infrequently.

[52] **Bankruptcy** 🔑 Settlement, adjustment, or enforcement of claims

Third-party release is not a merit badge that somebody gets in return for making a positive contribution to a restructuring; it is not a participation trophy nor a gold star for doing a good job.

[53] **Bankruptcy** 🔑 Settlement, adjustment, or enforcement of claims

Nonconsensual releases should not be granted by bankruptcy court unless barring a particular claim is important in order to accomplish a particular feature of the restructuring.

[54] **Bankruptcy** 🔑 Settlement, adjustment, or enforcement of claims

When the following seven factors are present pursuant to *Behrmann v. National Heritage Foundation*, 663 F.3d 704, bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor: (1) there is an identity of interests between debtor and third party, usually an indemnity relationship, such that a suit against non-debtor is, in essence, a suit

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

[55] **Bankruptcy** Confirmation; Objections

Given the dramatic effect of third-party releases and that they are to be approved only in unique circumstances, the meaningful exercise of appellate review at a minimum requires that the court make specific factual findings in support of its decision to grant equitable relief.

[56] **Bankruptcy** Confirmation; Objections

The exacting caution and detailed findings demanded of a bankruptcy court in granting a non-debtor release in a unique circumstance stems from the constitutional limitations placed on the bankruptcy court's jurisdiction. U.S. Const. art. 3, § 1 et seq.

[57] **Bankruptcy** Bankruptcy judges

Constitution limits bankruptcy courts, as non-Article III courts, to adjudicating only matters integral to bankruptcy proceeding. U.S. Const. art. 3, § 1.

[58] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Factors for determining whether to allow non-debtor releases task a reviewing court with determining how integral the releases are to a bankruptcy plan.

[59] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Bankruptcy Confirmation; Objections

Bankruptcy Court's lack of explanation supporting approval of broad third-party, non-debtor releases when confirming debtors' joint Chapter 11 plan was clear error; instead of making detailed factual findings as to whether unique circumstances warranted the inclusion of non-debtor releases, Bankruptcy Court stated in conclusory fashion that the third-party releases were integral to the plan.

[60] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Failing to opt out did not rise to the level of consent required to obviate analysis of seven factors under *Behrmann v. National Heritage Foundation*, 663 F.3d 704, for approving third-party, non-debtor releases in debtors' joint Chapter 11 plan.

[61] **Federal Civil Procedure** Factors, grounds, objections, and considerations in general

Federal Civil Procedure Options; withdrawal

Courts, notably, Article III judges, may bind absent class members to a judgment so long as they provide them notice of the action and the opportunity to either opt out or participate, but to do so, courts must ensure that the class action complies with the unique requirements of rule governing class actions. U.S. Const. art. 3, § 1; Fed. R. Civ. P. 23.

[62] **Bankruptcy** Parties

Court must appoint class counsel to represent the class, as pro se litigants cannot represent absent class members. Fed. R. Civ. P. 23; Fed. R. Bankr. P. 7023.

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[63] **Bankruptcy** Parties

Presiding court bears responsibility for ensuring compliance with all of the requirements for class actions. Fed. R. Civ. P. 23; Fed. R. Bankr. P. 7023.

[64] **Bankruptcy** Parties
Bankruptcy Judicial authority or approval

Any class settlement that would bind absent class members requires court approval. Fed. R. Civ. P. 23(e); Fed. R. Bankr. P. 7023.

[65] **Bankruptcy** Parties
Bankruptcy Judicial authority or approval

Inquiry appropriate under rule prohibiting compromise of class action without approval of court and notice to all class members protects unnamed class members from unjust or unfair settlements affecting their rights. Fed. R. Civ. P. 23(e); Fed. R. Bankr. P. 7023.

[66] **Bankruptcy** Parties
Constitutional Law Class Actions

To satisfy due process in class action, notice must be best practicable, reasonably calculated, under all circumstances, to apprise interested parties of pendency of action and afford them opportunity to present their objections; the notice should describe the action and the plaintiffs' rights in it; absent plaintiff must be provided with an opportunity to remove himself from the class by executing and returning an “opt out” or “request for exclusion” form to the court; and named plaintiff must at all times adequately represent the interests of the absent class members. U.S. Const. Amend. 5; Fed. R. Civ. P. 23; Fed. R. Bankr. P. 7023.

[67] **Bankruptcy** Settlement, adjustment, or enforcement of claims
Constitutional Law Class Actions

Notice and opt-out forms with respect to third-party, non-debtor releases in debtors' joint Chapter 11 plan, which did not describe the released claims or the rights given up by the absent releasing parties, failed to afford due process. U.S. Const. Amend. 5.

[68] **Bankruptcy** Settlement, adjustment, or enforcement of claims
Bankruptcy Confirmation; Objections

Because only cases with unique circumstances warrant granting nonconsensual non-debtor releases, bankruptcy court must make specific factual findings demonstrating why debtor's circumstances entitle it to the benefit of the releases.

[69] **Bankruptcy** Settlement, adjustment, or enforcement of claims
Bankruptcy Confirmation; Objections

Bankruptcy Court's erred in failing to analyze seven factors under *Behrmann v. National Heritage Foundation*, 663 F.3d 704, when approving broad third-party, non-debtor releases in debtors' joint Chapter 11 plan, and instead, stating only in a single footnote that if the *Behrmann* factors were applicable to the third-party releases, the court would find the factors were satisfied for the reasons stated in debtors' memorandum of law; such a cursory consideration of the *Behrmann* factors disregarded the Fourth Circuit's command to limit the use of third-party releases to the exceptional case warranting them, and District Court could not conduct meaningful appellate review as a result of the Bankruptcy Court's failure to address that which had been released.

[70] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Court may not satisfy its judicial responsibilities under *Behrmann v. National Heritage Foundation*, 663 F.3d 704, to make specific factual findings demonstrating that nonconsensual non-debtor release is warranted by simply incorporating by reference party's brief.

[71] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Broad third-party, non-debtor releases in debtors' joint Chapter 11 plan, including claims in putative class action alleging securities fraud, failed to satisfy factors for approval of releases under *Behrmann v. National Heritage Foundation*, 663 F.3d 704, warranting voiding the releases; fact that defendants provided releases to debtors did not amount to a substantial contribution of assets, especially given the illusory nature of the releases, debtors largely liquidated, rather than reorganized, which cut against the essential nature of the releases, plan would not be doomed if defendants did not obtain a release, and plan did not create a separate fund to pay the claims released or provide any other mechanism to consider or pay the securities claims.

[72] **Bankruptcy** Injunction or stay of other proceedings

Granting permanent injunctions to protect non-debtor parties on basis of theoretical identity of interest alone would turn bankruptcy principles on their head; nothing in Bankruptcy Code can be construed to establish such extraordinary protection for non-debtor parties.

[73] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Debtor must demonstrate that non-debtor release is essential to its reorganization, as factor for approval of release pursuant to *Behrmann v. National Heritage Foundation*, 663 F.3d 704, such that the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor.

[74] **Bankruptcy** Construction, execution, and performance

Third-party, non-debtor releases in debtors' joint Chapter 11 plan that were voided on appeal from Bankruptcy Court's confirmation order could be severed from the plan by District Court, despite nonseverability provision of plan stating that Bankruptcy Court could sever any provision before confirmation without it affecting the rest of the plan, but after confirmation all provisions were integral and only debtors could consent to severance of a particular provision; since District Court had found a *Stern* violation and vacated the confirmation order, the plan was before the District Court as proposed findings of fact and conclusions of law and the District Court stepped into the shoes of the Bankruptcy Court, such that first half of the nonseverability provision remained the operative provision. Fed. R. Bankr. P. 8018.1.

[75] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Bankruptcy Construction, execution, and performance

Severing voided third-party, non-debtor releases in debtors' joint Chapter 11 plan after Bankruptcy Court's confirmation order was vacated was appropriate; nonseverability provision expressly provided that, before confirmation, the Bankruptcy Court could find the third-party releases, or any provision, unenforceable, and in the event of such a holding, the plan would in no way be affected, impaired, or invalidated, and nonseverability provision also provided that a provision of the plan could be deleted with debtors' consent, which demonstrated that the third-party releases were not inextricably tied to the rest of the plan and that the plan could survive in the absence of any particular provision, and there was no evidence as to why the court could not excise the third-party releases without seriously threatening debtors' ability to re-emerge successfully from bankruptcy, as debtors made clear the plan had been substantially consummated.

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[76] **Bankruptcy** Construction, execution, and performance

In determining severability of provision from plan, courts must look to the evidence in the record and not simply whether the parties state in a conclusory fashion that the provision cannot be severed.

[77] **Bankruptcy** Moot questions

Normally a nonseverability clause standing on its own cannot support a finding of equitable mootness.

[78] **Bankruptcy** Moot questions

While a nonseverability clause may be one indication that a particular term was important to the bargaining parties, a district court cannot rely on such a clause to the exclusion of other evidence to support a finding of equitable mootness.

[79] **Statutes** Effect of Partial Invalidity; Severability

When confronted with an unconstitutional provision in a statute, courts typically sever any problematic portions while leaving the remainder intact.

[80] **Bankruptcy** Construction, execution, and performance

Presumption of severability operates in the presence or absence of a severability provision in bankruptcy plan.

[81] **Statutes** Effect of Partial Invalidity; Severability

In evaluating severability of unconstitutional provision in a statute, courts inquire whether the statute will function in a manner consistent with the intent of Congress without the unconstitutional provision.

[82] **Statutes** Effect of Partial Invalidity; Severability

If unconstitutionality of part of statute does not necessarily defeat or affect validity of its remaining provisions, then courts will invalidate only unconstitutional portion.

[83] **Statutes** Effect of Partial Invalidity; Severability

In evaluating severability of unconstitutional provision in a statute, courts look to whether severing the offending provision would upend the entire statute and, if not, they default to severing the provision.

[84] **Contracts** Partial Illegality

Under Virginia law, generally, when contract covers several subjects, some of whose provisions are valid and some void, those which are valid will be upheld if they are not so interwoven with those illegal as to make divisibility impossible.

[85] **Contracts** Partial Illegality

Under Delaware law, invalid term of otherwise valid contract, if severable, will not defeat contract.

[86] **Contracts** Certainty as to Subject-Matter

Under Delaware law, court will enforce contract with indefinite provision if provision is not material or essential term.

[87] **Contracts** Partial Illegality

When faced with unenforceable provision in contract, courts will look to whether severing provision will upset entire contract.

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[88] **Bankruptcy** Moot questions

Equitable mootness is pragmatic doctrine grounded in notion that, with passage of time after judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable.

[89] **Bankruptcy** Moot questions

Application of equitable mootness doctrine is based on practicality and prudence, does not employ rigid rules, and requires that court determine whether judicial relief on appeal can, as pragmatic matter, be granted.

[90] **Bankruptcy** Moot questions

In determining whether equitable mootness doctrine applies, courts can examine the following relevant factors: (1) whether appellant sought and obtained stay; (2) whether reorganization plan or other equitable relief has been substantially consummated; (3) extent to which relief requested on appeal would affect success of reorganization plan or other equitable relief granted; and (4) extent to which relief requested on appeal would affect interests of third parties.

[91] **Bankruptcy** Moot questions

Reviewing court has discretion whether to find an appeal equitably moot.

[92] **Bankruptcy** Moot questions

Equitable mootness applies to specific claims, not entire appeals and must be applied with a scalpel rather than an axe.

[93] **Bankruptcy** Moot questions

Equitable mootness doctrine did not apply to prevent District Court from hearing appeal by United States Trustee (UST) and lead plaintiffs designated in putative class action alleging securities fraud from Bankruptcy Court's order confirming debtors' joint Chapter 11 plan and approving broad third-party, non-debtor releases; finding of equitable mootness would preclude UST, who was seeking to protect rights of absent individuals, from fulfilling duty of protecting public interest and preventing abuse of the bankruptcy system, seriousness of Bankruptcy Court's errors in extinguishing claims of absent and nonconsenting parties without constitutional authority to adjudicate those claims directly concerned integrity of the bankruptcy process, and requested relief of invalidating all or parts of releases would only prospectively affect ability of parties to bring suits based on past events and would require no unwinding. U.S. Const. art. 3, § 1 et seq.

[94] **Bankruptcy** Moot questions

Equitable mootness doctrine applies especially when a party, seeking a return to the status quo ante, sits idly by and permits intervening events to extinguish old rights and create new ones.

[95] **Equity** Grounds of jurisdiction in general

When the public interest rather than private rights are at stake, equitable doctrines take on a different role in favor of protecting the public interests.

[96] **Federal Courts** Right to Decline Jurisdiction; Abstention

An Article III appellate court has a virtually unflagging obligation to exercise its subject matter jurisdiction. U.S. Const. art. 3, § 1 et seq.

[97] **Bankruptcy** Moot questions

Equity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process.

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[98] **Bankruptcy** 🔑 Moot questions

In determining whether equitable mootness applies, when relief requested does not seek to undo any aspect of confirmed plan that has been consummated, it would not be impractical, imprudent, or inequitable to allow the appeal to proceed.

[99] **Bankruptcy** 🔑 Compromises, Releases, and Stipulations

In contrast to third-party releases that offer protection to non-debtors for preconfirmation liability, an exculpation provision serves to protect court professionals who act reasonably while carrying out their responsibilities in connection with the bankruptcy case.

[100] **Bankruptcy** 🔑 Settlement, adjustment, or enforcement of claims

Exculpation provisions in Chapter 11 plans do not release parties, but instead raise the liability standard of fiduciaries for their conduct during their case.

[101] **Bankruptcy** 🔑 Settlement, adjustment, or enforcement of claims

Exculpation provisions in Chapter 11 plans generally are permissible, so long as they are properly limited and not overly broad.

[102] **Bankruptcy** 🔑 Settlement, adjustment, or enforcement of claims

Court will approve an exculpation provision in Chapter 11 plan so long as it is limited to those parties who have served the debtor, is narrowly tailored and complies with the applicable standards.

[103] **Bankruptcy** 🔑 Settlement, adjustment, or enforcement of claims

Exculpation provision is appropriate when it is solely limited to fiduciaries who have served a debtor through a Chapter 11 proceeding.

[104] **Bankruptcy** 🔑 Leave to sue

Under *Barton* rule, *Barton v. Barbour*, 104 U.S. 126, 26 L.Ed. 672, party cannot bring a suit against a bankruptcy trustee or the trustee's attorneys for acts within the trustee's duties of recovering assets for the estate without first obtaining leave of court.

[105] **Bankruptcy** 🔑 Leave to sue

The *Barton* doctrine, *Barton v. Barbour*, 104 U.S. 126, 26 L.Ed. 672, whereby party cannot bring suit against trustee or trustee's attorneys for acts within trustee's duties of recovering assets for the estate without first obtaining leave of court, serves the principle that a bankruptcy trustee is an officer of the court that appoints him and therefore that court has a strong interest in protecting him from unjustified personal liability for acts taken within the scope of his official duties.

[106] **Bankruptcy** 🔑 Creditors' and equity security holders' committees and meetings

Limited granted of immunity under bankruptcy statute governing powers and duties of committees covers committee members for actions within the scope of their duties. 11 U.S.C.A. § 1103(c).

[107] **Bankruptcy** 🔑 Settlement, adjustment, or enforcement of claims

Proper exculpation provision in Chapter 11 plan is protection not only of court-supervised fiduciaries, but also of court-supervised and court-approved transactions.

[108] **Bankruptcy** 🔑 Settlement, adjustment, or enforcement of claims

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Narrowly tailored exculpation provision in Chapter 11 plan serves only those aims of protecting parties who have performed necessary duties in connection with case.

[109] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Bankruptcy Court did not err by failing to apply factors for approving third-party, non-debtor releases under *Behrmann v. National Heritage Foundation*, 663 F.3d 704 to exculpation provision when the court approved debtors' joint Chapter 11 plan.

[110] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Exculpation provision in Chapter 11 plan that is limited to those parties who have served the debtor is narrowly tailored and complies with the applicable standards must contain the following limitations: (1) it must be limited to the fiduciaries who have performed necessary and valuable duties in connection with the bankruptcy case; (2) is limited to acts and omissions taken in connection with the bankruptcy case; (3) does not purport to release any pre-petition claims; (4) contains a carve out for gross negligence, actual fraud or willful misconduct; and (5) contains a gatekeeper function.

[111] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Exculpation provision in debtors' joint Chapter 11 plan impermissibly extended beyond fiduciaries who performed necessary and valuable duties, to include all current and former employees, attorneys, accountants, managers, financial advisors and consultants of every party being exculpated.

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MEMORANDUM OPINION

David J. Novak, United States District Judge

***1** This case arises out of the bankruptcy cases commenced by Mahwah Bergen Retail Group, Inc. (f/k/a Ascena Retail Group, Inc.) ("Mahwah" or "Ascena") and sixty-three of its affiliates (collectively, the "Debtors"). The United States Bankruptcy Court for the Eastern District of Virginia ("Bankruptcy Court") confirmed the reorganization plan ("the Plan") set forth by the parties in interest, and Joel Patterson and Michaella Corporation ("Securities Litigation Lead Plaintiffs") filed notices of appeal to this Court. Likewise, the United States Trustee ("Trustee") filed a notice of appeal of the confirmation to this Court.[1] The appeals were consolidated into this action.[2] In these appeals, Appellants challenge third-party (non-debtor) releases, as well as an exculpation provision, contained in the Plan.

1 The United States Securities and Exchange Commission (SEC) supported the Trustee's appeal as an amicus.

2 The other appeals consolidated into this action are Case No. 3:21cv166 and Case No. 3:21cv205.

[1] [2] [3] This appeal implicates the most fundamental right guaranteed by the due process clause in our judicial

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system: the right to be heard before the loss of one's rights. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' " *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 1 Wall. 223, 233, 17 L.Ed. 531 (1863)). "And, the Supreme Court has explained that the particular constitutional protection afforded by access to the courts is 'the right conservative of all other rights, and lies at the foundation of orderly government.' " *Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 817 (4th Cir. 2004) (quoting *Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 148, 28 S.Ct. 34, 52 L.Ed. 143 (1907)). Furthermore, "[t]his right ... has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Schroeder v. City of New York*, 371 U.S. 208, 212, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). Relatedly, "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement." *Loc. No. 93, Int'l Ass'n of Firefighters AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986). This is so, because the general rule provides "that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." *Martin v. Wilks*, 490 U.S. 755, 759, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989); *see also id.* at 762, 109 S.Ct. 2180 ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.").

These fundamental principles resonate with force in this appeal from the Bankruptcy Court, as third-party releases strike at the heart of these foundational rights. The United States Trustee — a statutory watchdog over bankruptcy proceedings — and the Securities Litigation Lead Plaintiffs, as designated by a United States District Judge in a putative class action alleging securities fraud, challenge the approval by the Bankruptcy Court[3] of exceedingly broad third-party (non-debtor) releases, as well as an exculpation provision, contained in the Plan submitted by Debtors.

3 The Honorable Kevin R. Huennekens, United States Bankruptcy Judge for the Eastern District of Virginia (Richmond Division).

***2** Third-party releases, such as those at issue here, carry much controversy, for they are a "device that lends itself to abuse." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005). Indeed, several Courts of Appeals (the Fifth, Ninth and Tenth Circuits) prohibit the use of third-party releases. *See, e.g.*, *In re Pac. Lumber Co.*, 584 F.3d 229, 251-53 (5th Cir. 2009); *In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re W. Real Estate Fund, Inc.*, 922 F.2d 592, 600-02 (10th Cir. 1990). And a District Judge in the Southern District of New York recently concluded in a thoughtful opinion that no statutory basis exists for their use. *In re Purdue Pharma, L.P.*, 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021).

The Fourth Circuit has made clear that the use of third-party releases is disfavored, saying that such releases should be "granted cautiously and infrequently." *Behrmann v. Nat'l Heritage Found.*, 663 F.3d 704, 712 (4th Cir. 2011). Other circuits that permit their use likewise reserve their utilization for the rare or exceptional case. *See, e.g.*, *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139 (3d Cir. 2019) (directing that "courts considering such releases do so with caution .... [and] with the utmost care and to thoroughly explain the justification for any such inclusion"); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015) (permitting releases and bar orders but cautioning that they "ought not to be issued lightly, and should be reserved for those unusual cases in which such an order is necessary for the success of the reorganization, and only in situations in which such an order is fair and equitable under all the facts and circumstances"); *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 141-43 (holding that involuntary releases should only be approved if they form an important part in a reorganization plan, and that they are proper "only in rare cases"); *In re Dow Corning Corp.*, 280 F.3d 648, 657-58 (6th Cir. 2002) ("Because such an injunction is a dramatic measure to be used cautiously, we follow those circuits that have held that enjoining a non-consenting creditor's claim is only appropriate in 'unusual circumstances.' ").

Despite these admonitions, the Bankruptcy Court for the Richmond Division of this district regularly approves third-party releases, as acknowledged by Debtors' counsel during oral argument. (Tr. of Dec. 20, 2021 Argument ("Arg. Tr.") at 6:8-14 (ECF No. 75).) This recurrent practice contributes to major companies like Mahwah (a New Jersey company) using the permissive venue provisions of the Bankruptcy Code to file for bankruptcy here.[4] Indeed, according to the Trustee, the Richmond Division (just the division, not the entire Eastern District of Virginia) joins the District of Delaware, the Southern District of New York, and the Houston Division

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of the Southern District of Texas as the venue choice for 91% of the "mega" bankruptcy cases. (Reply Br. of Appellant John P. Fitzgerald, III, Acting United States Trustee for Region 4 ("Trustee Reply Br.") at 22-23 (ECF No. 45).) The ubiquity of third-party releases in the Richmond Division demands even greater scrutiny of the propriety of such releases. And, their prevalence also undermines assertions that they are integral to the success of this particular reorganization plan. As District Judge Colleen McMahon astutely observed: "When every case is unique, none is unique." *In re Purdue Pharma, L.P.*, 2021 WL 5979108, at *3.

4 To be clear, venue properly exists in the Richmond Division, as Debtors latched onto the existing bankruptcy of one of their affiliates, Dress Barn, which is incorporated in Virginia, as the basis for venue. 28 U.S.C. § 1408. Consequently, the question is not whether venue was proper here, but instead why Debtors chose this venue over the many other venue options that it had available to it. During oral argument, counsel for Debtors had no explanation for his client's choice of Richmond to file for bankruptcy. (Arg. Tr. at 78:20-22.)

***3** The Third-Party Releases at issue in this case represent the worst of this all-too-common practice, as they have no bounds. The sheer breadth of the releases can only be described as shocking. They release the claims of *at least* hundreds of thousands of potential plaintiffs not involved in the bankruptcy, shielding an incalculable number of individuals associated with Debtors in some form, from every conceivable claim — both federal and state claims — for an unspecified time period stretching back to time immemorial. In doing so, the releases close the courthouse doors to an immeasurable number of potential plaintiffs, while protecting corporate insiders who had no role in the reorganization of the company. Yet, the Bankruptcy Court — acting with its limited Article I powers — extinguished these claims with little or no analysis. In doing so, the Bankruptcy Court exceeded the constitutional limits of its authority as delineated by the Supreme Court in *Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), ignored the mandates of the Fourth Circuit in *Behrmann*, and offended the most fundamental precepts of due process.

Likewise, the Bankruptcy Court erred by approving an overly broad Exculpation Provision that exceeds the bounds of similar provisions approved in other cases. However, unlike the Third-Party Releases that must be voided and severed from the reorganization plan, redrafting can salvage the Exculpation Provision on remand.

Accordingly, this case will be remanded to the Bankruptcy Court for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND[5]

5 Unless otherwise cited, the Court takes these facts from the Bankruptcy Court's Opinion ("Bankr. Confirm. Op.") explaining its reasoning for confirming the Plan, found at pages USTAPP 2837-2876 of the Trustee's Appendix (("USTAPP") (ECF Nos. 35-1 through 35-3)). In citing pages contained in the Trustee's Appendix, the Court will cite to the page numbers following "UST" in the Trustee's Appendix.

Ascena provided specialty retail apparel for women and girls, operating approximately 2,800 stores in the United States, Canada and Puerto Rico, which served more than 12.5 million customers and employed nearly 40,000 employees. Debtors held a portfolio of recognizable brands, including Ann Taylor, LOFT, Lane Bryant, Catherines, Justice, Lou & Grey and Cacique.

Beginning in March 2020, Debtors had to temporarily close all of their retail stores due to the COVID-19 pandemic, and in so doing, furloughed nearly all of their store-level workforce as well as a substantial portion of their corporate workforce. At the time, Debtors had approximately $1.6 billion in secured debt and $700 to $800 million in unsecured debt. (USTAPP 1592, 1599.) Before filing for bankruptcy, Debtors negotiated with many of their secured lenders to arrive at a restructuring support agreement, which formed the basis of the original chapter 11 plan. (USTAPP 1591.) Then, on July 23, 2020, Debtors commenced the Bankruptcy Cases that ultimately were consolidated into Case No. 20bk33113 in the Bankruptcy Court. However, rather than reorganize, Debtors ultimately largely liquidated the businesses, selling substantially all of the assets for a total sale price of $651.8 million. (USTAPP 2259-61, 2262-64, 2265-67, 2320.) Thereafter, they filed an amended chapter 11 plan. (Amended Joint Chapter 11 Plan of Reorganization of Mahwah Bergan Retail Group, Inc. and Its Debtor Affiliates (the "Plan") (USTAPP 2410-2529).)

A. The Plan

The Plan provided that some secured lenders would be paid in full, general unsecured creditors would receive pro rata payments from a trust funded by $7.25 million in cash

and the remaining class of secured claims would receive the remainder of Debtors' cash. (USTAPP 2621-36.) The shareholders would receive nothing and the Plan would extinguish their equity interest. (USTAPP 2634.)

On February 25, 2021, the Bankruptcy Court conducted an evidentiary hearing to consider the Debtors' Plan in addition to the unresolved objections filed by the SEC and the Trustee, as well as those raised by Joel Patterson and Michaella Corporation, the lead plaintiffs in a securities fraud action against Ascena and two of its former executives pending in the United States District Court for the District of New Jersey (the "Securities Litigation"). The Bankruptcy Court overruled the objections and confirmed the Plan and, on February 25, 2021, entered the Confirmation Order confirming the Plan. Then, on March 9, 2021, the Bankruptcy Court entered its Memorandum Opinion to supplement its findings of facts and conclusions of law in the Confirmation Order.

***4** Before confirming the Plan, the Bankruptcy Court had to first approve a Disclosure Statement that would supply creditors and interest holders with information about the proposed plan as a part of the solicitation process. Accordingly, on September 10, 2020, the Bankruptcy Court held a hearing regarding the Disclosure Statement. In response to objections by the SEC, the Bankruptcy Court required Debtors to amend the Disclosure Statement to include language recommended by the SEC, so that the notice would more clearly convey information to non-voting equity holders about the provisions of the Plan, including the inclusion of Third-Party Releases, the right of each non-voting equity holder to opt out of the Third-Party Releases and the process for doing so. Additionally, in response to objections by the Securities Litigation Lead Plaintiffs, the Bankruptcy Court adopted additional steps to effectuate notice of the Disclosure Statement. However, the Bankruptcy Court overruled the Trustee's objections, which closely resembled the issues that he raises in this appeal.

The sale of Debtors' brands for $651 million allowed their brands to continue under new ownership and brought proceeds into Debtors' estate for the benefit of creditors. Debtors' term lenders and the Creditors' Committee endorsed the Plan. The Plan provided for certain payment structures to Debtors' creditors. The unsecured creditors also received a waiver of any avoidance actions that Debtors' estate could bring against them. The holders of equity interest in Ascena were not projected to receive any distribution and, therefore, were deemed to reject the Plan. The Plan also included broad releases that form the basis of this appeal.

B. The Releases Contained in the Plan

As part of the Plan, the major stakeholders negotiated and included extremely broad and convoluted releases and an exculpation provision. Specifically, the Plan provides for the following Debtors' Releases:

> [E]ach Released Party is conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by each and all of the Debtors, the Reorganized Debtors, and their Estates ... from any and all Causes of Action, including any derivative claims, asserted or assertable on behalf of any of the Debtors ... based on or relating to, or in any manner arising from, in whole or in part, the Debtors (including the management, ownership, or operation thereof), the purchase, sale, or rescission of any Security of the Debtors or the Reorganized Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan,... or any other related agreement, or upon any other act, omission, transaction, agreement, event, or other occurrence (in each case, related to any of the foregoing) taking place on or before the Effective Date.

(USTAPP 2460-61.) The Plan further provides for the following Release by holders of Claims or Interests ("Third-Party Releases"):

> Effective as of the Effective Date, each Releasing Party in each case except for Claims arising under, or preserved by, the Plan, Each Releasing Party (other than the Debtors and the Reorganized Debtors), in each case on behalf of itself and its respective successors, assigns, and representatives, and any and all other Entities who may purport to assert any claim, Cause of Action, directly or derivatively, by, through, for, or because of the foregoing entities, is deemed to have released and discharged each Debtor, Reorganized Debtor, and each other Released Party from any and all Causes of Action, whether known or unknown, including any derivative claims, asserted or assertable on behalf of any of the Debtors ... based on or relating to, or in any manner arising from, in whole or in part, the Debtors (including the management, ownership or operation thereof), the purchase, sale, or rescission of any Security of the Debtors or the Reorganized Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual

arrangements between any Debtor and any Released Party, the Debtors' in- or out-of-court restructuring efforts, intercompany transactions, the ABL Credit Agreement, the Term Loan Credit Agreement, the Chapter 11 Cases, the Restructuring Support Agreement and related prepetition transactions, the Backstop Commitment Letter, the Disclosure Statement, the New Corporate Governance Documents, the Exit Facilities, the Plan (including, for the avoidance of doubt, providing any legal opinion requested by any Entity regarding any transaction, contract, instrument, document, or other agreement contemplated by the Plan or the reliance by any Released Party on the Plan or the Confirmation Order in lieu of such legal opinion), the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance or distribution of Securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, or upon any other act, omission, transaction, agreement, event, or other occurrence (in each case, related to any of the foregoing) taking place on or before the Effective Date.

***5** (USTAPP 2461.)

The Plan defines "Releasing Party" broadly to include:

> [C]ollectively, and in each case in its capacity as such: (a) each of the Debtors; (b) the Reorganized Debtors; (c) each of the Consenting Stakeholders; (d) the ABL Agent; (e) the ABL Lenders; (f) Term Loan Agent; (g) the Term Loan Lenders; (h) each of the lenders and administrative agents under the Exit Facilities; (i) the Backstop Parties; (j) the DIP ABL Agent; (k) the DIP ABL Lenders; (1) the DIP Term Agent; (m) the DIP Lenders; (n) all holders of Impaired Claims who voted to accept the Plan; (o) all holders of Impaired Claims who abstained from voting on the Plan or voted to reject the Plan but did not timely opt out of or object to the applicable release; (p) all holders of Unimpaired Claims who did not timely opt out of or object to the applicable release; (q) all holders of Interests; (r) the Plan Administrator; (s) each current and former Affiliate of each Entity in foregoing clause (a) through the following clause (t); (t) each Related Party of each Entity in the foregoing clause (a) through clause (t); and (u) the Creditors' Committee; *provided* that, in each case, an Entity shall not be a Releasing Party if it: (x) elects to opt of the releases contained in the Plan, or (y) timely objects to the releases contained in the Plan and such objection is not resolved before Confirmation; *provided further* that any such Entity shall not receive the Avoidance Action waiver.

(USTAPP 2427.) Thus, Releasing Parties includes all holders of claims and interests who do not timely opt out of or object to the Third-Party Releases.

Likewise, the Plan defines "Released Party" broadly, to include:

> [C]ollectively, each of the following in their capacity as such: (a) each of the Debtors; (b) the Reorganized Debtors; (c) each of the Consenting Stakeholders; (d) the ABL Agent; (e) the ABL Lenders; (f) the Term Loan Agent; (g) the Term Loan Lenders; (h) each of the lenders and administrative agents under the Exit Facilities; (i) the Backstop Parties; (j) the DIP ABL Agent; (k) the DIP ABL Lenders; (1) the DIP Term Agent; (m) the DIP Term Lenders; (n) the Plan Administrator; (o) each current and former Affiliate of Each Entity in the foregoing clause (a) through this clause (p); (p) each Related Party of each Entity in the foregoing clause (a) through this clause (p); and (q) the Creditors' Committee; *provided* that any holder of a Claim or Interest that opts out of the releases shall not be a "Released Party."

(USTAPP 2427.)

In turn, the Plan then defines the term "Related Party" to include:

> [W]ith respect to any person or Entity, each of, and in each case in its capacity as such, current and former directors, managers, officers, investment committee members, special or other committee members, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, managed accounts or funds, predecessors, participants, successors, assigns, subsidiaries, Affiliates, partners, limited partners, general partners, principals, members, management companies, fund advisors or managers, employees, agents, trustees, advisory board members, financial advisors, attorneys (including any other attorneys or professionals retained by any current or former director or manager in his or her capacity as director or manager of an Entity), accountants, investment bankers, consultants, representatives, and other professionals and advisors of such person or Entity, and any such Person's or Entity's respective heirs, executors, estates, and nominees.

***6** (USTAPP 2426.)

Finally, the Plan provides for the following Exculpation Provision:

> [N]o Exculpated Party shall have or incur, and each Exculpated Party is hereby released and exculpated from any Cause of Action or any claim arising from the Petition Date through the Effective Date related to any act or omission in connection with, relating to or arising out of, the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, filing, or termination of the Restructuring Support Agreement and related prepetition transactions, the Disclosure Statement, the Plan, the Exit Facilities, the Backstop Commitment Letter, the DIP Financing Order, Cash Collateral Order, or any Restructuring Document, contract, instrument, release or other agreement or document (including providing any legal opinion requested by any Entity regarding any transaction, contract, instrument, document, or other agreement contemplated by the Plan or the reliance by any Exculpated Party on the Plan or the Confirmation Order in lieu of such legal opinion) created or entered into in connection with the Disclosure Statement or the Plan, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance of Securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, except for claims related to any act or omissions that is determined in a Final Order to have constituted actual fraud, willful misconduct, or gross negligence, but in all respects such Entities shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan. The Exculpated Parties have, and upon consummation of the Plan shall be deemed to have, participated in good faith and in compliance with the applicable laws with regard to the solicitation of, and distribution of, consideration pursuant to the Plan and, therefore, are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or such distributions made pursuant to the Plan.
>
> (USTAPP 2461-62.)

The Plan defines "Exculpated Parties," in turn, to include:

> (a) each of the Debtors; (b) each of the Reorganized Debtors; (c) each of the Consenting Stakeholders; the Creditors' Committee and its members; (e) the Term Loan Agent; (f) each current and former Affiliate of each Entity in clause (a) through the following clause (g); and (g) each Related Party of each Entity in clause (a) through this clause (g).
>
> (USTAPP 2422.)

C. The Notice

Any reasonable review of the Third-Party Releases leads to a conclusion that the releases cover any type of claim that existed or could have been brought against anyone associated with Debtors as of the effective date of the plan. Yet, the Bankruptcy Court (and now Debtors as well) only focused on one claim against Ascena and two of its former corporate officers: a putative class action alleging securities fraud brought against Ascena, former CEO David Jaffe and former CFO Robert Giammatteo. By doing so, the Bankruptcy Court ignored all of the other potential claims (both federal and state claims) released against others covered by the releases, as well as neglected to address any other potential claims against Jaffe and Giammatteo. This tunnel vision proves fatal to any notions of proper notice (as well as consent) in this case.

***7** With its focus on the securities fraud litigation, the Bankruptcy Court approved a disclosure statement for dissemination to creditors and shareholders after a hearing. (USTAPP 0942, 0980-82.) The Bankruptcy Court required a Notice of Non-Voting Status to be sent to both current and former shareholders of Ascena during the Putative Class Period. The Notice of Non-Voting Status informed the recipients that they could opt out of the Third-Party Releases by returning an enclosed form no later than November 15, 2020. The Notice of Non-Voting Status stated in bold and underlined text that, under Debtors' Plan, **"you will be deemed to have released whatever claims you may have against many other people and entities (including company officers and directors) unless you return the enclosed 'Release Opt-Out Form'."** The recipient could return a hardcopy form in the pre-addressed, pre-paid envelope or electronically through an online portal, which would effectuate the opt-out.

The Bankruptcy Court did not order that any notice or opt-out forms be sent to all of the Releasing Parties, including the current and former employees, consultants, accountants or attorneys of Debtors, their affiliates, lenders, creditors or interest holders. Nor did it even examine other possible causes of action released. Prime Clerk — essentially a middleman in this process — bore responsibility for notifying the equity holders. Prime Clerk sent the notice and opt-out forms by first-class mail to all current and former registered

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holders identified by Ascena's transfer agent, American Stock Transfer & Trust Company, LLC ("AST"). As to the beneficial holders, Prime Clerk served the notice and opt-out forms on the list of Nominees with instructions to forward the materials to their beneficial holder clients as of the voting record date and their beneficial holder clients who had purchased or otherwise acquired the equity interest during the Putative Class Period. Additionally, the Bankruptcy Court ordered publication of a general notice of the confirmation hearing in *USA Today* and *The New York Times.* (USTAPP 0985-86.) This notice ran for one day and included the day and time of the hearing, the deadline by which to object to the Plan and that the Plan contained a third-party release. (USTAPP 1559.)

Throughout this process, Debtors sent notice of the Third-Party Releases and the opt-out procedure to roughly 300,000 parties believed to be potential members of the putative class action case pending in the New Jersey district court. The record lacks any information about how many of the parties actually received the notice or any mention of efforts to determine the success of the attempts at notice regarding the securities fraud litigation. As of November 18, 2020, Debtors had received approximately 596 Release Opt-Out Forms — approximately 0.2% of those targeted by the notice.

D. The Securities Litigation

Although not directly related to the procedural or factual history of the bankruptcy proceeding, the Third-Party Releases essentially thwart a lawsuit filed in a separate federal court. In June 2019, the Securities Litigation Lead Plaintiffs filed a federal securities putative class action in the United States District Court for the District of New Jersey.[6] On November 21, 2019, the Securities Litigation Lead Plaintiffs filed a Consolidated Amended Complaint against Debtors and the Individual Defendants, which included Debtors' former CEO (Jaffe) and CFO (Giammatteo). The proposed class included all persons, other than the defendants, who purchased or otherwise acquired Debtors' common stock between December 1, 2015 and May 17, 2017. The Amended Complaint asserts claims under the Securities Exchange Act of 1934 and generally alleges that the defendants engaged in a deceptive scheme and made false and misleading statements and omissions that artificially inflated the price of the common stock during the class period.

6 *Newman v. Ascena Retail Group, Inc., et al.*, 2:19cv13529 (D.N.J.).

***8** The Securities Litigation Lead Plaintiffs objected to the Third-Party Releases, but the Bankruptcy Court overruled their objections. Moreover, they attempted to opt out of the Third-Party Releases on behalf of the putative class, but the Bankruptcy Court denied that request. The Securities Litigation Lead Plaintiffs now appeal those decisions, as the Third-Party Releases in this case has halted the New Jersey case before reaching the class certification stage.

II. PROCEDURAL HISTORY

On March 12, 2021, the Securities Litigation Lead Plaintiffs filed two notices of appeal of the Confirmation Order to this Court.[7] In their appeals, the Securities Litigation Lead Plaintiffs argue that the Bankruptcy Court erred in approving the Third-Party Releases to the extent that the Third-Party Releases relate to the claims asserted in the Securities Litigation. (Opening Br. of Appellants Joel Patterson and Michaella Corp. ("Appellants' Br.") at 7 (ECF No. 30).) The Securities Litigation Lead Plaintiffs further argue that the Bankruptcy Court erred in finding that they lack standing to object to the Third-Party Releases and that they could not opt out on behalf of the class that they seek to represent. (Appellants' Br. at 7-8.)

7 The Securities Litigation Lead Plaintiff's other notice of appeal initiated Case No. 3:21cv166, which the Court then consolidated into this action.

On March 26, 2021, the Trustee filed a notice of appeal of the Confirmation Order to this Court.[8] The Court consolidated the Trustee's appeal with the other pending appeals into this case and set a briefing schedule. (ECF Nos. 11, 15.) In his appeal, the Trustee argues that the Bankruptcy Court erred by approving the Third-Party Releases and Exculpation Provision contained in the Plan and approved by the Confirmation Order. (Br. of Appellee [*sic*] John P. Fitzgerald, III, Acting United States Trustee For Region 4 ("Trustee Br.") at 2 (ECF No. 35).) The Trustee further argues that the Bankruptcy Court erred in the manner in which it conducted the confirmation approval process. (Trustee Br. at 47-50.)

8 The Trustee's notice of appeal initiated Case No. 3:21cv205, which the Court then consolidated into this action.

After filing the appeal, the Trustee filed a motion to stay in the Bankruptcy Court, asking the Bankruptcy Court to stay the application of the Plan's exculpation and release provisions

pending the adjudication of this appeal. On May 13, 2021, the Bankruptcy Court conducted a hearing on the stay motion below. Then, on May 28, 2021, the Bankruptcy Court denied the Trustee's stay motion and entered a Memorandum Opinion ("Bankr. Stay. Op." (USTAPP 2877-2904)) setting forth its findings of facts and conclusions of law.

On June 2, 2021, the Trustee filed a Motion to Stay in this Court (ECF No. 18), in which the Securities Litigation Lead Plaintiffs joined. (ECF No. 28.) Debtors opposed the stay. (ECF No. 27.) On June 28, 2021, the Court denied the Motion to Stay, finding that the Trustee had failed to meet the high burden required for a party seeking a stay. (ECF Nos. 33-34.)

On September 10, 2021, Debtors filed their Response Brief for Appellee Mahwah Bergen Retail Group, Inc. (("Appellee Br.") (ECF No. 43).) On October 11, 2021, the Securities Litigation Lead Plaintiffs and the Trustee each filed a reply brief, respectively. (("Trustee Reply Br.") (ECF No. 45); (Reply Br. of Appellants Joel Patterson and Michaela Corp.) ("Appellants' Reply Br.") (ECF No. 46).) On December 20, 2021, the Court held oral argument on this appeal, rendering it ripe for review. For the reasons stated below, the Court finds that the Bankruptcy Court erred in its approval of the Third-Party Releases and the Exculpation Provision.

III. STANDARD OF REVIEW

***9** **[4]** **[5]** **[6]** **[7]** **[8]** "When reviewing a decision of the bankruptcy court [rendered in a core proceeding], a district court functions as an appellate court and applies the standards of review in federal courts of appeal." *Paramount Home Ent. Inc. v. Cir. City Stores, Inc.*, 445 B.R. 521, 526-27 (E.D. Va. 2010) (citing *In re Webb*, 954 F.2d 1102, 1103-04 (5th Cir. 1992)). Specifically, "[t]he district court reviews the bankruptcy court's legal conclusions *de novo* and its factual findings for clear error." *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Serv. US, LLC*, 578 B.R. 325, 328 (E.D. Va. 2017) (citing *In re Harford Sands Inc.*, 372 F.3d 637, 639 (4th Cir. 2004)). Clear error exists when the district court " 'is left with the definite and firm conviction that a mistake has been committed.' " *Id.* (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)). In cases involving questions of law and fact, the Court reviews findings of fact under the clearly erroneous standard and reviews *de novo* the legal conclusions derived from those facts. *Gilbane Bldg. Co. v. Fed. Rsv. Bank of Richmond, Charlotte Branch*, 80 F.3d 895, 905 (4th Cir. 1996).

[9] Conversely, if the proceeding before the Bankruptcy Court constitutes a non-core proceeding and the parties did not consent to the Bankruptcy Court's jurisdiction, "the district court ... undertake[s] de novo analysis of both the factual findings to which [the appellant] objected and the law." *In re Apex Express Corp.*, 190 F.3d 624, 630 (4th Cir. 1999). Indeed, 28 U.S.C. § 157(c)(1) directs:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

Relatedly, Bankruptcy Rule 8018.1 provides that:

> If, on appeal, a district court determines that the bankruptcy court did not have the power under Article III of the Constitution to enter the judgment, order, or decree appealed from, the district court may treat it as proposed findings of fact and conclusions of law.

Fed. R. Bankr. P. 8018.1. The district court then reviews such proposed findings of fact and conclusions of law *de novo.* Fed. R. Bankr. P. 9033(d).

IV. ANALYSIS

This appeal requires the Court to first determine whether the Bankruptcy Court exceeded its authority under the Constitution when it released the claims included in the Third-Party Releases. This analysis will encompass whether the Releasing Parties consented to the jurisdiction of the Bankruptcy Court. Next, the Court must determine whether the Bankruptcy Court erred in approving the Third-Party Releases under applicable Fourth Circuit standards. This, again, will require an analysis of whether the parties consented to the Third-Party Releases. Then, the Court will address Appellee's argument that the Court must dismiss this appeal on equitable mootness grounds. Finally, the Court will examine the challenge to the Exculpation Provision. However, before addressing the merits of the appeal, the Court will address whether Appellants have standing to press this appeal.

A. Standing to Appeal

1. The United States Trustee's Standing to Appeal

[10] [11] During oral argument, Debtors' counsel conceded that Debtors have no challenge to the standing of the Trustee to appeal. (Arg. Tr. at 20:10-11.) Debtors make this concession for good reason. The Bankruptcy Code gives the United States Trustee standing, providing that the Trustee "may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title." 11 U.S.C. § 307. The Trustee serves the role of "protecting the public interest and ensuring that bankruptcy cases are conducted according to law." *In re Clark*, 927 F.2d 793, 795 (4th Cir. 1991) (quotations omitted). Given their role, the Fourth Circuit has recognized that a trustee could never satisfy the "person aggrieved standard," discussed below, but still has standing to appeal adverse bankruptcy decisions in its role as a "public watchdog" over bankruptcy proceedings. *See id.* at 796 ("[S]tanding to appeal under the Bankruptcy Act as a 'party aggrieved' may arise from a party's official duty to enforce the bankruptcy law in the public interest."). The Fourth Circuit noted that, "had Congress intended to prohibit U.S. trustees from appealing adverse bankruptcy court rulings, it would have done so explicitly." *Id.* Accordingly, the Trustee has standing to appeal to this Court. And, his appeal of the Third-Party Releases encompasses the appeal advanced by the Securities Litigation Lead Plaintiffs. This leaves the Court with no reservations that it can consider the merits of the appeal regardless of whether the Securities Litigation Lead Plaintiffs have standing.

2. The Securities Litigation Lead Plaintiffs' Lack of Standing to Appeal

***10** The Debtors do, however, challenge the Securities Litigation Lead Plaintiffs' standing to prosecute this appeal. (Appellee Br. at 48.) Specifically, Debtors argue that by objecting to the Third-Party Releases, the Securities Litigation Lead Plaintiffs opted out of the release and, therefore, it has no impact on them. The Court agrees and finds that the Securities Litigation Lead Plaintiffs lack standing to prosecute this appeal.

[12] [13] "The test for standing to appeal a bankruptcy court's order to the district court is well-established: the appellant must be a *person aggrieved* by the bankruptcy order." *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Serv. US LLC*, 469 F. Supp. 3d 505, 523 (E.D. Va. 2020) (internal quotations omitted). To satisfy the person aggrieved standard, "the appellant must show that the order diminishes its property, increases its burdens, or impairs its rights." *Id.* (internal quotations omitted).

Here, the Securities Litigation Lead Plaintiffs argue that they were placed in a "death trap" by being forced to choose between either not opting out, and thereby waiving significant rights, or opting out (as they ultimately chose) and risking a challenge to their standing. Although the Court is sympathetic to the conundrum in which they were placed, tough strategic decisions do not confer standing. Moreover, this tough strategic decision resulted in the Third-Party Releases having no binding effect on them as individuals. They may still pursue any and all claims that the Third-Party Releases purport to release. Thus, they cannot complain of any diminution of property, increase in burden or impairment of rights in their individual capacity. Although they claim that the Third-Party Releases inhibit their ability to enlarge their recovery in the Securities Action (Appellants' Reply at 18), they actually seek to enlarge the recovery of the putative class — *i.e.*, more class members obtaining a recovery, leading to a greater overall class recovery — not necessarily their own personal recovery. As such, the Securities Litigation Lead Plaintiffs must pin their hopes of establishing standing on harm suffered in their capacity as putative representatives of the class.

[14] [15] [16] However, the Securities Litigation Lead Plaintiffs' capacity as putative representatives of a class in the District of New Jersey does not confer standing to appeal in this Court. The Securities Litigation Lead Plaintiffs claim that they have standing "because they are fiduciaries for the Class, have rights closely aligned with those of Class members, and are the court-appointed advocate for Class members' rights." (Appellants' Reply at 19.) However, this argument puts too much weight on their role as putative class representatives. As lead plaintiffs in a *putative* class action, the Securities Litigation Lead Plaintiffs have no special status; consequently, they must establish individualized harm. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 165, 136 S.Ct. 663, 193 L.Ed.2d 571 (2016) ("While a class lacks independent status until certified,... a would-be class representative with a live claim of her own must be accorded a

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fair opportunity to show that certification is warranted."). As the Fourth Circuit has noted, "[n]ot every effort to represent a class will succeed; the representative is an agent only if the class is certified." *Gentry v. Siegel*, 668 F.3d 83, 90 (4th Cir. 2012). Accordingly, the Securities Litigation Lead Plaintiffs' argument that their representative capacity confers standing on them relies on the speculation that they will eventually represent a certified class. But, "[s]peculation and conjecture do not give rise to bankruptcy appellate standing." *Mar-Bow*, 469 F. Supp. 3d at 532.

***11 [17]** Two appellate decisions support this conclusion. In *Gentry*, the Fourth Circuit concluded that the named plaintiffs in putative classes lacked standing to challenge the notice procedures employed by the bankruptcy court. 668 F.3d at 95. The plaintiffs had received the actual notice, such that they could not challenge the notice on behalf of themselves, and the Fourth Circuit concluded that they did "not have standing to assert the due process rights of others who are not parties." *Id.* Similarly, here, the Securities Plaintiffs cannot challenge on their own behalf the Third-Party Releases that no longer (due to the opt out) release their own individual claims, and they lack standing to challenge the Third-Party Releases on behalf of others who are not parties.

Likewise, the Second Circuit encountered a nearly identical circumstance to the facts here in *In re Dynegy, Inc.*, 770 F.3d 1064 (2d Cir. 2014). There, a named plaintiff in a putative securities class action sought to challenge the third-party releases in a confirmation plan that would release non-debtor officers. *Id.* at 1067. The Second Circuit agreed with the district court that the named plaintiff lacked standing to personally challenge the plan, because he had opted out of the release. *Id.* Likewise, the Second Circuit found that he lacked standing to opt out of or object to the releases on behalf of the putative class, because the class had not been certified in either the trial court or the bankruptcy court. *Id.* at 1068-70. The same facts exist here, and the Court reaches the same conclusion.

Accordingly, the Court finds that the Securities Litigation Lead Plaintiffs lack standing to prosecute this appeal.[9] Again, however, the Court stresses that the Trustee has standing to raise the same challenges to the Third-Party Releases as the Securities Litigation Lead Plaintiffs have raised.

9 The Securities Litigation Lead Plaintiffs have raised additional issues in this appeal. Specifically, they claim that the Bankruptcy Court erred in finding that they lacked the authority to opt out on behalf of the putative class and in declining to certify the class for the limited purpose of opting out on behalf of the class. (Appellants' Br. at 82-85.) However, the Court's ultimate conclusion that the Third-Party Releases are unenforceable renders moot the question of whether the Bankruptcy Court should have provided some mechanism to opt out of the class from the Third-Party Releases.

B. The Constitutional Implications of the Third-Party Releases

In assessing whether the Bankruptcy Court erred in approving the Third-Party Releases, the Court will begin with a discussion of the jurisdiction of bankruptcy courts generally and whether they have the constitutional power to approve such releases. The Court will then examine whether the Releasing Parties consented to adjudication of their claims by an Article I court. The Court answers both questions in the negative.

1. The Limitations of the Jurisdiction of the Bankruptcy Courts

[18] [19] Federal district courts exercise "original and exclusive jurisdiction of all cases" under the Bankruptcy Code. 28 U.S.C. § 1334(a). District courts may refer all bankruptcy matters to bankruptcy judges, which this District has done as a matter of course since 1984. 28 U.S.C. § 157(a); *see In the Matter of: The Administration of the Bankruptcy Courts and Reference of Bankruptcy Cases and Proceedings to the Bankruptcy Judges of this District* (E.D. Va. Aug. 15, 1984) (Standing Order referring all bankruptcy matters to Bankruptcy Court). District courts retain the authority to withdraw, in whole or in part, any case or proceeding that they had referred. *See Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 481 (4th Cir. 2015) (citing 28 U.S.C. § 157(d)). "In short, while the district courts were given jurisdiction over bankruptcy cases, Congress also delegated to the bankruptcy courts, 'as judicial officers of the district courts,' ... adjudicatory authority, subject to the district courts' supervision as particularized in § 157 and the limits imposed by the Constitution." *Id.* (quoting *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 679, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015)). This case implicates those limits imposed by Article III of the Constitution.

***12 [20] [21]** Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from

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time to time ordain and establish." Congress has established 94 District Courts and 13 Courts of Appeals, "composed of judges who enjoy the protections of Article III: life tenure and pay that cannot be diminished." *Wellness Int'l*, 575 U.S. at 668, 135 S.Ct. 1932. The Supreme Court has long recognized that "Congress may not withdraw from" the Article III courts "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Stern*, 564 U.S. at 484, 131 S.Ct. 2594. This limitation finds its basis in the protections of life tenure and against salary diminution that Article III provides, which "help to ensure the integrity and independence of the Judiciary." *Wellness Int'l*, 575 U.S. at 668, 135 S.Ct. 1932. In authorizing the appointment of bankruptcy judges (who do not enjoy the Article III protections), Congress has attempted to align the responsibilities of bankruptcy judges with the boundaries set by the Constitution. However, as discussed below, the Supreme Court has found that Congress violated Article III in authorizing bankruptcy judges to decide certain claims for which litigants enjoy an entitlement to an Article III adjudication.

2. *Northern Pipeline* and Congress' Reaction

In *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, the Supreme Court considered the constitutionality of the Bankruptcy Reform Act enacted by Congress in 1978, and specifically whether the bankruptcy court had the judicial authority to adjudicate a state-law contract claim filed by the debtor against a third party. 458 U.S. 50, 54, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). The Bankruptcy Reform Act gave the newly created bankruptcy courts power "much broader than that exercised under the former" system and enabled bankruptcy courts to decide "all civil proceedings arising under title 11 or arising in or related to cases under title 11." *Id.* at 55, 102 S.Ct. 2858. Thus, Congress vested the bankruptcy judges with most of the "powers of a court of equity, law, and admiralty" without affording them the protections of Article III. *Id.* Because the Bankruptcy Reform Act vested "the essential attributes of the judicial power" in a non-Article III adjunct, the Supreme Court held that "[s]uch a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts." *Id.* at 87, 102 S.Ct. 2858. Thus, it found the "broad grant of jurisdiction to the bankruptcy courts" unconstitutional and concluded that the bankruptcy court lacked jurisdiction to adjudicate the state-law contract claim against an entity not otherwise part of the bankruptcy proceedings. *Id.* at 69-72, 87, 102 S.Ct. 2858.

[22] [23] [24] Following the decision in *Northern Pipeline*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Act"), revising the statutes governing bankruptcy judges and their jurisdiction. Pub. L. No. 98-353, 98 Stat. 333. Under the 1984 Act, "[t]he manner in which a bankruptcy judge may act ... depends on the type of proceeding involved." *Stern*, 564 U.S. at 473, 131 S.Ct. 2594. "Congress has divided bankruptcy proceedings into three categories: (1) those that arise under title 11, (2) those that arise in a title 11 case, and (3) those that are related to a case under title 11." *Chesapeake Tr. v. Chesapeake Bay Enters., Inc.*, 2014 WL 202028, at *2 (E.D. Va. Jan. 17, 2014) (citing *Stern*, 564 U.S. at 473, 131 S.Ct. 2594). The first two categories constitute "core proceedings" such that a bankruptcy judge has the statutory authority to "hear and enter final judgments." *Stern*, 564 U.S. at 474, 131 S.Ct. 2594. With respect to the third category, non-core proceedings, a bankruptcy judge may hear a "proceeding that is not a core proceeding but that is otherwise related to a case under title 11," but, unless the parties consent, the bankruptcy judge cannot enter final judgments and instead must submit "proposed findings of fact and conclusions of law to the district court." 28 U.S.C. § 157(c)(1).

Section 157 sets forth a non-exhaustive list of examples of core proceedings. The list includes, for example, "the allowance or disallowance of claims against the estate," and "counterclaims by the estate against persons filing claims against the estate." 28 U.S.C. § 157(b)(2)(B)-(C). A party may appeal the final judgment of a bankruptcy court to the district court, which reviews it under traditional appellate standards. 28 U.S.C. § 158(a); Fed. R. Bankr. Proc. 8013. However, when a bankruptcy judge determines that a "proceeding ... is not a core proceeding but ... is otherwise related to a case under title 11," the bankruptcy judge may only "submit proposed findings of fact and conclusions of law to the district court," which then reviews de novo any matter to which a party objects. 28 U.S.C. § 157(c)(1).

3. *Stern v. Marshall*

***13** The Supreme Court took up the constitutionality of the 1984 Act in *Stern v. Marshall*. 564 U.S. at 471, 131 S.Ct. 2594. There, the Court faced the issue of whether the bankruptcy court had jurisdiction to enter a final judgment on a counterclaim brought by the debtor against an individual who had filed a proof of claim in the bankruptcy action.

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Id. The Court noted that the debtor's counterclaim plainly constituted a "core" proceeding under the statute, thus giving the bankruptcy judge the *statutory* authority to enter a final judgment on the claim. *Id.* at 475, 131 S.Ct. 2594. However, the Court concluded that Article III of the Constitution did not permit the bankruptcy court to enter final judgment on the counterclaim. *Id.* at 482, 131 S.Ct. 2594. The counterclaim "[was] a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy." *Id.* at 487, 131 S.Ct. 2594. The Supreme Court reaffirmed that "Congress may not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case ...." *Id.* at 499, 131 S.Ct. 2594. Instead, "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* The Court found that the bankruptcy court had gone beyond constitutional limits when it "exercised the 'judicial Power of the United States' in purporting to resolve and enter final judgment on a state common law claim." *Stern*, 564 U.S. at 487, 131 S.Ct. 2594. Accordingly, the bankruptcy court lacked the constitutional authority to adjudicate the claim. *Id.* at 503, 131 S.Ct. 2594.

[25] In sum, the Supreme Court mandates that bankruptcy courts only have the constitutional authority to adjudicate core claims, even if Congress has granted them the statutory authority to resolve other claims. Naturally, this constitutional limitation applies to a bankruptcy court's authority to grant releases. *See In re Millennium Lab Holdings II, LLC*, 945 F.3d at 137 (holding that an approval of releases by a bankruptcy court is only "permissible if it involves a matter integral to the restructuring of the debtor-creditor relationship"); *In re Purdue Pharma, L.P.*, 2021 WL 5979108, at *40 ("Nothing in *Stern* or any other case suggests that a party otherwise entitled to have a matter adjudicated by an Article III court forfeits that constitutional right if the matter is disposed of as part of a plan of reorganization in bankruptcy. Were it otherwise, then parties could manufacture a bankruptcy court's *Stern* authority simply by inserting the resolution of some otherwise non-core matter into a plan.").

Here, by granting the Third-Party Releases, the Bankruptcy Court took jurisdiction over and extinguished the liability of an extraordinarily vast range of claims held by an immeasurable number of individuals against a broad range of potential defendants. However, before doing so, the Bankruptcy Court took no steps to determine if it had the power to extinguish the liability on any particular claim. Indeed, the only extinguished claims that the Bankruptcy Court considered were the securities fraud claims against the Individual Defendants (Jaffe and Giammatteo), and it ignored all of the other potential claims that it terminated by approving the releases. In so doing, the Bankruptcy Court failed to take the proper steps to ensure that it had the authority to grant the releases.

4. Classification of Core v. Non-Core

[26] [27] [28] [29] [30] A bankruptcy court has the responsibility to properly classify the claims before it based on the content of the claims and adjudicate them according to those classifications. "It is the bankruptcy court's responsibility to determine whether each claim before it is core or non-core." *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 33, 134 S.Ct. 2165, 189 L.Ed.2d 83 (2014). "A cause of action is constitutionally core when it 'stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' " *Allied Title Lending, LLC v. Taylor*, 420 F. Supp. 3d 436, 448 (E.D. Va. 2019) (quoting *Stern*, 564 U.S. at 499, 131 S.Ct. 2594). A bankruptcy estate's claim against a creditor "would necessarily be resolved in the claims allowance process when it shares common questions of fact and law with the creditor's claims and when it seeks to directly reduce or recoup the amount claimed." *Id.* (internal quotations omitted). A claim can become core when it "become[s] integral to the restructuring of the debtor-creditor relationship." *Stern*, 564 U.S. at 497, 131 S.Ct. 2594. Conversely, claims by the bankruptcy estate that seek to "augment the estate" but do not "directly modify the amount claimed" do not qualify as a core claim "to be resolved in ruling on the proof of claim." *Allied Title Lending, LLC*, 420 F. Supp. 3d at 448.

***14** **[31]** When confronted with a so-called *Stern* claim — "a claim designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter," — the bankruptcy court should proceed with the claim as it would for non-core claims. *Exec. Benefits Ins. Agency*, 573 U.S. at 35-36, 134 S.Ct. 2165. That requires the bankruptcy court to "determine whether the claim may be adjudicated as a non-core claim — specifically, whether it is 'not a core proceeding' but is 'otherwise related to a case under title 11.' " *Id.* at 36, 134 S.Ct. 2165. If it satisfies the "otherwise related to a case under title 11" as required by 28 U.S.C. § 157(c)(1), then the bankruptcy court "should hear the proceeding and submit proposed findings of

fact and conclusions of law to the district court for *de novo* review and entry of judgment." *Id.* at 36, 134 S.Ct. 2165. Of course, if the claim has no relation to a case under title 11, then the bankruptcy court lacks any authority to act on it.

[32] *Stern* teaches that courts should focus on the content of the proceeding rather than the category of the proceeding when determining whether a bankruptcy court has acted within its constitutional authority. The *Stern* Court explained that counterclaims that do not "stem[ ] from the bankruptcy itself or would [not] necessarily be resolved in the claims allowance process" must be decided by Article III courts. *Stern*, 564 U.S. at 497, 131 S.Ct. 2594. The Court never declared that all counterclaims by a debtor fall outside of a bankruptcy court's jurisdiction. Instead, the Court looked to the content of the debtor's counterclaim and compared the factual and legal determinations necessary to resolve the counterclaim to those necessary to resolve the original claim. *Id.* at 498-99, 131 S.Ct. 2594. It did so to assess whether the counterclaim would necessarily be resolved in the claims-allowance process. *Id.* In doing so, the Court focused on the basis for the counterclaim to determine whether it stemmed from the bankruptcy itself. *Id.* Given *Stern's* focus on the content of the claim over its categorization, courts cannot bypass the constitutional limitations simply by categorizing a widely varying swath of claims as "core" and then assuming jurisdiction over them.

a. The Bankruptcy Court Failed to Identify Whether it had Jurisdiction Over the Claims That it Released.

[33] Here, the Bankruptcy Court engaged in none of the content-based analysis demanded by *Stern.* The Bankruptcy Court did not parse the content of the claims that it purported to release to determine if each claim constituted a core claim, a non-core claim or a claim unrelated to the bankruptcy case. The sheer breadth of the Third-Party Releases renders this a herculean undertaking and underscores the constitutional questionability of the Bankruptcy Court's actions. However, the enormity of the task does not absolve the Bankruptcy Court of its responsibility to properly identify the content of the claims before it and ensure that it has jurisdiction to rule on each of them. In fact, because of the constitutional implications of extinguishing these claims, this undertaking carries even greater import. As an appellate court, this Court will not speculate as to the claims released and then parse each purportedly released claim to determine whether the Bankruptcy Court had the power to extinguish that claim — that was the responsibility of the Bankruptcy Court. *In re Continental Airlines*, 203 F.3d 203, 214 (3d Cir. 2000) ("The hallmarks of permissible non-consensual releases — fairness, necessity to the reorganization, and specific factual findings to support these conclusions — are all absent here."). The sheer breadth of the releases and the lack of findings with respect to each released claim renders appellate review virtually impossible and speaks to the impropriety of the approval of the Third-Party Releases.

b. The Bankruptcy Court Lacks Jurisdiction Over Many Released Claims.

***15** **[34]** **[35]** Although the Court cannot determine precisely which Released Claims the Bankruptcy Court could have adjudicated, it takes only a cursory review of the Third-Party Releases and the Releasing Parties to find released claims that the Bankruptcy Court lacked the authority to adjudicate. The universe of released claims includes claims between non-debtors which may have no connection to the property of Mahwah's bankruptcy estate or the administration of the Bankruptcy Proceeding. For example, the Third-Party Release would bar securities claims, such as those brought by the Securities Plaintiffs, against former directors and officers of Mahwah, even if the claims arose before Mahwah filed for bankruptcy and those directors and officers had no involvement in the Bankruptcy Proceeding. And it bears noting that "federal courts disfavor indemnity for federal securities law violations, calling into question the enforceability of these obligations." *In re Continental Airlines*, 203 F.3d at 216 (citing cases). Thus, the only type of released claim that the Bankruptcy Court actually considered finds antipathy in the case law.

The Trustee points out numerous other potential claims that the Bankruptcy Court released. (Trustee Br. at 33.) These include hostile work environment claims by a former Mahwah employee against another Mahwah employee; negligence by a Mahwah employee against a consultant hired by Mahwah to counsel employees on retirement plans; slander by a former employee of Mahwah's term lenders against a current employee of the lender for remarks that the former employee mishandled the lender's deal with Mahwah; a breach of contract action by an accountant of one of Mahwah's loan agents against the agent for failure to pay for the work that the account performed on the agent's transaction with Mahwah; and malpractice by an affiliate of Mahwah against its law firm for the firm's

simultaneous representation of both the affiliate and Mahwah when their interests diverged. (Trustee Br. at 33.) None of these claims appear even related — much less integral — to the restructuring of the debtor-creditor relationship, such that the Bankruptcy Court could adjudicate them without running afoul of the Constitution. And, given the breadth of the releases, the above examples likely represent only a fraction of the purportedly released claims that lack an integral connection to the bankruptcy process, such that the Bankruptcy Court lacked the power to release them.

5. The Implication of *Stern's* Constitutional Analysis on the Released Claims

Debtors' argument that the Third-Party Releases do not implicate *Stern's* constitutional limitations fails. Essentially, Debtors ask the Court not to parse the released claims in any way and, instead, find that the Bankruptcy Court had constitutional authority based on the inclusion of the Releases in the Plan. (Appellee Br. at 57-59.) This argument would require the Court to conclude that only the Plan Confirmation Order constitutes a judgment and that jurisdiction over confirmation proceedings cures any jurisdictional defects within those proceedings. The Court concludes neither.

a. The Bankruptcy Court Must Have Jurisdiction Over a Claim to Release it.

[36] First, the releases here implicate the constitutional limits on the Bankruptcy Court's ability to adjudicate claims, even if they do not constitute a judgment following a hearing on the merits of the claim. Once the Plan became final, the provisions therein, including the Third-Party Releases, became *res judicata* for subsequent parties trying to bring the claims. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009); *In re Purdue Pharma, L.P.*, 2021 WL 5979108, at *41 ("Nor is there any doubt that the entry of an order releasing a claim has former adjudication effects, which is a key attribute of a final judgment. The Supreme Court has twice held that non-consensual third-party releases confirmed by final order are entitled to *res judicata* claim preclusion barring any subsequent action bringing a released claim ...."). Likewise, when the Bankruptcy Court declared the releases consensual settlements of the claims, they became final judgments on the merits for purposes of further litigation. *See* *Larken, Inc. v. Wray*, 189 F.3d 729, 732 (8th Cir. 1999) (stating that a voluntary dismissal with prejudice "constitutes a final judgment on the merits"); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987) (holding that order confirming plan that released creditor's claims against guarantor was a final judgment on the merits of those claims); *see also* *In re Digital Impact, Inc.*, 223 B.R. 1, 12, 13 n.6 (Bankr. N.D. Okla. 1998) ("A release, or permanent injunction, contained in a confirmed plan ... has the effect of a judgment — a judgment against the claimant and in favor of the non-debtor, accomplished without due process.").

***16** At bottom, the Bankruptcy Court extinguished the Released Claims, which amounts to adjudication of the claim for *Stern* purposes. *In re Purdue Pharma, L.P.*, 2021 WL 5979108, at *41 ("There really can be no dispute that the release of a claim 'finally determines' that claim. It does so by extinguishing the claim, so that it cannot be adjudicated on the merits. A nonconsensual third-party release is essentially a final judgment against the claimant, in favor of the non-debtor, entered 'without any hearing on the merits.' "). To claim that the Bankruptcy Court can fully extinguish these claims based solely on their inclusion in the Plan — without any hearing on them or any findings about them —amounts to arguing that courts need not have the authority to extinguish claims so long as they provide no procedural safeguards in extinguishing the claims. Obviously, this cannot be.

Likewise, the argument that the Bankruptcy Court possesses the power to extinguish these claims based only on its jurisdiction over confirmation proceedings misses the mark. True, bankruptcy courts have jurisdiction over Chapter 11 proceedings under 28 U.S.C. § 157(a), and plan confirmation proceedings constitute core proceedings that the bankruptcy court may adjudicate on a final basis. 28 U.S.C. § 157(b)(2)(L). Further, 11 U.S.C. § 105(a) permits the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." But, this grant of authority has limits.

[37] **[38]** Although § 105 permits a bankruptcy court to issue orders necessary or appropriate to carry out the provisions of the Bankruptcy Code, that section does not provide an independent source of federal subject matter jurisdiction. *In re Combustion Engineering, Inc.*, 391 F.3d 190, 224-25 (3d Cir. 2004) ("But as the statute makes clear, § 105 does not provide an independent source of federal subject matter jurisdiction."). Thus, independent statutory basis must exist for the bankruptcy court to exercise jurisdiction over the claims. *See* *In re Johns-Manville Corp.*, 801 F.2d 60, 63 (2d Cir. 1986) ("Section 105(a) does not, however, broaden

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the bankruptcy court's jurisdiction, which must be established separately ....").

[39] [40] [41] [42] Without an independent source of jurisdiction, a bankruptcy court must rely on its own jurisdiction, which comes in the form of *in rem* jurisdiction over the debtor's property and the disposition of that property. *See* *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 362, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006) ("Bankruptcy jurisdiction, at its core, is *in rem.*"). It is certainly true "that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549, 110 S.Ct. 2139, 109 L.Ed.2d 580 (1990). Yet, third-party claims belong to third parties, not the debtor's estate. "As a general rule, a bankruptcy court has no power to say what happens to property that belongs to a third party, even if that third party is a creditor or otherwise is a party in interest." *In re Aegean Marine Petroleum Network, Inc.*, 599 B.R. 717, 723 (Bankr. S.D.N.Y. 2019) (*citing* *Callaway v. Benton*, 336 U.S. 132, 136-41, 69 S.Ct. 435, 93 L.Ed. 553 (1949)).

[43] Similarly, although a bankruptcy court's *in rem* jurisdiction gives it authority over claims against the estate, it has no *in rem* jurisdiction over third-party claims not against the estate or property of the estate. *See* *In re Johns-Manville Corp.*, 600 F.3d at 153-54 (holding that a bankruptcy court did not have *in rem* jurisdiction over a third party's direct claims against a non-debtor insurer). Additionally, bankruptcy courts have subject matter jurisdiction over "civil proceedings" that are "related to" a bankruptcy case. 28 U.S.C. §§ 157, 1334. However, the Third-Party Releases here purport to release claims that may not yet constitute any pending civil proceeding.

***17** Additionally, many of the claims lack any relation to the bankruptcy case, even affording "related to" jurisdiction the most liberal reading. Debtors' argument that bankruptcy courts must be able to confirm plans even if those plans affect other cases has it backwards. (Appellee's Br. at 59.) The Plan confirmation does not merely have a "tangential effect" on the Securities Litigation and other claims. Rather, the Plan has the ultimate effect — extinguishment — on the claims despite having — at most — a tangential effect on the bankruptcy estate. Therefore, the bankruptcy court has no independent authority on which to rely.

[44] Indeed, as discussed above, *Stern* and its progeny stand for the proposition that Congress cannot enlarge the subject matter jurisdiction of the bankruptcy courts beyond permissible constitutional limits. Thus, Congress could not eviscerate the limits of Article III jurisdiction by enacting § 105. Article III simply does not allow third-party non-debtors to bootstrap any and all of their disputes into a bankruptcy case to obtain relief. *See* *In re Midway Gold US, Inc.*, 575 B.R. 475, 519 (Bankr. D. Colo. 2017) ("If proceedings over which the Court has no independent jurisdiction could be metamorphisized into proceedings within the Court's jurisdiction by simply by including their release in a proposed plan, this [Bankruptcy] Court could acquire infinite jurisdiction.") (citations omitted). Moreover, the Court does not view releasing a claim held by a third-party non-debtor against another third-party non-debtor as an "appropriate" order to carry out the Bankruptcy Code. And certainly, given many of the released claims' complete attenuation to the bankruptcy estate and proceeding, these releases cannot be considered "necessary." Any finding by the Bankruptcy Court otherwise constitutes a clear error.

b. The Parties did not Consent to Article I Adjudication of Non-Core Claims.

The Debtors further argue that the Third-Party Releases do not implicate the jurisdictional constraints of *Stern*, because the parties consented to the Releases. (Appellee Br. at 55-56.) This argument ignores the standard that the Supreme Court has set for consenting to bankruptcy court jurisdiction. Likewise, the Bankruptcy Court ignored the standard that must be met to find that a party has consented to its jurisdiction. As discussed below, the record contains no evidence that could meet the Supreme Court's standard for consent to non-Article III jurisdiction.

i. The Supreme Court's Standard for Consent

Following *Stern*, the Supreme Court took up the issue of whether a party could consent to having the bankruptcy court decide a *Stern* claim in *Wellness International Network, Ltd. v. Sharif*, 575 U.S. 665, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015). The Court first answered the question of whether a litigant could waive the right to an Article III court, concluding that "allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts." *Id.* at 679, 135 S.Ct. 1932. In reaching this decision, the Court relied on the fact that "*Stern* — like its predecessor, *Northern Pipeline* — turned on

the fact that the litigant did not truly consent to resolution of the claim against it in a non-Article III forum." *Id.* at 681, 135 S.Ct. 1932 (quotations omitted).

However, the Court next determined what constituted valid consent to adjudication by a bankruptcy court. The Court rejected the argument that "such consent must be express." *Id.* at 683, 135 S.Ct. 1932. Instead, it held that "[t]he implied consent standard articulated in *Roell* supplies the appropriate rule for adjudications by bankruptcy courts under § 157." *Id.* at 684, 135 S.Ct. 1932. Therefore, "the key inquiry is whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator." *Id.* at 685, 135 S.Ct. 1932 (cleaned up). An understanding of the standard in *Wellness* necessitates a brief review of *Roell v. Withrow*, 538 U.S. 580, 123 S.Ct. 1696, 155 L.Ed.2d 775 (2003).

***18** In *Roell*, the Supreme Court held that consent to proceedings before a magistrate judge under 28 U.S.C. § 636(c) need not be express and instead can be inferred from a party's conduct during litigation. 538 U.S. at 582, 123 S.Ct. 1696. In *Roell*, the plaintiff agreed orally and in writing to having the magistrate judge preside over the entire case. *Id.* at 582-83, 123 S.Ct. 1696. The district judge then referred the case to the magistrate judge for final disposition, but with the caveat that the defendants would have the opportunity to consent and the referral order would be vacated if they did not consent. *Id.* at 583, 123 S.Ct. 1696. The clerk then sent the referral order to the defendants with instructions to submit a separate pleading indicating whether they consented or not. *Id.* One defendant consented to magistrate judge jurisdiction, but two others did not take a position at all. *Id.* The magistrate judge then proceeded to preside over a jury trial all the way to a verdict and judgment. *Id.* On at least three different instances, the parties did nothing when the magistrate judge stated that the parties had consented to her jurisdiction. *Id.* at 584, n.1, 123 S.Ct. 1696. Following the judgment, the defendants submitted their consent in writing, but the district court and the Fifth Circuit Court of Appeals nevertheless vacated the judgment, ruling that consent had to be express under § 636(c). *Id.* at 585, 123 S.Ct. 1696.

The Supreme Court disagreed that consent to magistrate judge jurisdiction had to be expressly written. *Id.* at 586, 123 S.Ct. 1696. Instead, it found that the parties had "clearly implied their consent by their decision to appear before the Magistrate Judge, without expressing any reservation, after being notified of their right to refuse and after being told that she intended to exercise case-dispositive authority." *Id.* The Court noted that allowing the conduct of the parties to determine consent "checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority." *Id.* at 590, 123 S.Ct. 1696. Accordingly, it concluded that "the better rule is to accept implied consent where, as here, the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge." *Id.*

In *Wellness*, the Supreme Court found that applying the same standard in the bankruptcy context possessed the same pragmatic virtues that motivated its adoption in the magistrate judge concept. 575 U.S. at 684-85, 135 S.Ct. 1932. However, the Court made clear that this standard has teeth: "[i]t bears emphasizing, however, that a litigant's consent — whether express or implied — must still be knowing and voluntary." *Id.* at 685, 135 S.Ct. 1932 (citing *Roell*, 538 U.S. at 587, n.5, 123 S.Ct. 1696 ("notification of the right to refuse" adjudication by a non-Article III court "is a prerequisite to any inference of consent")).

ii. The Bankruptcy Court Incorrect Application of the Standard for Consent

[45] Applying this standard here, it becomes clear that the Bankruptcy Court erred as a matter of law in finding that failure to return the opt-out form could constitute consent to Article I adjudication. The Bankruptcy Court relied on the fact that the Releasing Parties received notice and an opportunity to opt out of the Third-Party Releases as the basis for consent. (Bankr. Confirm. Op. at 31-33.) But, the Bankruptcy Court made this determination in the context of whether the Releasing Parties consented to the Third-Party Releases, not the threshold question of whether they consented to having the Bankruptcy Court adjudicate the released claims.[10] This will not suffice to support a finding of consent to Article I adjudication for all of the Releasing Parties.

10 As the Bankruptcy Court made no attempt to discern whether the Releasing Parties consented to it adjudicating their non-core claims, the Court must assume that it would have relied on the same manner of consent that it relied on in finding that the Releasing Parties consented to the Third-Party Releases.

[46] *Wellness* and *Roell* make clear that courts can discern the implication of consent to a non-Article III court based on a party's *actions.* However, they do not permit a finding of consent based on *inaction.* In finding consent to Article I adjudication, *Roell* relied on the litigation conduct of the parties and the fact that they appeared before the magistrate judge to try their case after notification of the referral. Indeed, the Court even cited the definition of an appearance as an "overt act by which a party submits himself to the court's jurisdiction." *Roell*, 538 U.S. at 586, n.3, 123 S.Ct. 1696. This reliance on the overt act of appearing in the non-Article III court demonstrates the importance of actions over inactions. Likewise, *Wellness* cited to *Roell* for the proposition that "actions rather than words" can support a finding of consent and that "the key inquiry is whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator." *Wellness Int'l*, 575 U.S. at 684-85, 135 S.Ct. 1932 (cleaned up). Importantly, any consent "must still be knowing and voluntary." *Id.* at 685, 135 S.Ct. 1932.

***19** **[47]** Here, the Court cannot discern any actions undertaken by the Releasing Parties to support a finding that they knowingly and voluntarily consented to Article I adjudication of the claims that they released. Despite the enormous breadth of Releasing Parties deemed to have released claims, the Bankruptcy Court undertook no analysis to determine which Releasing Parties (if any) had consented to bankruptcy jurisdiction and which had not. Instead, as previously noted, the Bankruptcy Court took a myopic approach to the Releasing Parties, focusing only on the putative securities fraud class action members, ignoring all other Releasing Parties. And, because the Bankruptcy Court failed to parse the core claims from non-core claims in the Third-Party Releases, the Bankruptcy Court took no steps to determine which Releasing Parties needed to consent to Article I adjudication of their claims before the Bankruptcy Court could act on them. Rather, the Bankruptcy Court merely relied on the fact that a document was mailed out with the goal of reaching thousands of individuals. Then, without regard to whether those individuals received the document, and without regard as to whether those individuals took any overt actions in response to the document, the Bankruptcy Court determined that they had surrendered their constitutional right to an Article III court.

Again, the Bankruptcy Court ignored a wide swath of those releasing claims and, even for those targeted with the notice, the notice contained no information about agreeing to Article I adjudication. Indeed, counsel for Debtors conceded during oral argument that the distributed releases made no mention of agreeing to adjudication of their claims by an Article I court. (Arg. Tr. at 41:10-11.) In any event, the record is silent as to how many of the targeted shareholders actually received the notice. Yet, hoping (without proving) that someone received a deficient document — without any further action from that person — does not meet the standard for knowing and voluntary consent to adjudication of a non-core claim by a bankruptcy court, as set forth by the Supreme Court in *Wellness.*

Additionally, the Supreme Court in both *Wellness* and *Roell* indicated that the implied consent standard that it set forth had its basis in the elimination of gamesmanship. *See, e.g.*, *Wellness Int'l*, 575 U.S. at 685, 135 S.Ct. 1932 (noting that "checking gamesmanship" motivated the adoption of the consent standard). Yet, allowing inaction to imply consent encourages the very gamesmanship that the Supreme Court intended to check. That is, non-debtors could tuck releases unrelated to a bankruptcy proceeding into bankruptcy plans, then secrete an opt-out opportunity into a convoluted legal document, send the document to non-parties previously unaware of the bankruptcy proceeding and use their non-response to extinguish all of their claims. This type of gamesmanship, aimed at extinguishing claims of unwitting individuals and providing a golden parachute to the parties drafting the plan, cannot be tolerated.

In words that apply equally well here, Judge McMahon wrote the following in *In re Purdue Pharma, L.P.*:

> The third-party claims at issue neither stem from [the debtor's] bankruptcy nor can they be resolved in the claims allowance process. Yet those claims are being finally disposed of pursuant to the Plan; they are being released and extinguished, without the claimants' consent and without any payment, and the claimants are being enjoined from prosecuting them. Debtors and their affiliated non-debtor parties cannot manufacture constitutional authority to resolve a non-core claim by the artifice of including a release of that claim in a plan of reorganization.

2021 WL 5979108, at *41. The Bankruptcy Court here exceeded its constitutional authority without any inquiry or factfinding. Accordingly, the Bankruptcy Court erred in adjudicating the *Stern* claims without the knowing and voluntary consent of the Releasing Parties.

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6. Consequence of a *Stern* Violation

[48] **[49]** Having determined that the Bankruptcy Court violated *Stern* by exceeding its authority, the Court must vacate the Confirmation Order and treat it as a Report and Recommendation with proposed findings of fact and conclusions of law, which the Court reviews *de novo*. *Purdue Pharma, L.P.*, 2021 WL 5979108, at *42; 28 U.S.C. § 157(c)(1); Bankruptcy Rule 8018.1. Here, unfortunately, the Bankruptcy Court's opinion lacks any meaningful factfinding, so the Court will need to set forth its own factual findings based on the record from the confirmation hearing. Bankruptcy Rule 9033(d).

***20** **[50]** Before turning to the factual findings in this case, the Court pauses for an observation about the procedure for the handling of third-party releases by bankruptcy courts going forward. Due to the substantial constitutional issues at play with the use of this perilous tool, it seems preferrable for a bankruptcy court to submit any third-party releases to the district court for approval via a Report and Recommendation in the rare and exceptional case that warrants the use of third-party releases. The Report and Recommendation should identify with specificity the claims and individuals released and provide detailed proposed findings of fact and conclusions of law to ensure that the released claims are truly integral to the reorganization. *See In re Seaside Engineering & Surveying, Inc.*, 780 F.3d at 1079 (noting that this "inquiry is fact intensive in the extreme"); *In re Dow Corning Corp.*, 280 F.3d at 657-58 (criticizing conclusory statements and mandating specific evidentiary findings with separate analysis for each individual release). This practice would necessarily avoid any *Stern* issues.

[51] Moreover, it would serve as an extra safeguard to ensure that third-party releases are reserved for the truly appropriate case, mindful that the use of third-party releases should be utilized "cautiously and infrequently." *Behrmann*, 663 F.3d at 712. As one bankruptcy court has observed:

> **[52]** **[53]** [t]hird-party releases are not a merit badge that somebody gets in return for making a positive contribution to a restructuring. They are not a participation trophy, and they are not a gold star for doing a good job. Doing positive things in a restructuring case — even important positive things — is not enough. Nonconsensual releases are not supposed to be granted unless barring a particular claim is important in order to accomplish a particular feature of the restructuring.

In re Aegean Marine Petroleum Network, Inc., 599 B.R. at 726-27.

C. Factual Findings Under Bankruptcy Rule 9032

The Court will now set forth its findings of facts in accordance with Rule 9033(d). The findings are based on the evidence submitted during the confirmation hearing.[11] For the hearing, Debtors tendered declarations from Carrie W. Teffner (President and Executive Chair of Debtors), Gary W. Begeman (a disinterested director of the Board of Directors for Debtors), Alex Orchowski (Director of Global Corporate Acts at Prime Clerk LLC), and William Kosturos (Managing Director of Alvarez & Marsal North America, LLC, who served as Debtors' financial advisor). Teffner and Begeman also testified during the confirmation hearing on February 25, 2021.

11 Notably, the evidence was uncontroverted; therefore, there is no need to assess the credibility of the witnesses.

The Court finds the following facts as relevant to the issues presented in this appeal:

1. On June 7, 2019, Securities Litigation Lead Plaintiffs filed a complaint as a putative class action in the District of New Jersey alleging securities fraud against Ascena Retail Group, Inc., David Jaffe and Robert Giammatteo in *Newman v. Ascena Retail Group, Inc., et al*, Case No. 2:19cv13529 (D.N.J.). On August 23, 2019, United States District Judge Kevin McNulty appointed Securities Litigation Lead Plaintiffs and their counsel as lead plaintiff and lead counsel, respectively. (Dkt. No. 26, *Newman v. Ascena Retail Group, Inc., et al*, Case No. 2:19cv13529 (D.N.J.) ("D.N.J. Dkt.").) On February 7, 2020, the defendants in that case filed a motion to dismiss that remains pending. (D.N.J. Dkt. No. 47). On July 27, 2020, the defendants in that case filed a pleading entitled "Suggestion of Bankruptcy" (D.N.J. Dkt. No. 58) that resulted in a stay of all proceedings in that case being entered the next day, July 28, 2020 (D.N.J. Dkt. No. 59). The case remains stayed as of the date of this Opinion.

2. David Jaffe previously served as the Chief Executive Officer of Debtors, while Robert Giammatteo previously served as Debtors' Chief Financial Officer. Both Jaffe and Giammatteo left their employment with Debtors several

months before Debtors filed for bankruptcy. (USTAPP 0929, 1030.)

***21** 3. On July 23, 2020, Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. (USTAPP 0001-18.)

4. With the Bankruptcy Court's approval, Debtors consummated three transactions involving the sale of their businesses. On September 24, 2020, the Bankruptcy Court approved the sale of Debtors' Catherines enterprise. On November 12, 2020, the Bankruptcy Court approved the sale of Debtors' Justice enterprise. On December 8, 2020, the Bankruptcy Court approved the sale of Debtors' remaining businesses, including the sale of the Lane Bryant brand and the Premium business segment, which included Ann Taylor, LOFT, and Lou & Grey, to buyer Premium Apparel LLC. The last of these sales closed on December 23, 2020. These sales consisted of substantially all of the Debtors' assets. (Decl. of Carrie W. Teffner in Supp. of Confirmation of the Amended Joint Chapter 11 Plan ("Teffner Decl.") ¶ 5 (USTAPP 2318-2335).) The sale of the Debtors' Premium and Lane Bryant business resulted in Debtors receiving approximately $472 million in net cash proceeds. (Decl. of William Kosturos in Supp. of Confirmation of the Amended Joint Chapter 11 Plan ("Kosturos Decl.") ¶ 5 (Dkt. No. 1761, *In re Retail Group, Inc.*, Case No. 20bk33113 ("Bankr. Dkt.")).)

5. As a result of the sale of its assets, all that was left for the reorganization after December 23, 2020, was the distribution of Debtors' remaining estate cash. (Teffner Decl. ¶5.) By February 22, 2021, the Debtors had sold substantially all of their assets and all that remained was to distribute cash proceeds in accordance with the terms of the Plan. (Teffner Decl. ¶30.)

6. The Reorganization Plan reflects a global resolution with the Creditors' Committee and contemplates payment in full in cash of all allowed administrative and priority claims. The Reorganization Plan had the support of 97% of the Term Lenders. (Teffner Decl. ¶ 5.)

7. The Reorganization Plan resulted from the collaborative efforts between Debtors, their advisors and legal counsel, and their stakeholders. The Amended Plan reflects the wind down process and maximizes value to the Debtors' stakeholders. (Teffner Decl. ¶ 26.)

8. The Reorganization Plan contains third-party releases, an exculpation provision, and an injunction provision. According to Ms. Teffner, these provisions were the product of extensive good faith, arm's-length negotiations and were material inducements for the parties to enter into the comprehensive settlement embodied in the Plan. (Teffner Decl. ¶ 41.) The negotiations involved the Debtors and their lenders. (Tr. of Feb. 25, 2021 Hr'g ("Confirm. Tr.") at 22:24-25 (USTAPP 2673-2836).) None of the putative members of the securities fraud class action participated in the negotiation. And, Ms. Teffner acknowledged that none of the Releasing Parties had a seat at the table during the negotiations. (Confirm. Tr. at 23:5-10.)

9. David Jaffe and Robert Giammatteo did not participate in the negotiations involving the Third-Party Releases. Furthermore, the Third-Party Releases as they related to Jaffe and Giammatteo were not material inducements for the comprehensive settlement for the Reorganization Plan. (Confirm. Tr. at 23:11-24:2.). Moreover, neither Jaffe nor Giammatteo participated at all (directly or indirectly) in the Debtors' Chapter 11 process. Indeed, they were no longer employed by Debtors at the time of the reorganization. (Confirm. Tr. at 26:10-21.) Consequently, neither Jaffe nor Giammatteo played an integral (or any) role in the formulation and negotiation of the Debtors' plan. (Confirm. Tr. at 34:9-16; 48:20-23.) The Court therefore finds that the releases for Jaffe and Giammatteo were not integral to the reorganization.

***22** 10. The negotiations surrounding the Third-Party Releases were focused on all existing and prior officers and directors (including Jaffe and Giammatteo) and were designed to be broad. (Confirm. Tr. at 27:11-12; 32:23-25.) Ms. Teffner did not know whether the Third-Party Releases covered former employees and consultants. (Confirm. Tr. at 41:3-16.) Because the negotiations surrounding the Third-Party Releases were addressed to only officers and directors, the Third-Party Releases exceeded the terms of the negotiations.

11. At the time of the reorganization, Debtors had Director & Officer liability insurance coverage of at least $50 million. (Confirm. Tr. at 29:1-31:4.) No evidence exists in the record that any of the claims released by the Third-Party Releases would exceed the D&O insurance coverage and thereby cause a financial depletion of the estate.

12. The Third-Party Releases were designed to limit time spent defending any type of litigation, which would deplete assets and resources of the estate. (Confirm. Tr. 33:19-24.)

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The failure to approve the Third-Party Releases included in the Reorganization Plan could potentially increase the time and expense of the Debtors' wind-down process to the detriment of the Debtors' stakeholders. According to Ms. Teffner, the *quid pro quo* for the contributions, concessions and support offered by the Released Parties was the Third-Party Releases. (Teffner Decl. ¶ 45.)

13. Debtors created a Special Committee that consisted of Mr. Begeman and one other disinterested director. (Decl. of Gary D. Begeman in Supp. of Confirmation of Amended Joint Chapter 11 Plan ("Begeman Decl.") ¶ 1 (Bankr. Dkt. No. 1759).) The purpose of the Special Committee was to conduct and oversee an investigation into historical transactions and evaluate any proposed release of any claims or causes of actions by Debtors in connection with a future transaction. The Special Committee retained Kirkland & Ellis (Debtors' counsel) to investigate potential causes of action that the Debtors could bring against any of the Related Parties during a six-year lookback period. (Begeman Decl. ¶¶ 6-8.) The investigation found no material claims in favor of the Debtors. (Begeman Decl. ¶ 9.)

14. After an extensive investigation, the Debtors were unable to uncover any material claims or causes of actions that could be brought against the Releasing Parties, and it is unlikely that the Debtors would recover material amounts, if any, from the Releasing Parties. (Teffner Decl. ¶ 42.) As such, the release by the Released Parties of claims against the Releasing Parties (described as the "mutual release" in this appeal) has no value and is fictional.

15. Mr. Begeman also reviewed the pending securities fraud class action filed in the District of New Jersey against the Debtor and its former directors and officers (Jaffe and Giammatteo) in Case No. 2:19cv12529. The Special Committee (Mr. Begeman and one other disinterested director) determined that the claims in the class action lacked merit and had no material value as related to the Debtors' estates. (Begeman Decl. ¶ 14.) Notably, the Bankruptcy Court did not accept this as an expert opinion; instead, it only received it as a report from the Special Committee. (Confirm. Tr. at 12:10-18.) This Court gives no credit to Mr. Begeman's assessment for this reason.

16. This Court explicitly rejects the Bankruptcy Court's finding that the Third-Party Releases were consensual. (Bankr. Confirm. Op. at 31.) Instead, the Court finds the Third-Party Releases to be nonconsensual both as a matter of fact and as a matter of law. In terms of factual grounds, the Bankruptcy Court's opt-out notice was directed only to the putative class members in the securities fraud case. The Bankruptcy Court made no effort to provide notice and obtain consent from the numerous other Releasing Parties as described in the Third-Party Releases.

***23** 17. As to the putative class members in the securities fraud case, the record fails to establish that *any* consented to the release of their claims against Jaffe and Giammatteo. Debtors used Prime Clerk to ensure to the best of their ability to get access to putative members of the class action and to distribute the notices to the putative members. (Confirm. Tr. 21:3-16.) Prime Clerk worked with third parties to attempt to identify putative members of the class action and then to communicate the Notice to them. (Decl. of Craig E. Johnson of Prime Clerk LLC in Supp. of the Debtors' Objection to Securities Lead Plaintiffs' Motion for Entry of an Order Authorizing Lead Plaintiffs to Opt Out of Third-Party Releases on Behalf of the Class ("Johnson Decl.") ¶¶ 7-9 (Bankr. Dkt. No. 947).) Prime Clerk sent the notice to approximately 300,000 individuals; however, the record contains no information about the success of their efforts to reach this group. (Bankr. Confirm. Op. at 13.) Indeed, Prime Clerk received only 596 opt-outs, which corresponds to 0.2% of those targeted. (Confirm. Tr. at 52:22-24.) The Court therefore finds that this effort was insufficient to establish notice of the opt-out provision in the Notice. Further, the record lacks any information establishing as a matter of fact that *any* of the targeted recipients of the Notice affirmatively consented to the release of their claims as provided in the Third-Party Release.

18. As to the shareholders who were putative class members in the securities fraud action, those who were deemed to have opted out did not receive anything of value for their releases. (Confirm. Tr. 18:13-22.)

19. There is no evidence in the record of any evaluation of any other potential claims that the Releasing Parties could have brought against the Debtors other than the securities fraud class action filed in the District of New Jersey, nor does the record contain any effort to provide notice of the releases to any Releasing Party beyond the securities fraud class action.

20. According to Ms. Teffner, the Exculpation Provision resulted from good faith, arm's-length negotiations and was designed to protect those who served and assisted

with the restructuring process, including those who did not necessarily owe a fiduciary duty to the Debtors. (Teffner Decl. ¶ 47.)

Against this factual backdrop, the Court will now turn its attention to the propriety of the Third-Party Releases.

D. The Application of *Behrmann* to the Third-Party Releases

In addition to the factual and constitutional defects in the approval of the Third-Party Releases outlined above, Appellants argue that the Bankruptcy Court erred in approving the Third-Party Releases under the applicable standards in the Fourth Circuit for approving nonconsensual third-party releases as set forth in *Behrmann.* (Trustee Br. at 37; Appellants' Br. at 73.) Debtors respond that the Releasing Parties consented to the releases, rendering the *Behrmann* factors inapplicable. (Appellee Br. at 41.) Additionally, Debtors contend that the Third-Party Releases satisfy the *Behrmann* factors. (Appellee Br. at 75.)

Thus, beyond the *Stern* issues, this appeal boils down to two questions: (1) whether the Bankruptcy Court erred by finding the releases consensual, and (2) whether the Bankruptcy Court erred by failing to conduct the seven-factor *Behrmann* analysis. The Court finds that the Bankruptcy Court erred on both fronts.

1. Third-Party Releases and *Behrmann* Generally

As previously noted, some Courts of Appeal have held that bankruptcy courts lack the power to grant nonconsensual third-party releases of the kind approved here. The Fifth, Ninth and Tenth Circuits prohibit nonconsensual third-party releases. *See, e.g.*, *In re Pac. Lumber Co.*, 584 F.3d at 251-53; *In re Lowenschuss*, 67 F.3d at 1401-02; *In re W. Real Estate Fund, Inc.*, 922 F.2d at 600-02. These Circuits generally base this prohibition on 11 U.S.C. § 524(e), which states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." *See, e.g.*, *In re Pac. Lumber Co.*, 584 F.3d at 252 ("In a variety of contexts, this court has held that Section 524(e) only releases the debtor, not co-liable third parties.") (collecting cases); *In re Am. Hardwoods, Inc.*, 885 F.2d 621, 626 (9th Cir. 1989) ("We therefore conclude that the specific provisions of section 524 displace the court's equitable powers under section 105 to order the permanent relief sought by American.").

***24** Other Circuits have held that bankruptcy courts have the power to impose involuntary releases, but that such involuntary releases should be imposed in "only rare cases." *See, e.g.*, *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 141-43 (holding that involuntary releases should only be approved if they form an important part of a reorganization plan, and that they are proper "only in rare cases"); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 1078 (permitting releases and bar orders but cautioning that they "ought not to be issued lightly, and should be reserved for those unusual cases in which such an order is necessary for the success of the reorganization, and only in situations in which such an order is fair and equitable under all the facts and circumstances"); *In re Dow Corning Corp.*, 280 F.3d at 657-58 ("Because such an injunction is a dramatic measure to be used cautiously, we follow those circuits that have held that enjoining a non-consenting creditor's claim is only appropriate in 'unusual circumstances.' ").

[54] The Fourth Circuit has joined the circuits that allow non-debtor releases, but only "cautiously and infrequently." *Behrmann*, 663 F.3d at 712. In *Behrmann*, the Fourth Circuit confirmed that it had previously "rejected the notion that 11 U.S.C. § 524(e) forecloses bankruptcy courts from releasing and enjoining causes of action against nondebtors." 663 F.3d at 710 (citing *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989)). It noted that it had "declined to retreat from this holding" in a subsequent opinion and then, again, rejected as "without merit" the "blanket assertion that equitable relief in the form of non-debtor releases is never permissible under the Bankruptcy Code." *Id.* In rejecting this blanket assertion, the Fourth Circuit adopted the Sixth Circuit's test for approving non-debtor releases outlined in *In re Dow Corning Corp.* The Fourth Circuit quoted in full from *In re Dow Corning Corp.*:

> We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor:
>
> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
>
> (2) The non-debtor has contributed substantial assets to the reorganization;
>
> (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from

indirect suits against parties who would have indemnity or contribution claims against the debtor;

(4) The impacted class, or classes, has overwhelmingly voted to accept the plan;

(5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;

(6) The plan provides an opportunity for those claimants who choose not to settle to recover in full; and,

(7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Behrmann, 663 F.3d at 711-12 (quoting *In re Dow Corning Corp.*, 280 F.3d at 658).

[55] Given the dramatic effect of third-party releases and that they are to be approved only in unique circumstances, "the meaningful exercise of appellate review at a minimum requires that the court make specific factual findings in support of its decision to grant equitable relief." *Id.* at 712. Ultimately, the Fourth Circuit remanded the case, because the bankruptcy court's conclusory statements regarding the factors "[were] meaningless in the absence of specific factual findings explaining why this is so." *Id.* at 713. Underscoring the point that non-debtor releases only have a place in unique circumstances, the Fourth Circuit found that the bankruptcy court's "conclusions could apply just as well to any number of reorganizing debtors." *Id.* Therefore, it remanded the case "to set forth specific factual findings supporting its conclusions" that the debtor's circumstances entitled it to the non-debtor releases. *Id.*

***25** Following remand, a different bankruptcy judge found the releases unenforceable and the district court affirmed the bankruptcy court. *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 347 (4th Cir. 2014). The Fourth Circuit affirmed, concluding that the debtor had "failed to carry its burden of proving that the facts and circumstances of this case justify the Release Provision." *Id.* at 347.

2. The Interrelationship Between *Stern* and *Behrmann*

[56] [57] [58] The exacting caution and detailed findings demanded of a bankruptcy court in granting a non-debtor release in a unique circumstance stems from the constitutional limitations placed on the bankruptcy court's jurisdiction. As the *Stern* analysis demonstrates, the Constitution limits bankruptcy courts — as non-Article III courts — to adjudicating only matters integral to a bankruptcy proceeding. In essence, the *Behrmann* factors task a reviewing court with determining how integral the releases are to a bankruptcy plan. Indeed, one factor asks the court to consider whether the release "is essential to the reorganization" such that the "reorganization hinges on the debtor being free from indirect suits." *Behrmann*, 663 F.3d at 711-12. Another factor requires that the non-debtor "contributed substantial assets to the reorganization." *Id.* at 711. Yet another examines the identity of interests between the debtor and the third party and the extent to which the suit against the third party would deplete the assets of the estate. *Id.* Clearly, these factors ask the bankruptcy court to determine the extent of the entanglement between the released claim and the bankruptcy case. Likewise, a bankruptcy court determining whether it has "core" constitutional authority over a matter looks to the same relationship. *See Allied Title Lending, LLC*, 420 F. Supp. 3d at 448 ("A cause of action is constitutionally core when it 'stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' ") (quoting *Stern*, 564 U.S. at 499, 131 S.Ct. 2594).

The Third Circuit's decision in *In re Millennium Lab Holdings II, LLC* illustrates this connection between the *Stern* analysis and the *Behrmann*-type analysis, and stands in stark contrast to what occurred here. There, the court examined a release in the debtor's restructuring agreement that released the debtor's two primary shareholders from conduct that occurred before the restructuring agreement. 945 F.3d at 131. Eventually, the bankruptcy court confirmed the plan that included the releases, over a lender's objection. *Id.* at 132. The bankruptcy court and district court both overruled the lender's objection that *Stern* prohibited the confirmation of a plan releasing its claims, stating that *Stern* did not apply to plan confirmation proceedings. *Id.* at 133. The lender appealed to the Third Circuit.

On appeal, the Third Circuit affirmed the confirmation, but not because it determined that *Stern* did not apply to plan confirmation proceedings.[12] Rather, the Third Circuit conducted an exhaustive discussion of *Stern* and the limitations that it places on the authority of bankruptcy courts. *Id.* at 133-37. It concluded its discussion as follows:

> In sum, *Stern* teaches that the exercise of "core" statutory authority by a bankruptcy court can implicate the limits imposed by Article III. Such an exercise of authority

is permissible if it involves a matter integral to the restructuring of the debtor-creditor relationship. And, in determining whether that is the case, we can consider the content of the "core" proceeding at issue.

***26** *Id.* at 137.

12 Indeed, in a footnote, the court acknowledged the appellees' argument that a bankruptcy court could always constitutionally confirm a plan. However, it stated that "[w]e have our doubts about so broad a statement but we do not need to address it to decide this case." *Id.* at 137, n.10.

Applying those principles, the Third Circuit concluded that the bankruptcy court possessed constitutional authority to confirm the plan with the releases. Borrowing from its *Stern* analysis, the court stated that "the question is whether," in examining the release provisions at issue, "the Bankruptcy Court was resolving a matter integral to the restructuring of the debtor-creditor relationship." *Id.* at 137. Although it did not apply the facts to explicit factors like courts in the Fourth Circuit must, the court's reasoning closely resembles the *Behrmann* factors. For example, the court relied on the contributions made by the released parties — $325 million transfers of their equity to the lenders — and how the restructuring could not have occurred without those contributions. *Id.* at 137. The court noted how the releases resulted from protracted arm's-length negotiations in exchange for the contributions that allowed the debtor to continue operating. In short, "[r]estructuring in this case was possible only because of the release provision." *Id.* Ultimately, because the "Bankruptcy Court's conclusion that the release provisions were integral to the restructuring was well-reasoned and well-supported by the record," the bankruptcy court "was constitutionally authorized to confirm the plan in which those provisions appeared." *Id.* at 140. But even then, the Third Circuit made clear that the situation was an outlier. *Id.* at 140 ("In short, our holding today is specific and limited. It is that, under the particular facts of this case, the Bankruptcy Court's conclusion that the release provisions were integral to the restructuring was well-reasoned and well-supported by the record.").

[59] The Third Circuit's reliance on the detailed factual findings below supporting the releases underscore the importance of a bankruptcy court fully supporting its basis for approving a non-debtor release. The detailed factual findings in *In re Millennium Lab* further highlight the lack of factual findings in this case. Here, the Bankruptcy Court stated in conclusory fashion that the Third-Party Releases were integral to the Plan, but it based this only on the fact that the Plan stated as much. Thus, instead of making detailed factual findings as to whether unique circumstances warranted the inclusion of non-debtor releases, the Bankruptcy Court abdicated this crucial function to the negotiators of the Plan — the very negotiators who stood to benefit from the Releases. However, the Bankruptcy Court cannot delegate to private citizens the determination of whether a court has the constitutional power to approve the releases. Thus, the Bankruptcy Court's lack of explanation constitutes clear error, in addition to erring both factually and as a matter of law in its determination that the parties' consent obviated the need to conduct the *Behrmann* analysis, as explained below.

3. Consent and the *Behrmann* Analysis

***27** Debtors argue that *Behrmann* does not apply to consensual releases (Appellee Br. at 60), whereas the Trustee argues that consent does not obviate the need to conduct the *Behrmann* analysis. (Trustee Br. at 24.) Aside from adopting the Sixth Circuit's approach for *nonconsensual* releases, the Fourth Circuit has not spoken directly on whether the *Behrmann* analysis applies to consensual releases. Again, courts around the country have split on the issue.

Several courts have found that a party can consent to a third-party release and eliminate the need for a *Behrmann* analysis. For example, the Seventh Circuit has noted approvingly that "courts have found releases that are consensual and non-coercive to be in accord with the strictures of the Bankruptcy Code." *In re Specialty Equip. Cos., Inc.*, 3 F.3d 1043, 1047 (7th Cir. 1993). Likewise, the United States Bankruptcy Court for the District of Maryland distinguished consensual releases from those requiring a *Behrmann* analysis, because "[i]t is well recognized that, where the application of the *Dow Corning* or other applicable factors leads to the conclusion that the third party releases should not be approved, the court can nevertheless approve the releases with the consent of the releasing parties." *In re Neogenix Oncology, Inc.*, 508 B.R. 345, 361 (Bankr. D. Md. 2014). The Second Circuit has also indicated that "[n]ondebtor releases may also be tolerated if the affected creditors consent." *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 142. Similarly, the Northern District of Texas has noted that "[m]ost courts allow consensual nondebtor releases to be included in a plan." *In re Wool Growers Cent. Storage Co.*, 371 B.R. 768, 775 (Bankr. N.D. Tex. 2007).

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a. Failing to Opt Out Does Not Rise to the Level of Consent Required to Obviate *Behrmann*.

[60] Even if consent can obviate the need for a *Behrmann* analysis, the level of consent required to eliminate the need for a *Behrmann*-type analysis varies. Debtors contend that failing to opt out of a release evidences consent to that release. (Appellee Br. at 41.) The Trustee argues that the Bankruptcy Court erred in finding that this type of implied consent suffices. (Trustee Br. at 24.) The Court agrees with the Trustee as a matter of law and as a matter of fact (as previously determined).

The Fourth Circuit does not appear to have spoken on the issue of whether implied consent can give rise to a consensual non-debtor release. *See In re Neogenix Oncology, Inc.*, 2015 WL 5786345, at *5 (Bankr. D. Md. Oct. 1, 2015) ("The Fourth Circuit has not expressly faced the issue presented here, whether a 'consensual' third party release must be express or whether implied consent can be sufficient."). Other courts have diverged on whether implied consent can suffice for a release.

Some courts, like the District of New Jersey, look to the principles of contract law rather than the bankruptcy court's confirmation authority to conclude that the validity of the releases requires affirmative consent. For example, in *In re Congoleum Corp.*, the court determined that a creditor must have "unambiguously manifested assent to the release of the nondebtor from liability on its debt." 362 B.R. 167, 194 (Bankr. D.N.J. 2007). Likewise, in *In re Arrowmill Development Corp.*, the court held that it was "not enough for a creditor to abstain from voting for a plan, or even to simply vote 'yes' as to a plan." 211 B.R. 497, 507 (Bankr. D.N.J. 1997).

***28** Yet, other courts have found that a creditor must individually consent by voting in favor of the plan. In *In re Coram Healthcare Corp.*, the court stated that "to the extent creditors or shareholders voted in favor of the Trustee's Plan, which provides for the release of claims they may have against the Noteholders, they are bound by that." 315 B.R. 321, 336 (Bankr. D.Del. 2004). Likewise, in *In re Washington Mutual, Inc.*, the court found the opt-out mechanism in the plan insufficient to support the third-party releases with respect to the parties who did not return a ballot. 442 B.R. 314, 355 (Bankr. D. Del. 2011).

However, other courts have determined that failure to return a ballot constitutes consent to a third-party release when the creditor received notice of implications of releasing parties. For example, in *In re Indianapolis Downs, LLC*, the court found that providing an opportunity to opt out along with detailed instructions for how to opt out warranted approval of the releases. 486 B.R. 286, 305-06 (Bankr. D. Del. 2013). However, the court allowed the "deemed" acceptance by the unimpaired creditors, because "these creditors are being paid in full and have therefore received consideration for the releases." *Id.* at 305. Likewise, in *In re Spansion, Inc.*, the court found that parties who had accepted the plan and not opted-out would be bound by the release. 426 B.R. 114, 144 (Bankr. D. Del. 2010).

Still, other courts have allowed implied consent releases. In *In re DBSD North America, Inc.*, the court approved third-party releases when the releasing parties received adequate notice of the release and they had an opportunity to opt out of the release. 419 B.R. 179, 218-19 (Bankr. S.D.N.Y. 2009); *see also In re Calpine Corp.*, 2007 WL 4565223 (Bankr. S.D.N.Y. Dec. 19, 2007) ("[parties] choosing not to opt out of the releases were given due and adequate notice that they would be granting the releases by acting in such a manner"). Similarly, in *In re Conseco, Inc.*, the court found that impaired creditors who did not opt out had impliedly consented to the releases. 301 B.R. 525, 527-28 (Bankr. N.D. Ill. 2003).

Debtors advance this last approach by comparing the opt-out provisions to contract law and class action procedures. (Appellee Br. at 65.) However, both comparisons cut sharply against their argument.

i. Contract Law Does Not Support Consent by Failure to Opt Out.

First, contrary to Debtors' statement that "actual principles of contract law have long provided that the manifestation of assent may be made wholly by failure to act" (Appellee Br. at 65), black letter contract law dictates otherwise. *See Meekins v. Lakeview Loan Servicing, LLC*, 2020 WL 1922765, at *4 (E.D. Va. Apr. 21, 2020) ("A party's silence, however, is insufficient to show its intention to be bound by the terms of a contract.") (quotations omitted). Indeed, in one of the cases cited by Debtors for its acceptance-by-silence proposition, the First Circuit stated, "it's basic contract law that an offeror cannot unilaterally impose on another party the obligation to respond and reject their offer." *Rivera-Colon v. AT&T*

Mobility Puerto Rico, Inc., 913 F.3d 200, 211 (1st Cir. 2019) (citing 1 Corbin on Contracts § 3.19 (2018) ("It should here be plainly set forth that an offeror has no power to cause the silence of the offeree to operate as an acceptance when the offeree does not intend it to do so."); 2 Williston on Contracts § 6:50 (4th ed. 1993) ("Merely sending an unsolicited offer does not impose upon the party receiving it any duty to speak or deprive the party of its privilege of remaining silent without accepting.")). Limited exceptions to this rule exist, such as previous dealings or when an offeror gives the offeree reason to believe that silence or inaction will manifest assent, and the offeree remains silent or inactive with the intent to accept the offer. Restatement (Second) of Contracts § 69(1)(b). However, neither Debtors nor the Bankruptcy Court identified any facts that would support the application of an exception to the general rule of contracts that silence cannot manifest assent. Nor does the record reveal any such facts. Indeed, the Court has already found as a matter of fact that consent did not occur. Accordingly, any attempt to claim that contract law supports a finding of consent to third-party releases based on inaction rings hollow.

ii. Class Action Law Does Not Support Finding Consent by Failing to Opt Out.

***29** **[61]** Likewise, Debtors' comparison to class actions falls short of providing support of their contention that a failure to opt out constitutes consent to the releases. In fact, the comparison to class action litigation highlights the impropriety of finding releases consensual based merely on a failure to opt out. True, as noted by Debtors, courts (notably, Article III judges) may bind absent class members to a judgment so long as they provide them notice of the action and the opportunity to either opt out or participate. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). But to do so, courts must ensure that the class action complies with the unique requirements of Rule 23 of the Federal Rules of Civil Procedure.

[62] **[63]** Importantly, Rule 23(a), in relevant part, allows an individual to sue on behalf of other class members only if he will "fairly and adequately protect the interests of the class" and his claims "are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3)-(4). Further, the class must be specifically defined to identify the class members and the class claims. Fed. R. Civ. P. 23(c)(1)(B). Moreover, the court must appoint class counsel that can best "represent the interests of the class." Fed. R. Civ. P. 23(g). Indeed, the court *must* appoint class counsel to represent the class, as pro se litigants cannot represent absent class members. *See Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975) ("Ability to protect the interests of the class depends in part on the quality of counsel, and we consider the competence of a layman representing himself to be clearly too limited to allow him to risk the rights of others.") (internal citations omitted). And, the presiding court bears responsibility for ensuring compliance with all of the above requirements. Most, if not all, of these requirements become heavily litigated throughout the life of a class action.

None of these protections exist in the context of a non-debtor release in a bankruptcy action. First and foremost, no party litigates on behalf of the absent releasing party. No party with a typical claim has a duty to ensure that he fairly and adequately represents the best interests of the absent releasing party. Moreover, the absent releasing party does not enjoy counsel that will represent his best interests in his stead. Indeed, the facts of this case highlight that distinction. The Bankruptcy Court expressly rejected the ability of certain absent releasing parties to have a party and counsel represent their best interests. Yet, the Bankruptcy Court still sought to extinguish their claims.

[64] **[65]** Similarly, and importantly, any class settlement that would bind absent class members requires court approval. Fed. R. Civ. P. 23(e). After giving notice to all class members of the proposed settlement, the court may only approve the settlement "after a hearing and only on finding that it is fair, reasonable, and adequate" taking into account whether "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate; and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). "The inquiry appropriate under Rule 23(e) ... protects unnamed class members from unjust or unfair settlements affecting their rights ...." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (internal quotations omitted). And it is an Article III judge, acting with all of their powers and protections as described in *Stern*, that approves the settlement.

Conversely, if mere failure to opt out obviates the need to conduct a *Behrmann* analysis, then no court carries an obligation to ensure the fairness, reasonableness and adequacy of the relief afforded the absent releasing parties. The *Behrmann* analysis at least provides some oversight that resembles the scrutiny given by a court to class settlement

under Rule 23, even if it falls short of ensuring that the release of the claims is fair, reasonable and adequate. Again, the facts of this case highlight the need for scrutiny of what Debtors call a "settlement" of the released claims. No court would find this "settlement" fair, reasonable and adequate under Rule 23, as application of those factors demonstrate. No party or counsel represented the interests of the class, much less represented them adequately. The settlement of the released claims did not result from any negotiation with the Releasing Parties, much less one that occurred at arm's length. Instead, it appears that negotiations only occurred between the individuals and entities that would benefit from releases in an effort to shield themselves from any liability, not those who would confer the benefit in exchange for some other benefit.

***30** Along those lines, the settlement of the released claims provides no relief to the Releasing Parties, much less adequate relief. The fact that the Releasing Parties also receive a release provides nothing more than illusory consideration. The Court cannot envision a potential claim that a former officer or director of Debtors could have against a former shareholder that would give a mutual release any real value. Indeed, the Court has already found as a matter of fact that the mutual release lacked any value and was purely fictional.

The protections provided to absent class members under Rule 23 highlight the lack of protections provided to absent releasing parties in this context. Moreover, the comparison to class actions also demonstrates the due process issues that result from releasing a claim based only on the failure to opt out.

b. Releasing These Claims Raises Serious Due Process Concerns.

Third-party releases in bankruptcy actions based only on a failure to opt out also raise serious due process concerns, because they lack the critical due process protections of Rule 23. *See* *Bell v. Brockett*, 922 F.3d 502, 511 (4th Cir. 2019) ("Rule 23's adequacy requirements provide critical safeguards against the due process concerns inherent in all class actions."). In the seminal case on due process in class actions, the Supreme Court held that when "a fully descriptive notice is sent [by] first-class mail to each class member, with an explanation of the right to 'opt out,' [that procedure] satisfies due process" even if the absent class member would be bound absent an affirmative opt in. *Shutts*, 472 U.S. at 812, 105 S.Ct. 2965.

[66] However, the Supreme Court's basis for this holding underscores the lack of due process present here. First, "[t]he notice must be the best practicable, reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 812, 105 S.Ct. 2965 (quotations omitted). Second, the "notice should describe the action and the plaintiffs' rights in it." *Id.* Third, "an absent plaintiff [must] be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.* Fourth, "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Id.*

[67] In this case, the Third-Party Releases fail three of the four elements required to afford due process. First, the Bankruptcy Court found the notice "sufficient." (Bankr. Confirm. Op. at 31.) But, "sufficient" falls short of the "best practicable, reasonably calculated" standard set forth by the Supreme Court. Although the Court will not now fully undertake the analysis of whether the notice constituted the "best practicable, reasonably calculated" notice "under the circumstances," it seems unlikely that the notice would meet that higher standard. Second, the notice did not describe the released claims or the rights given up by the absent Releasing Parties. Nor did it mention the only purported benefit (the illusory "mutual release") to the Releasing Parties as consideration for their release. Describing the bankruptcy action and generally stating that the absent party would release all claims does not identify the specific claims subject to release. It does not "describe the action and the plaintiffs' rights in it." The notice satisfies the third element of providing the absent Releasing Parties the opportunity to opt out. Finally, as discussed above, the absent class members had no one to adequately represent their interests. Accordingly, allowing the release of claims based only on the failure to opt out does not comport with due process.

***31** In conclusion, the Court finds that the Bankruptcy Court erred both factually and legally in finding the Third-Party Releases to be consensual. Failure to opt out, without more, cannot form the basis of consent to the release of a claim. Whether the Court labels these "nonconsensual" or based on "implied consent" matters not, because in either case there is a lack of sufficient affirmation of consent. *See* *In re Neogenix Oncology, Inc.*, 2015 WL 5786345, at *6 ("*Behrmann* provides sufficient guidance on whether a

court should approve a release for which there is insufficient affirmation of consent, whether the release is said to be 'nonconsensual' or based on 'implied consent.' "). And, it bears emphasizing again that Debtors' argument about consent focuses only on the pending securities fraud case in the District of New Jersey, which constitutes only the tip of the release iceberg, as the Third-Party Releases cover far more than a single case against two former officers. No argument about consent can be raised about all of the other Releasing Parties that the Bankruptcy Court never even considered.

Accordingly, the mandates of *Behrmann* unquestionably apply, and the Bankruptcy Court should have conducted the *Behrmann* analysis to determine if this case constitutes the rare case warranting such third-party releases.

4. The Bankruptcy Court's Error in Failing to Conduct a *Behrmann* Analysis

[68] *Behrmann* commands that a bankruptcy court may only grant nonconsensual non-debtor releases "cautiously and infrequently." *Behrmann*, 663 F.3d at 712. Because only cases with unique circumstances warrant granting such releases, a bankruptcy court must make "specific factual findings" demonstrating why the debtor's circumstances entitle it to the benefit of the releases. *Id.* at 712-13.

[69] **[70]** Here, the Bankruptcy Court failed to conduct any *Behrmann* analysis, precluding any meaningful appellate review. Indeed, the Bankruptcy Court addressed the *Behrmann* factors in a single footnote — again, a single footnote — that merely said: "were the *Behrmann* factors applicable to the Third-Party Releases, the Court would find the *Behrmann* factors were satisfied for the reasons stated in the *Debtors' Memorandum of Law* ...." (Bankr. Confirm. Op. at 38, n.28). It should be obvious that a court may not satisfy its judicial responsibilities by simply incorporating by reference a party's brief. *Cuthbertson v. Biggers Bros.*, 702 F.2d 454, 458 (4th Cir. 1983) ("We have previously condemned the practice of adopting the prevailing party's proposed findings of facts and conclusions of law, and we repeat that admonition here."). As the Third Circuit reminded in *Bright v. Westmoreland County*, 380 F.3d 729 (3d Cir. 2004):

> Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions.

Id. at 732. And such a cursory consideration of the *Behrmann* factors disregards the Fourth Circuit's command to limit the use of third-party releases to the exceptional case warranting them.

Moreover, the vast Third-Party Releases broadly release a wide variety of claims, against a wide variety of individuals, held by a wide variety of individuals. The variety of claims released here necessarily means that the specific factual findings supporting the propriety of releasing each type of claim will also vary. Accordingly, the Court cannot conduct meaningful appellate review as a result of the Bankruptcy Court's failure to address that which has been released, setting forth the specific factual findings for each type of claim released. Meaningful review requires detailed findings of fact by the Bankruptcy Court. That did not happen here.

***32** Indeed, the only identified claims released in this appeal are those against the Individual Defendants (Jaffe and Giammatteo) as asserted in the putative class action filed in the District of New Jersey. Yet, by way of example, they demonstrate the Third-Party Releases' inability to meet the *Behrmann* factors. A brief examination of the *Behrmann* factors as applied to these claims follows.

a. Identity of Interests

[71] **[72]** Under the first factor, "a court must consider whether there is an identity of interests — usually an indemnity obligation — between the debtor and the released parties," such that the "suit against the non-debtor may, in essence, be a suit against the debtor that risks depleting the assets of the estate." *Nat'l Heritage Found., Inc.*, 760 F.3d at 348 (cleaned up). Debtors claim that they had an indemnification obligation to the Individual Defendants. (Appellee Br. at 78-79.) But, Debtors have essentially liquidated and, therefore, it remains uncertain whether Debtors have a continuing indemnification obligation to the Individual Defendants. Moreover, the Court agrees with the Third Circuit's view in *In re Continental Airlines*:

> We conclude that granting permanent injunctions to protect non-debtor parties on the bases of theoretical identity of interest alone would turn bankruptcy principles on their head. Nothing in the Bankruptcy Code can be construed to establish such extraordinary protection for non-debtor parties.

203 F.3d at 217. Consequently, this factor does not weigh in favor of the releases.

b. Substantial Contribution

The second factor requires Debtors "to demonstrate that the Released Parties made a substantial contribution of assets to its reorganization." *Nat'l Heritage Found., Inc.*, 760 F.3d at 348. The record does not support that the Individual Defendants made any financial contribution to the reorganization or any other contribution. Indeed, the Court has already made a factual finding that the Individual Defendants played no role in the reorganization (they had already left Debtors' employment) and their releases were not integral to the reorganization. The fact that they also provided releases to Debtors does not amount to a "substantial contribution of assets," especially given the illusory nature of the releases. Even if it could, the record does not support that the releases provided by the Individual Defendants could amount to a contribution of substantial assets. Accordingly, this factor weighs heavily against granting the release.

c. Essential to the Reorganization

[73] To satisfy the third factor, "a debtor must demonstrate that the non-debtor release is essential to its reorganization, such that the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor." *Id.* As an initial matter, Debtor largely liquidated, rather than reorganized. This alone cuts against the essential nature of the releases. The third and final asset sale transaction closed on December 23, 2020 — well before confirmation of the Plan. That the deals closed and the assets changed hands well before any release was finalized or went into effect demonstrates that the Plan does not hinge on the inclusion of the releases.

Moreover, the record does not reveal that the Plan would be doomed if the Individual Defendants did not obtain a release. Indeed, as previously noted, the releases of the Individual Defendants were not integral to the reorganization. And, the Court cannot discern any reason why a lack of release for the Individual Defendants would prove fatal to the implementation of the Plan. Accordingly, this factor also weighs heavily against granting the release.

d. Approval by the Affected Class

***33** The fourth factor requires Debtor "to prove that the class or classes affected by the Release Provision overwhelmingly voted in favor of the Plan." *Id.* at 350. Here, the Class Members, as a class receiving nothing under the Plan, were deemed to reject the Plan as a matter of law. 11 U.S.C. § 1126(g). Debtors claim that the small number of opt outs satisfy this prong. However, for the reasons stated above, the Court gives little weight to the failure to opt out of the Plan and will not view it as analogous to an affirmative vote in favor of the Plan. Therefore, this factor also weighs heavily against the release.

e. Mechanism to Pay Substantially All of the Class Affected

Under the fifth factor, the court considers "whether the debtor's reorganization plan provides a mechanism to consider and pay all or substantially all of the class or classes affected by the non-debtor release." *Id.* at 350. Here, the Plan does not create a separate fund to pay the claims released or provide any other mechanism to consider or pay the securities claims. Indeed, the Third-Party Releases are so broad that there has been no effort to even discern the full extent of the claims. Because the Plan extinguishes these claims entirely without giving any value in return, this weighs strongly against granting the Release. *See id.* at 351 (concluding that "the absence of such a [channeling fund] can weigh against the validity of a non-debtor release, especially when the result is that the impacted class's claims are extinguished entirely").

f. Opportunity to Recover

The final substantive factor "is whether the plan provides an opportunity for those who chose not to settle to recover in full." *Id.* at 351. Here, the Plan provides the class members an opportunity to opt out of the Release and pursue the Securities claims. However, given the deficient notice, the Court has already found that here, as a matter of fact, notice did not

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occur. Accordingly, this factor also weighs against granting the Release.

In sum, the *Behrmann* factors clearly weigh against releasing the Individual Defendants from liability in the Securities Claims. As with the *Stern* analysis, these claims have no meaningful connection to the bankruptcy case. Indeed, the Court has already made a factual finding that these releases were not integral to the Plan. Therefore, they do not implicate the unique circumstances that would warrant a bankruptcy court — or, at least one that grants non-debtor releases only cautiously and infrequently — to release these claims as part of the bankruptcy proceedings. Debtors' claim that "virtually every confirmed plan in every complex bankruptcy case [in the Eastern District of Virginia] includes consensual third-party release provisions of this variety" (Appellees' Br. at 8), harms, rather than helps, its argument. That the Bankruptcy Court grants such non-debtor releases as a matter of course, rather than "cautiously and infrequently" and only when warranted by unique circumstances, underscores the lack of specific factual findings supporting the releases here.

For these reasons, the Bankruptcy Court clearly erred in finding that the releases satisfied the *Behrmann* factors. Consequently, the Third-Party Releases must be voided and rendered unenforceable. The Court will now turn to the impact on the Plan of the voiding of the Third-Party Releases and whether the voided releases may be severed from the Plan.

E. Severability

[74] The Court finds that it can sever the unenforceable releases from the Plan. Debtors argue that the nonseverability provision renders the Third-Party Releases nonseverable from the Plan. (Appellee Br. at 34-35.) The provision relied upon by Debtors follows in its entirety:

> ***34** If, before Confirmation, any term or provision of the Plan is held by the Bankruptcy Court to be invalid, void, or unenforceable, the Bankruptcy Court shall have the power to alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void, or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration, or interpretation, the remainder of the terms and provisions of the Plan will remain in full force and effect and will in no way be affected, impaired, or invalidated by such holding, alteration, or interpretation. The Confirmation Order shall constitute a judicial determination and shall provide that each term and provision of the Plan, as it may have been altered or interpreted in accordance with the foregoing, is: (1) valid and enforceable pursuant to its terms; (2) integral to the Plan and may not be deleted or modified without the Debtors' or the Reorganized Debtors' consent, as applicable; and (3) nonseverable and mutually dependent.

(the "Nonseverability Provision") (USTAPP 2528).) Boiled down to its essence, the Plan explicitly provides that the Bankruptcy Court could sever any provision before confirmation without it affecting the rest of the Plan, but following confirmation all provisions are integral and only the Debtors can consent to severance of a particular provision. It does not explain why each provision becomes integral only upon confirmation.

As explained above, after having found a *Stern* violation and vacated the Confirmation Order, the Plan now comes before the Court under Rule 8018.1 "as proposed findings of fact and conclusions of law." Therefore, the Court steps into the shoes of the Bankruptcy Court in terms of the Nonseverability Provision. That is, the first half of the Nonseverability provision remains the operative provision, and the Plan itself has not declared the Third-Party Releases nonseverable. Consequently, the Plan provides that the Court should sever the voided Third-Party Releases from the Plan. And the Court will do so. However, just as the Court would not find the Third-Party Releases nonseverable after confirmation based only on the boilerplate Nonseverability Provision, it will not rely solely on the Nonseverability Provision to find the provisions severable now that the Plan returns to the pre-confirmation phase. Instead, the Court will analyze the law surrounding severability and the record to determine that it can sever these Third-Party Releases that lack any connection to the reorganization.

1. The Nonseverability Provision's Textual Support for Severability

[75] As described above, the Nonseverability Provision provides that, before confirmation, the Plan remains in full effect in the event that the Bankruptcy Court finds any provision unenforceable. Having now vacated the Confirmation Order, the Court steps into the shoes of the Bankruptcy Court before confirmation, when the parties agreed that the Third-Party Releases could be severed.

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Yet, Debtors maintain that the Nonseverability Provision reinforces that the Third-Party Releases carry too much import in the Plan for it to survive without the Releases.

However, the contradictory text and operation of the Nonseverability Provision belies the argument that the Plan cannot survive without the Third-Party Releases. The Nonseverability Provision expressly provides that, before confirmation, the Bankruptcy Court could find the Third-Party Releases (or any provision) unenforceable, as the Court is now doing. In the event of such a holding, the Plan would "in no way be affected, impaired, or invalidated." The fact that the Plan would have survived if the Bankruptcy Court had severed the Third-Party Releases just before confirmation, without any further changes, demonstrates that the Third-Party Releases are not inextricably tied to the rest of the Plan. Therefore, just as the Bankruptcy Court could sever the Third-Party Releases before confirmation, this Court can sever the Third-Party Releases after vacating the Confirmation Order.

***35** Likewise, the Nonseverability Provision provides that a provision of the Plan can be deleted with Debtors' consent. Again, this demonstrates that the Plan could survive in the absence of any particular provision. Debtors attempted to reserve for themselves the right to sever provisions of the Plan — without the consent of any other affected parties — while arguing here that the Court lacks the same authority to sever legally unenforceable provisions. This confirms that the Nonseverability Provision amounts to nothing more than a hollow attempt to evade judicial review of the Third-Party Releases. The negotiating parties here have attempted to release a wide variety of claims of a wide variety of absent and nonconsenting individuals and then use a boilerplate Nonseverability Provision to constrain Article III review of those releases. The Court cannot let such gamesmanship occur. Therefore, the Court will look to the record in determining that the releases do not form an integral part of the Plan and, consequently, the Court may sever this provision without upending the entire Plan.

2. The Importance of the Provision to the Plan's Determination of Severability

[76] [77] [78] In determining severability, courts must look to the evidence in the record and not simply whether the parties state in a conclusory fashion that the provision cannot be severed. As the Second Circuit has explained, "normally a nonseverability clause standing on its own cannot support a finding of equitable mootness." *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 485 (2d Cir. 2012). The Second Circuit's reasoning in the equitable mootness context provides sound guidance in examining severability generally. The Second Circuit explained that "[a]llowing a boilerplate nonseverability clause, without more, to determine the equitable mootness question would give the debtor and other negotiating parties too much power to constrain Article III review," and would "moot virtually every appeal where a stay had not been granted." *Id.* Importantly, "[w]hile a nonseverability clause may be one indication that a particular term was important to the bargaining parties, a district court cannot rely on such a clause to the exclusion of other evidence." *Id.*

The Second Circuit ultimately found the release provisions nonseverable, but only because courts below "did not rest [their] decision exclusively on the nonseverability clause." *Id.* at 486. Instead, it relied on specific testimony regarding the importance of the releases. *Id.* This included an examination of how the releases induced a specific released party to settle and an explanation of why the plan required that released party's contribution. *Id.* The court relied on evidence that "these provisions could not be excised without seriously threatening Charter's ability to re-emerge successfully from bankruptcy," because the parties would need to reenter negotiations. *Id.*

Other circuits, including the Fourth Circuit, have followed a similar approach in looking to the facts to determine severability. For example, in *Behrmann*, the Fourth Circuit rejected the equitable mootness argument based not only on a severability provision, but also on the absence of any factual support that the releases "[were] important to the overall objectives of the Plan" as argued. 663 F.3d at 714. The debtor had "failed to demonstrate how the relief requested by Appellants would jeopardize the success of the Confirmed Plan." *Id.* After explaining that the importance of the releases to the overall plan lacked factual support, the Fourth Circuit "also note[d]" the existence of a severability provision — allowing provisions to be severed, like the posture here now — "suggests that the plan would remain viable absent the Release Provisions." *Id.* Thus, the Fourth Circuit relied on the facts to determine the importance of a provision to the plan, not just the provisions in the plan addressing severability.

Similarly, in the *In re Continental Airlines* case, the Third Circuit rejected an argument as to the essential nature of third-party releases to a plan where the debtors presented

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"[n]o evidence or arguments ... that Plaintiffs' appeal, if successful, would necessitate the reversal or unraveling of the entire plan of reorganization." 203 F.3d at 210. It explained that the debtors had provided no evidence that "investors and creditors, in deciding whether to support the Continental Debtors' plan, ever considered Plaintiffs' claims." *Id.* The Third Circuit ultimately invalidated the releases. *Id.* at 217-18.

3. Other Areas of the Law's Support for Focusing on the Provision's Importance to the Plan

***36** **[79]** **[80]** This focus on the overall importance of the provision proposed to be severed finds support in other areas of severability. For example, when confronted with an unconstitutional provision in a statute, courts typically "sever[ ] any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010). This presumption operates in the presence or absence of a severability provision. *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, ––– U.S. ––––, 140 S. Ct. 2335, 2352-53, 207 L.Ed.2d 784 (2020) ("Even if the severability clause did not apply to the government-debt provision at issue in this case (or even if there were no severability clause in the Communications Act), we would apply the presumption of severability as described and applied in cases such as *Free Enterprise Fund.* And under that presumption, we likewise would sever the 2015 government-debt exception, the constitutionally offending provision.").

[81] **[82]** **[83]** With this presumption in mind, courts look to the importance of the provision to the overall statute. "The more relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987). Indeed, if "the unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions," then courts will invalidate only the unconstitutional portion. *Free Enter. Fund*, 561 U.S. at 508, 130 S.Ct. 3138. Thus, courts look to whether severing the offending provision would upend the entire statute and, if not, they default to severing the provision.

[84] **[85]** **[86]** **[87]** Likewise, contract law supports looking to the overall importance of the unenforceable provision. As the Fourth Circuit has described Virginia contract law: "Generally, when a contract covers several subjects, some of whose provisions are valid and some void, those which are valid will be upheld if they are not so interwoven with those illegal as to make divisibility impossible." *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279, 285 (4th Cir. 1974). Similarly, "Delaware law is clear that an invalid term of an otherwise valid contract, if severable, will not defeat the contract. Thus, a court will enforce a contract with an indefinite provision if the provision is not a material or essential term." *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 284-85 (3d Cir. 2014) (cleaned up). Thus, when faced with an unenforceable provision in a contract, courts will look to whether severing the provision will upset the entire contract.

4. The Evidence in This Case Supports Severing the Third-Party Releases

Applying these principles, the Court finds that severing the Third-Party Releases at this stage would not upset the viability of the Plan. In fact, the evidence demonstrates otherwise. Indeed, Carrie Teffner testified that, as of February 22, 2021, "Debtors have sold substantially all of their assets and all that remains is to distribute cash proceeds in accordance with the terms of the plan." (Teffner Decl. ¶ 30.) To that end, the three main sales of the assets had all closed months before the confirmation hearing. No evidence exists that severing the Third-Party Releases would upset these already-closed sales, require Debtors to return any of the funds generated by the sales or disrupt the distribution of the cash proceeds.

Teffner further testified that the various release provisions "are the product of extensive good faith, arm's-length negotiations and were material inducements for the parties to enter into the comprehensive settlement embodied in the plan." (Teffner Decl. ¶ 41.) Yet, this "arm's-length" negotiation occurred without the Releasing Parties having a seat at the negotiating table. Teffner admitted as much during cross-examination during the Confirmation hearing. (Confirm. Tr. at 23:1-10.) Moreover, she did not describe how the releases operated as a material inducement for the parties to enter into the settlement, especially given that many of the parties did not enter into the settlement. Instead, she testified that it was the Debtors, not third parties, who sought the broad releases. (Confirm. Tr. at 36:1-4.) Again, she admitted as much on cross-examination. (Confirm Tr. at 23:21-24:2.) In fact, she admitted that with respect to her statement

regarding the material inducement, "the third-party releases were addressed in totality with no specific individuals called out." (Confirm. Tr. 23:25-24:2.) The Court cannot agree that the Third-Party Releases provided a material inducement to such a broad array of individuals without examining the inducement to each individual. Additionally, Teffner admitted that the Releasing Parties had no participation in the bankruptcy process at all. (Confirm. Tr. at 26:10-14.)

***37** Furthermore, Teffner claimed that not approving the Third-Party Releases "could potentially significantly increase the time and expense of the Debtors' wind down process, to the detriment of the Debtors' stakeholders." (Teffner Decl. ¶ 45.) On cross-examination, she expanded that this referred to the time and expense of engaging in discovery and defending litigation. (Confirm. Tr. at 33:19-22.) However, expending additional time and expense to respond to discovery does not amount to unwinding the Plan, especially with the presence of substantial insurance to offset certain litigation costs. Indeed, Debtors had in excess of $50 million in insurance, and perhaps in excess of $100 million dollars. (Confirm. Tr. 30:14-31:4.)

Critically, during the Confirmation Hearing, Teffner could not offer specific reasons why the Third-Party Releases comprised a necessary part of the Plan. (Confirm. Tr. at 36:1-4.) Instead, she offered only general statements that the overall intent of Debtors was to provide releases for everyone. (Confirm. Tr. at 36:1-4.) And she admitted that the negotiations focused only on past/current officers and directors, not the vast universe of Released Parties contained in the Third-Party Releases. (Confirm. Tr. at 27:19-24; 42:3-9.) She refused to answer whether the reorganization would fail absent the releases.[13] (Confirm. Tr. at 36:10-19.)

13 Likewise, Gary Begeman refused to testify when asked whether the confirmation could proceed absent the Third-Party Releases. (Confirm. Tr. at 47:18-21.)

In fact, Teffner confirmed that the most important reasons for the inclusion of the Third-Party Releases — pushing the Plan to completion, playing an integral role in the bankruptcy, expending time and resources, and making concessions — would not apply to individuals or entities that worked for Debtors before the bankruptcy filing. (Confirm. Tr. at 42:3-44:6.) Yet, the only addressed Released Parties involves two former executives (Jaffe and Giammatteo) who had left their employment with Debtors months before the bankruptcy and played no role in the reorganization.

In sum, the record contains no evidence of how the Third-Party Releases induced specific releasing parties to settle, or why the Plan required that Releasing Party's contribution. It contains no evidence as to why the Court could not excise the Third-Party Releases without seriously threatening Debtors' ability to re-emerge successfully from bankruptcy. Nor does the record suggest that the parties would need to reenter any negotiations. Indeed, Debtors have made clear that the Plan "is substantially consummated — and then some." (Appellee Br. at 30.) Simply saying that the Third-Party Releases form an integral part after confirmation of the Plan does not make it so. And, by saying the Third-Party Releases do not form an integral part of the Plan before confirmation, Debtors essentially admit that they do not form an integral part at any time.

The Court will not allow parties who gifted themselves a release in the Plan to hold this appeal hostage with a Nonseverability Provision, especially when the parties have not articulated a sound basis for nonseverability. For these reasons, the Court has no difficulty in severing the voided Third-Party Releases from the Plan.

F. Equitable Mootness

Debtors also argue that the Court should dismiss this appeal on the grounds of equitable mootness. (Appellee Br. at 30.) The Court declines the invitation to use its equitable powers to ignore the serious errors that have occurred here.

1. Equitable Mootness Doctrine Generally

[88] [89] [90] [91] [92] "Equitable mootness is a pragmatic doctrine grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable." *In re Bate Land & Timber LLC*, 877 F.3d 188, 195 (4th Cir. 2017). The doctrine's application "is based on practicality and prudence, does not employ rigid rules, and requires that a court determine whether judicial relief on appeal can, as a pragmatic matter, be granted." *Id.* In making this determination, courts can examine the following relevant factors:

> ***38** (1) whether the appellant sought and obtained a stay;
>
> (2) whether the reorganization plan or other equitable relief has been substantially consummated;

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(3) the extent to which the relief requested on appeal would affect the success of the reorganization plan or other equitable relief granted; and,

(4) the extent to which the relief requested on appeal would affect the interests of third parties.

Id. The reviewing court has discretion whether to find an appeal equitably moot. *Behrmann*, 663 F.3d at 714 ("In sum, we decline to exercise our discretion to dismiss this appeal as equitably moot."). And, notably, "equitable mootness applies to specific claims, not entire appeals and must be applied with a scalpel rather than an axe." *In re Charter Commc'ns, Inc.*, 691 F.3d at 481-82 (cleaned up).

[93] Before addressing the factors, the Court notes that four threshold issues weigh against a finding of equitable mootness. First and foremost, vacating the Confirmation Order undercuts the argument in support of equitable mootness. The Confirmation Order no longer constitutes a final judgment, such that the Court no longer faces "the passage of time after a judgment in equity and implementation of that judgment," *In re Bate Land & Timber LLC*, 877 F.3d at 195, that the equitable mootness doctrine is based upon. The inquiry could end here. However, the Court will continue its analysis of the equitable mootness doctrine and find that it does not apply even if the Confirmation Order had not been converted into a Report and Recommendation.

Second, the fact that the Trustee brings this appeal counsels against applying the equitable doctrine. The Trustee argues that equitable mootness should never apply against an appeal brought by the Government. (Trustee Reply at 30.) Although the Court need not adopt such an ironclad rule, the Court believes that equitable mootness should not lie against the Trustee under these or similar circumstances. *See Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 423, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) ("But it remains true that we need not embrace a rule that no [equitable] estoppel will lie against the Government in any case in order to decide this case.").

[94] **[95]** As the Fourth Circuit has articulated, the equitable mootness doctrine applies especially "when a party, seeking a return to the status quo ante, sits idly by and permits intervening events to extinguish old rights and create new ones." *Mac Panel Co. v. Virginia Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002). This reasoning does not apply when the Trustee brings an appeal on behalf of absent individuals. The Trustee does not occupy the normal status as a "party" attempting to create or enlarge its own rights. Rather, the Trustee acts as a "watchdog" serving the role of "protecting the public interest and ensuring that bankruptcy cases are conducted according to law." *In re Clark*, 927 F.2d 793, 795 (4th Cir. 1991). As the Supreme Court has recognized, when the public interest rather than private rights are at stake, equitable doctrines take on a different role in favor of protecting the public interests. *See Kansas v. Nebraska*, 574 U.S. 445, 456, 135 S.Ct. 1042, 191 L.Ed.2d 1 (2015) ("As we have previously put the point: When federal law is at issue and 'the public interest is involved,' a federal court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.' "); *Off. of Pers. Mgmt.*, 496 U.S. at 419, 110 S.Ct. 2465 ("From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants.").

***39** Here, a finding of equitable mootness would preclude the Trustee from fulfilling its duty of protecting the public interest and preventing the abuse of the bankruptcy system. In fact, these facts demonstrate the need for the Trustee to discharge his statutory responsibilities. Not only did the parties craft a release that would extinguish the rights of countless individuals, they did so in a way that would insulate the release from judicial review. As the Securities Litigation Lead Plaintiffs' plight reveals, any party that challenges the Third-Party Releases loses standing to challenge the Third-Party Releases. Indeed, Debtors have argued vehemently that the Securities Litigation Lead Plaintiffs lack standing to challenge the releases. Without the Trustee's ability to serve as a watchdog, the Court might not ever endeavor to conduct a merits-based review of the Third-Party Releases that discharge the claims of thousands of absent individuals. The Trustee must have the ability to speak for those parties affected by a bankruptcy proceeding when the other interested parties have been effectively silenced from speaking on behalf of themselves. Accordingly, the Court will not apply the doctrine of equitable mootness against the Trustee when the Trustee seeks to protect the rights of absent individuals.

[96] **[97]** Third, the seriousness of the Bankruptcy Court's errors counsels against a finding of equitable mootness. As the Eighth Circuit recently explained in response to the assertion of equitable mootness, "invoking this doctrine often results in the refusal of the Article III courts to entertain a live appeal over which they indisputably possess statutory jurisdiction and in which meaningful relief can be awarded. An Article III appellate court has a virtually unflagging obligation to exercise its subject matter jurisdiction." *In re VeroBlue Farms*

USA, Inc., 6 F.4th 880, 883 (8th Cir. 2021) (cleaned up). Here, the Bankruptcy Court extinguished the claims of absent and nonconsenting parties without the constitutional authority to adjudicate those claims. Pragmatism does not outweigh the need to remedy constitutional errors. *See Stern*, 564 U.S. at 501, 131 S.Ct. 2594 ("It goes without saying that the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.") (cleaned up). These constitutional errors directly concern the integrity of the bankruptcy process. "Equity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process." *In re Pac. Lumber Co.*, 584 F.3d at 251-53.

Fourth, the facts here do not suggest that "effective judicial relief is no longer practically available." *In re Bate Land & Timber, LLC*, 877 F.3d at 195. Debtors have offered no reason for the Court to conclude that it could not sever the Third-Party Releases here, and the Court has already found them severable. Such relief would not alter any creditor's recovery or affect the bankruptcy estate in any way. *Id.* Indeed, the overriding defect in the Third-Party Releases arises from the fact that it releases claims entirely attenuated from the Bankruptcy Case — claims that have no connection to the Bankruptcy Case against non-debtors held by third parties. Although Debtors point to the Nonseverability Provision, the Court does not believe that this provision constrains the ability to offer effective judicial relief. For one, without a valid Confirmation Order in place, the Nonseverability Provision now provides that the Court can sever the offending releases. In any event, a boilerplate nonseverability clause included by a debtor and other negotiating parties must not preclude appellate review of provisions that extinguish the rights of others in favor of those negotiating parties. *In re Charter Commc'ns, Inc.*, 691 F.3d at 485 ("Allowing a boilerplate nonseverability clause, without more, to determine the equitable mootness question would give the debtor and other negotiating parties too much power to constrain Article III review.").

2. Application of the Equitable Mootness Factors

Turning to the factors, they do not support a finding of equitable mootness and the Court will decline to exercise its discretion to avoid reviewing the merits of this appeal. *See Behrmann*, 663 F.3d at 711 ("[W]hether a court should lend its aid in equity to a Chapter 11 debtor will turn on the particular facts and circumstances of the case ....")

***40** First, Appellants sought a stay in the Bankruptcy Court and this Court but failed in both attempts. Although they failed to obtain a stay, they moved for one at both levels, so this differs from the case where a party makes a strategic choice that "allow[s] the reorganization plan to go into effect, taking the risks that attended such a decision." *Mac Panel Co. v. Virginia Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002) (moving for a stay in the bankruptcy court but choosing not to in the district court weighs in favor of a finding of equitable mootness). Moreover, the Trustee's requested relief does not seek to affect the recovery of any creditor; therefore, its unsuccessful attempts to obtain a stay would not render it inequitable for the Court to rule on the appeal. *See In re Bate Land & Timber, LLC*, 877 F.3d at 196 ("But because BLC merely seeks to add to its recovery from the Debtor's pocket without affecting the recovery of any other creditor, we conclude that BLC's unsuccessful attempt to obtain a stay would not render it inequitable for this court to provide the requested relief."). Additionally, this Court denied the request for a stay based on the high burden placed on a party requesting a stay. It expressly left open the door for Appellants to prevail on the merits. Closing that door now, simply because the Court did not previously grant a stay, would itself cause inequity.

[98] Second, the substantial consummation of the Plan does not render it inequitable to rule on this appeal. When "the relief requested does not seek to undo any aspect of the Confirmed Plan that has been consummated, it would not be impractical, imprudent, or inequitable to allow the appeal to proceed." *Id.* The Plan is no longer in the post-confirmation phase. Moreover, the Trustee does not seek to undo any transactions that have occurred in the Plan's undertaking. Indeed, the requested relief — invalidating all or parts of the releases at issue — would only prospectively affect the ability of parties to bring suits based on past events. It would require no unwinding.

Similarly, the third factor, the extent to which the relief requested would affect the success of the reorganization plan, counsels against a finding of equitable mootness. Invalidating or altering the releases would not impact the recovery of any creditors. Indeed, the Plan itself states that the Third-Party Releases can be severed. The Plan would not be disturbed in any material way by allowing third parties to retain their causes of action against non-debtors.

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The fourth — and most important — factor concerns the effect on the interests of third parties. *In re VeroBlue Farms USA, Inc.*, 6 F.4th at 889-90 (stressing that the most important factor in this analysis is the impact on third parties). As the releases here only apply to claims arising on or before the Effective Date, no post-confirmation transactions with third parties have occurred in reliance on the releases. Thus, considering the merits of the appeal would not negatively affect any third parties who relied on the confirmation of the Plan. *See In re Bate Land & Timber, LLC*, 877 F.3d at 196 ("The Debtor has not engaged in significant transactions with third parties who relied on the Confirmed Plan's terms such that alteration of the Confirmed Plan would negatively impact the Confirmed Plan and the third parties who relied upon it."). Conversely, extinguishing the claims of thousands of individuals without compensation, without consent and without due process reeks of inequity to third parties. *See In re Continental Airlines*, 203 F.3d at 211 ("In balancing the policy favoring finality of bankruptcy court judgments — particularly reorganization plans — against other considerations, we note as well that the equities here would not dictate dismissal. Plaintiffs, who have never had their day in court, have been forced to forfeit their claims against non-debtors with no consideration in return.").

Finally, the doctrine of equitable mootness is all too often invoked to avoid judicial review, as Debtors seek to do here. *In re VeroBlue Farms USA, Inc.*, 6 F.4th at 889-91; *In re Charter Commc'ns, Inc.*, 691 F.3d at 485. That concern takes on greater import here with the shockingly broad releases and the inclusion in the Plan of an attempted "poison pill" Nonseverability Provision. The errors committed by the Bankruptcy Court here are serious and command review by an Article III court. That Debtors invoke an equitable principle designed to promote a fair outcome embodies the height of irony.

***41** Consequently, the Court concludes that the equities strongly favor considering the merits of this appeal. Debtors' doomsday scenarios all stem from the inclusion of the Nonseverability Provision. However, the Court will not allow that provision or an equitable doctrine to preclude appellate review of plainly erroneous release provisions. Indeed, the Released Parties have given themselves broad releases and have sought to immunize the unconstitutional releases from appellate review with the inclusion of an inflexible Nonseverability Provision (which no longer has any effect). Equity does not support this.

G. The Exculpation Provision

The Trustee further argues that the Bankruptcy Court erred in approving the Exculpation Provision. (Trustee Br. at 43.) First, the Trustee submits that the Bankruptcy Court should have applied the *Behrmann* factors to the Exculpation Provision. (Trustee Br. at 43.) Second, the Trustee asserts that the Exculpation Provision bars claims against an overly broad set of parties and fails to include an exception for claims to proceed with court approval. (Trustee Br. at 44.) The Exculpation Provision provides:

> [N]o Exculpated Party shall have or incur, and each Exculpated Party is hereby released and exculpated from any Cause of Action or any claim arising from the Petition Date through the Effective Date related to any act or omission in connection with, relating to or arising out of, the Chapter 11 Cases ... except for claims related to any act or omission that is determined in a Final Order to have constituted actual fraud, willful misconduct, or gross negligence.

[99] **[100]** **[101]** **[102]** **[103]** In contrast to third-party releases that offer protection to non-debtors for preconfirmation liability, an exculpation provision serves to protect court professionals who act reasonably while carrying out their responsibilities in connection with the bankruptcy case. Exculpation provisions do not release parties, but instead raise the liability standard of fiduciaries for their conduct during their case. *In re Health Diagnostic Lab. Inc.*, 551 B.R. 218, 232 (Bankr. E.D. Va. 2016). Exculpation provisions "generally are permissible, so long as they are properly limited and not overly broad." *In re Nat'l Heritage Found., Inc.*, 478 B.R. 216, 233 (Bankr. E.D. Va. 2012). To that end, courts will approve an exculpation provision "so long as it is limited to those parties who have served the debtor, is narrowly tailored and complies with the applicable standards." *In re Alpha Nat. Res., Inc.*, 556 B.R. 249, 260 (Bankr. E.D. Va. 2016). "Exculpation is appropriate when it is solely limited to fiduciaries who have served a debtor through a chapter 11 proceeding." *In re Health Diagnostic Lab., Inc.*, 551 B.R. at 232-33.

[104] **[105]** Exculpation clauses have their genesis in two different sources: the *Barton* Rule and Section 1103(c) of the Bankruptcy Code. *In re Nat'l Heritage Found., Inc.*, 478 B.R. at 233. Under the *Barton* Rule, based on *Barton v. Barbour*, 104 U.S. 126, 26 L.Ed. 672 (1881), a party cannot bring a suit against a bankruptcy trustee or the trustee's attorneys for acts within the trustee's duties of recovering assets for the estate

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without first obtaining leave of court. *McDaniel v. Blust*, 668 F.3d 153, 157 (4th Cir. 2012). "The Barton doctrine serves the principle that a bankruptcy trustee is an officer of the court that appoints him and therefore that court has a strong interest in protecting him from unjustified personal liability for acts taken within the scope of his official duties." *Id.* In *McDaniel*, the Fourth Circuit affirmed dismissal of claims against the trustee's counsel, because the plaintiff's allegations "can be considered by the bankruptcy court ... in its role as gatekeeper." *Id.* at 157.

***42** **[106]** **[107]** **[108]** Under Section 1103(c) of the Bankruptcy Code, the Creditors' Committee possesses broad authority to formulate a plan and perform "such other services as are in the interest of those represented." 11 U.S.C. § 1103(c). Courts have interpreted this section to imply both a fiduciary duty to committee constituents and a limited grant of immunity to committee members. *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000). "This immunity covers committee members for actions within the scope of their duties." *Id.* "[A] proper exculpation provision is a protection not only of court-supervised fiduciaries, but also of court-supervised and court-approved transactions." *In re Aegean Marine Petroleum Network, Inc.*, 599 B.R. at 721. Thus, a narrowly tailored exculpation provision serves only those aims of protecting parties who have performed necessary duties in connection with the case.

1. *Behrmann* and Exculpation Provisions

[109] The Trustee argues that the Bankruptcy Court erred in failing to apply the *Behrmann* factors to the Exculpation Provision. (Trustee Br. at 43.) However, he cites no case law in support of his argument. Further, the Fourth Circuit in *Behrmann* did not analyze the exculpation provision at issue; instead, the Court only mentioned it as being part of the plan.

Moreover, the purposes behind the *Behrmann* factors do not fully align with the purposes of an exculpation provision. As discussed above, the *Behrmann* factors seek to determine the necessity of a release to the ultimate success of a particular plan and the release's effect on the impacted classes. Exculpation provisions, on the other hand, serve to ensure that court-supervised parties can carry out transactions to effectuate the plan without fear of liability for court-authorized actions. Accordingly, the Court concludes that the Bankruptcy Court did not err by failing to apply the *Behrmann* factors to the Exculpation Provision. However, that does not end the analysis of the Exculpation Provision.

2. The Bankruptcy Court's Error in Approving the Exculpation Provision

On remand from the Fourth Circuit, the bankruptcy court in the *Behrmann* case approved the exculpation provision there (but not the third-party release provision). *In re National Heritage Found., Inc.*, 478 B.R. at 234.[14] Specifically, the bankruptcy court approved the exculpation provision because it:

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

[110] *Id.* The Court finds these factors persuasive, with additional limitations found in the case law and the underpinnings of the bases for exculpation provisions. Therefore, an exculpation provision that "is limited to those parties who have served the debtor, is narrowly tailored and complies with the applicable standards," *In re Alpha Nat. Res., Inc.*, 556 B.R. at 260, must contain the following limitations:

> (a) it must be limited to the fiduciaries who have performed necessary and valuable duties in connection with the bankruptcy case;
>
> (b) is limited to acts and omissions taken in connection with the bankruptcy case;
>
> (c) does not purport to release any pre-petition claims;
>
> (d) contains a carve out for gross negligence, actual fraud or willful misconduct; and,
>
> (e) contains a gatekeeper function.

14 The parties thereafter did not appeal the approval of the exculpation provision.

***43** An exculpation clause narrowly tailored to these factors serves the purposes underpinning exculpation provisions.

Additionally, adhering to these limitations ensures that a court need not test the exculpation provision against the *Behrmann* factors. The further that an exculpation provision stretches beyond these limitations, the closer that it becomes in substance to a more general non-debtor release to which the *Behrmann* analysis must apply.

[111] Here, the Exculpation Provision satisfies some, but not all, of these limiting factors. In support of approval, it is limited to acts and omissions taken in connection with the bankruptcy case, does not release any pre-petition conduct and contains a carve out for gross negligence, actual fraud or willful misconduct. However, it extends beyond fiduciaries who have performed necessary and valuable duties. Instead, the "Exculpated Parties" include all current and former employees, attorneys, accountants, managers, financial advisors and consultants of every party being exculpated. Additionally, it lacks a gatekeeping function.

In conclusion, the Exculpation Provision extends beyond the permissible parties and fails to contain a gatekeeper function that would allow an avenue into court for some claims. Therefore, the Court concludes that the Bankruptcy Court clearly erred in approving the Exculpation Provisions. However, unlike the Third-Party Releases, the Court believes that this can be redrafted on remand to comply with the requirements outlined here.

IV. CONCLUSION

The Bankruptcy Court extinguished a broad swath of claims held by a wide variety of people. However, despite this drastic action, the Bankruptcy Court failed to determine whether it had the authority to rule on those claims or whether the facts supported extinguishing those claims. Indeed, the Bankruptcy Court plainly lacked the constitutional power to adjudicate many of the claims encompassed by the Third-Party Releases and to confirm the Reorganization Plan. Therefore, the Court VACATES the Bankruptcy Court's Order (Bankr. Dkt. No. 1811; USTAPP 2530-2672) confirming Debtors' Reorganization Plan, VOIDS the Third-Party Releases and RENDERS the Third-Party Releases UNENFORCEABLE. The Court FINDS the voided Third-Party Releases to be SEVERABLE from the Reorganization Plan and, therefore, SEVERS the voided Third-Party Releases from Debtors' Reorganization Plan.

Additionally, the Court FINDS the Exculpation Provision to be overly broad and, therefore, VOIDS the Exculpation Provision as currently drafted. However, the Court believes that the Exculpation Clause could be redrafted to comply with the applicable law in a manner consistent with this Opinion. Consequently, the Court hereby REMANDS this case to the Bankruptcy Court with instructions to redraft the Exculpation Provision in a manner consistent with this Opinion and then to proceed with confirmation of the Plan without the voided Third-Party Releases.[15]

15 The Court notes that the Exculpation Provision does not implicate *Stern* issues, so the Bankruptcy Court possesses the constitutional authority to confirm Debtors' Reorganization Plan without the voided Third-Party Releases. Additionally, no party objects to any other aspect of the Plan than addressed here.

Finally, the Court FINDS that the interests of justice warrant reassigning this case to another Bankruptcy Judge in this district outside of the Richmond Division and therefore ORDERS the Chief Judge of the Bankruptcy Court for this district to REASSIGN this case on remand to another Bankruptcy Judge in this district outside of the Richmond Division.[16] The Chief Judge may reassign the case to himself if he believes the interests of justice so warrant.[17]

16 The Court has considered the factors for reassignment as set forth in *United States v. McCall*, 934 F.3d 380, 384 (4th Cir. 2019), and believes that reassignment is warranted here due to the practice of issuing third-party releases in the Richmond Division in contravention of the Fourth Circuit's admonitions in *Behrmann.* To be clear, the undersigned does not question the integrity or impartiality of Judge Huennekens. Indeed, the contrary is true, as the undersigned holds Judge Huennekens in high regard. However, the practice of regularly approving third-party releases and the related concerns about forum shopping call into question public confidence in the manner that these cases are being handled by the Bankruptcy Court in the Richmond Division.

17 Even though the case shall be reassigned to a Bankruptcy Judge outside of the Richmond Division, the case shall remain a Richmond Division case and any appeal after remand shall be assigned to the undersigned.

***44** Accordingly, this case will be remanded to the Bankruptcy Court in accordance with the instructions herein. An appropriate order shall issue.

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The Clerk is directed to file this Memorandum Opinion electronically, notify all counsel of record and forward a copy to the chambers of Chief United States Bankruptcy Judge Frank J. Santoro and United States Bankruptcy Judge Kevin R. Huennekens.

It is so ORDERED.

All Citations

--- B.R. ----, 2022 WL 135398

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