UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PURDUE PHARMA L.P., *et al.*, BANKRUPTCY APPEALS	21 cv 7532 (CM) 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)
This Filing Relates to	
ALL MATTERS	

SUPPLEMENTAL BRIEF OF APPELLANTS THE STATES OF WASHINGTON, CONNECTICUT, DELAWARE, RHODE ISLAND AND VERMONT IN RESPONSE TO THE COURT'S QUESTIONS AT ORAL ARGUMENT

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I. INTRODUCTION

Second Circuit precedent provides clear guidance on both questions as to which the Court requested supplemental briefing. The answers to both require reversal.

First, the Second Circuit has emphasized that Congress did not "intend that the bankruptcy court be a haven for wrongdoers." *In re Berry Estates., Inc.*, 812 F.2d 67, 71 (2d Cir. 1987) (citing *In re Flight Transp. Corp. Securities Litig.*, 730 F.2d 1128, 1136-37 (8th Cir. 1985); *In re Teltronics, Ltd.*, 649 F.2d 1236, 1239-42 (7th Cir. 1981); 2 *Collier on Bankruptcy* ¶ 362.05, at 362-42). Thus, in deciding whether to grant a non-debtor release—a judicially created exception intended to advance equity in rare cases—the Court can and should consider whether the party seeking the release is using it to escape the consequences of its own wrongdoing.

The evidence here shows that the Sacklers had a long-term, calculated strategy to use a Purdue bankruptcy as a haven for their own wrongdoing, to protect their vast opioid wealth from their many victims. Starting in 2007, as they became aware of the scope of their personal liability for lying about Oxycontin's dangers, they began consulting bankruptcy experts about how to shield their assets. They then extracted billions of dollars from the company and moved it overseas, following advice they received from people involved in asbestos bankruptcies. This evidence is all in the record, and Judge Drain acknowledged it; he just failed to consider the appropriate legal conclusion: that the nonconsensual Sackler Release cannot be approved because it abuses the bankruptcy process. No remand is necessary for the Court to reach this legal conclusion.

As to the Court's second question, *Metromedia* holds that there is no explicit statutory authorization for non-debtor releases outside the asbestos context. *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005). The Second Circuit has never upheld a non-debtor release based on any of the statutes Purdue cites. This Court should not infer statutory authority for such releases beyond what the Second Circuit has recognized, especially when doing so violates other explicit Code provisions, tramples on the sovereign authority of States, and rewards the Sacklers' intentional abuse of the bankruptcy process.

II. ARGUMENT

A. The Court Can and Should Consider Evidence that the Sacklers Intentionally Withdrew Funds from Purdue to Enrich Themselves and Prevent Those Funds from Going to Their Victims

This Court has asked whether it should consider the Sacklers' extraction of $11 billion from Purdue in the years leading up to its bankruptcy in determining whether the Sackler Release abuses the bankruptcy process. The answer is yes. Their calculated strategy to "milk" Purdue of billions and "jurisdictional[ly] shield" the money in offshore trusts is critically important in assessing the abusiveness of the Release and to avoid exploitation of this Court's equitable authority in this case and in future bankruptcies. JX-2974, JX-1660.

To start, Second Circuit authority *requires* close examination of every non-debtor release with a careful eye towards preventing abuse of the bankruptcy process not just in the particular case, but in future cases. *Metromedia* starkly warned that a non-debtor release "lends itself to abuse" because of the sweeping scope of bankruptcy releases and the lack of countervailing safeguards of the Bankruptcy Code. *Deutsche Bank A.G. v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005). *Manville III* expanded on this warning, embracing this Court's analysis in *Karta* that a court's application of *Metromedia* considerations—such as the importance of any non-debtor release to the plan—must anticipate and deter manipulation. *In re Johns-Manville Corp.*, 517 F.3d 52, 66 (2008) (*Manville III*) (citing *In re Karta Corp.*, 342 B.R. 45, 55 (S.D.N.Y. 2006)). As this Court recognized in *Karta*, applying *Metromedia* factors mechanically, without considering the ways in which debtors and third parties seeking a release can shape a bankruptcy plan to depend on a third party's financial contribution and manufacture supporting evidence, would allow "the very small *Metromedia* umbrella" to swallow the rule. *In re Karta Corp.,* 342 B.R. at 55. *Metromedia* itself warned against reducing the decision to grant a non-debtor release into a checklist of factors and prongs. 416 F.3d at 142.

Thus, Second Circuit precedent addressing non-debtor releases requires this Court to consider all of the relevant circumstances, including that in the face of mounting liability, the Sacklers extracted billions from Purdue that would otherwise be available for distribution. That evidence is detailed below and necessarily leads to the conclusion that granting the Release here not only blesses the Sacklers' efforts to shield their assets from their victims, but also turns this Court's equitable powers into another tool in their jurisdictional shielding strategy. Whatever lawyer-crafted excuses the Sacklers now offer, there are no innocent explanations for extracting billions from Purdue in the face of growing personal liability and stashing it in the Isle of Jersey and other asset-shielding trusts. The bottom line is that this money would be available for distribution in this bankruptcy without the need for a release if the Sacklers had not taken it out of Purdue and shielded it from their victims.

Looking beyond the non-debtor release cases to other bankruptcy principles confirms this conclusion. Congress intended bankruptcy to provide a fresh start for unfortunate debtors, not "a haven for wrongdoers." *Berry Estates.*, 812 F.2d at 71; *see also In re Sire Plan, Inc.*, 100 B.R. 690, 694 (Bankr. S.D.N.Y. 1989) (emphasizing that courts should never allow their equity power to be "perverted as an instrument for approving what it was designed to thwart" (quoting *Pepper v. Litton*, 308 U.S. 295, 312 (1939)). Indeed, given the extraordinary power of bankruptcy courts, "[t]he conduct of bankruptcy proceedings not only should be right but must seem right." *In re Ira Haupt & Co.*, 361 F.2d 164, 168 (2d Cir. 1968) (Friendly, J.).[1] Granting the Release is not right: it

[1] This principle has been applied in many contexts in bankruptcy cases, including when a corporate debtor intentionally manufactured the venue for its bankruptcy case by creating a subsidiary in the desired forum

is a transparent abuse of the bankruptcy process that the public has loudly decried. Affirming the Release not only condones the Sacklers' premeditated abuse in this case, it invites the same and even greater abuses in the future. This Court was prescient in *Karta* in recognizing that a non-debtor release cannot be approved without inviting the same conduct in the future. 342 B.R. at 55. As detailed below, the *W.R. Grace* asbestos bankruptcy served as a roadmap for the Sacklers' strategies to extract billions from Purdue and stockpile those funds out of reach of creditors and victims. If approved here, the Sackler Release will become the blueprint for even more abusive tactics in the future.

Bankruptcy scholars already use the Sackler Release to exemplify the opportunism of "bankruptcy grifters," who seek non-debtor releases with far fewer benefits and safeguards for creditors than were required in the past. "These 'bankruptcy grifters' act as parasites, receiving many of the substantive and procedural benefits of a host bankruptcy but incurring only a fraction of the associated burdens." Lindsey D. Simon, *Bankruptcy Grifters*, 131 Yale L.J. (forthcoming 2022) at 1, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817530. "Often facing significant mass tort liability, these entities have commandeered a process designed to equitably address failures, and instead used it to impose a binding universal settlement on claimants." *Id.* at 51. "Bankruptcy grifters are waiting in the wings of pending cases, ready to guide the next wave of precedent that expands use of chapter 11." *Id.*

As explained by Professor Ralph Brubaker, the Sackler Release in particular is a classic abuse, and has outraged the public:

> The pending Purdue Pharma bankruptcy, implicating the Sackler family's personal responsibility for the ravages of the opioid OxyContin, is 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

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and then filing its chapter 11 petition, along with chapter 11 petitions for multiple "affiliates," in the targeted forum. *In re Patriot Coal Corp.*, 482 B.R. 718, 745 (Bankr. S.D.N.Y. 2012).

> precedent, fueling the proliferating and rapidly accelerating system of bankruptcy grifting. The prospect of liability releases for the Sacklers in the Purdue Pharma case, however, finally awakened a wider realization, even and perhaps particularly among the general public, with all of the shock, disbelief, and outrage that bankruptcy grifting should have elicited from its infancy.

Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J. (forthcoming 2022) at 2, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3960117.

In short, upholding the Release would gravely damage the principles of equity and justice that are supposed to undergird the bankruptcy system, as well as public confidence in that system. *S.E.C. v. Miller*, 808 F.3d 623, 634 (2d Cir. 2015) (bankruptcy policy should prevent debtor from "frustrating necessary governmental functions by seeking refuge in bankruptcy court," particularly when the "timing speaks loudly for itself" that the debtor sought to abuse the bankruptcy process); *Pepper*, 308 U.S.at 304-05 (equitable power should be invoked so "that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done"). As this Court noted at argument, the law never *requires* courts to approve non-debtor releases; at most it allows them to do so in rare cases. As this Court decides whether this is one of the rare cases meriting exercise of this exceptional equitable authority, it can and should consider the history of intentional abuse leading up to this request, and how approving this request will encourage such abuse in future cases. When the Court evaluates that history, the only tenable answer is to deny the Sacklers' request.

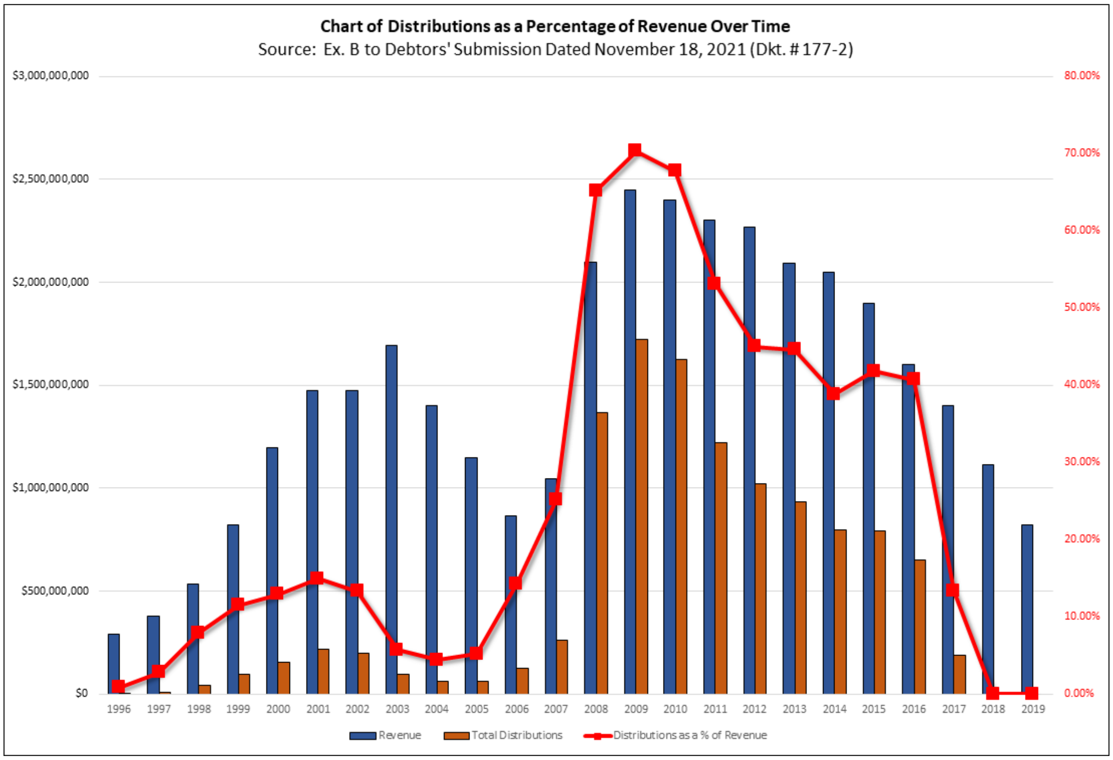
B. Ample Evidence Demonstrates that the Sacklers "Milked" Purdue of Billions Before OxyContin Liability Could "Break Through" to the Family

The evidence in this case establishes that, in the wake of the opioid-related criminal plea by Purdue in 2007, the Sacklers radically increased their distributions from the company as part of a strategy to "milk[]" as much money as possible from Purdue and shield those assets overseas.

JX-2974 at 3. This milking strategy created an existential threat to the Company, leaving it with insufficient liquidity to cover its mounting civil liability and setting the stage for Purdue's inevitable bankruptcy and the need for the Sacklers' "contribution" in the first instance. To now allow the Sacklers to use a bankruptcy they precipitated as a vehicle for escaping any accountability for their wrongful acts is the ultimate abuse of the bankruptcy process.

There is no dispute about the basic facts of the Sacklers' extraction of more than $11 billion from Purdue starting in 2008. Judge Drain acknowledged evidence "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." Bankr. Dkt. # 3786 (Decision) at 95. Purdue and the Sacklers cannot dispute this inference, which is supported by ample evidence. Indeed, Purdue just submitted evidence confirming the radical increase in the Sacklers' distribution rates in 2008. Dist. Ct. Dkt. # 177.[2] Before 2008, the Sacklers took personal distributions from Purdue ranging from roughly five to fifteen percent of Purdue's revenue. Dist. Ct. Dkt. # 177-2. But from 2008 to 2010 they took distributions of roughly *seventy percent* of Purdue's revenues each year, and from 2011 to 2016 they took distributions ranging from forty to fifty-five percent each year. *Id.* The total impact on Purdue's balance sheet and the Sacklers' wealth was enormous. From 1996 to 2007, distributions to the family totaled $1.3 billion. Dist. Ct. Dkt. ## 177-1, 177-2. But from 2008 to 2018, distributions totaled over $10.7 billion. *Id.* The chart below highlights this stark change.

[2] References to the Dist. Ct. Dkt. are to the docket in 21-cv-7532.



The evidence shows that this dramatic increase in distributions followed mounting concerns by the Sacklers over the specter of opioid liability breaking through to the family. In March 2007, Richard, Jonathan, Kathe, and Mortimer Sackler exchanged emails noting that the "future course [for the business] is uncertain," JX-2976 at 2, and identifying the "emergence of numerous new lawsuits" as a "risk[] . . . we're not really braced for." JX-2957 at 2. Later that year, just after Purdue's guilty plea, David Sackler wrote his family that it was only a matter of time before some lawsuit manages to "get through to the family[,]" prompting him to suggest that they "'lever up where we can, and try to generate some additional income. We may well need it . . . Even if we have to keep it in cash.'" JX-2237 at 1. Thus began the family's systematic extraction of billions from Purdue.

In May 2007, Purdue had "very little," if any, debt. JX-2985. Yet, in the week after the Purdue criminal guilty pleas, David Sackler wrote to Jonathan and Richard Sackler: "what do you think is going on in all of these courtrooms right now? We're rich? For how long? Until which suits get through to the family?" JX-2237 at 1. Within a week, a calendar entry shows a May 22, 2007, meeting between Richard and Jonathan Sackler and a bankruptcy attorney, Joe Smolinsky, though Purdue was not at risk of bankruptcy. JX-2986 at 3. Soon after, Richard and Jonathan Sackler started receiving advice about "jurisdictional shielding" for Sackler assets. JX-1660 at 4. Under a heading entitled "Legal Liabilities[,]" the memo states: "In general, a key learning [from the *W.R. Grace* bankruptcy] was that perceptions of deep pockets hugely affect litigants' strategy, and the prospects for a 'final' settlement. For the family, it may be that overseas assets with limited transparency and jurisdictional shielding from U.S. judgements will be less attractive to litigants than domestic assets. Obviously, this factor depends on how the ownership is structured, and I presume the family has taken most of the appropriate defensive measures." *Id*.

The Sacklers' anxieties over protecting their riches from victims of the opioid crisis spiked in 2008. In January 2008, Richard Sackler emailed Mortimer Sackler that "I've been told by Silbert that I will be [sued] and probably soon." JX-3001 at 4.[3] The entire e-mail chain relates to a potential suspense account that Mortimer makes clear would only be triggered if "Purdue is unable to meet its obligations under its indemnification agreements." *Id.* The Sacklers thus contemplated Purdue becoming unable to meet its obligations even as they prepared to drain the Company of billions. On February 13, 2008, Mortimer wrote to Richard Sackler: "Fundamentally we don't want to stay in this business anymore (given the horrible risks, outlooks, difficulties, etc)[.]" Bankr. Dkt. # 2161, Ex. 67. On April 18, 2008, Richard Sackler warned in a memo to family members that the business posed a "dangerous concentration of risk" and proposed that the family either sell the company or mine the company's profits and "distribute more free cash flow" to themselves. JX-2214, ¶ 86; JX-3004; JX-3104. During this same period, Purdue's financial statements, while

[3] Richard Silbert is the Vice-President and "Chief Legal Strategist" for Purdue. Dkt #358 at 530. Before that, he was counsel for Purdue. Dkt #2166, Ex. 66 at 224, Ex. 68.

underplaying the extent of Purdue's opioid exposure, could not completely ignore the rising threat from opioid litigation. Purdue's 2007 year-end financial statements reflect 102 pending product liability lawsuits against the Company related to OxyContin. JX-2955. By year-end 2008, the number had more than tripled to 326 OxyContin product lawsuits. JX-2963. By year-end 2009, there were 476 OxyContin product liability lawsuits. JX-2971. All the while, the Sacklers continued to extract billions from Purdue. Dist. Ct. Dkt. # 177-2.

The Sackler "milking strategy", JX-2974 at 3, continued in the years that followed, even as the Sacklers were well aware of the rising toll of OxyContin deaths. JX-2960, JX-2997, JX-2998, JX-2999, JX-3000, JX-3006, JX-3010, JX-3016. As OxyContin devastation metastasized, in October 2014, Jonathan Sackler candidly described Purdue's prescription opioids business as "a smart milking program." JX-2974 at 3. An August 2014 e-mail reflects that a prospective high-level employee was dissuaded from joining Purdue based on Board member comments on, among other things, "'milking' the Purdue business." JX-2983 at 2. "In a 2014 email to Mortimer, Jonathan acknowledged, 'we've taken a fantastic amount of money out of the business.'" Dist. Ct. Dkt. # 91-4 at 71 (UST Br., App. vol. 4 at 1372 ¶ 164). 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 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 at 3.

More evidence of this "milking strategy", JX-2974 at 3, reaches the public eye every day. *See generally* Patrick Radden Keefe, *Empire of Pain* (Doubleday, 1st ed. 2021). In 2008, for example, Richard Sackler proposed in a memo to his family that, rather than selling Purdue, the

Sacklers instead "install a CEO at Purdue who would be 'loyal' to the family . . . so they could simply 'distribute more free cash flow' to themselves." *Id.* at 299-300; *accord* JX-3004. These Sackler pay-outs were approved at family-only sessions of Purdue board meetings, excluding virtually all non-family executives, where "the Sacklers would vote to pay themselves. A hundred million here, a hundred million there." Keefe, *Empire of Pain* 300 (citing Mortimer D. A. Sackler emails, Nov. 23 and 24, 2010, cited in Massachusetts Complaint); *see* JX-1989 (David Sackler Deposition at 80-85).

The extraction of virtually all of Purdue's profits during this time posed undeniable risks to the Company. "In June 2010, Purdue presented the Sacklers with a ten-year plan that was projected to generate $700 million each year for the family, for the next ten years. One downside of this strategy was that it didn't leave much of a war chest for Purdue to reinvest in the business." Keefe, *Empire of Pain* at 301 (citing Purdue Pharma 10-Year Plan, June 24, 2010, cited in Massachusetts Complaint). "Mortimer personally directed the company to slash spending on research and development. For scientists who worked at Purdue, this was frustrating: OxyContin was still generating a tremendous amount of revenue, but the Sacklers seemed more intent on pulling money out of Purdue than on growing or diversifying the company." *Id.*; *see also* JX-0841 at 16.

In light of these facts, the Sacklers' contention at argument that there is not a "shred" of evidence suggesting abuse here, Tr., Nov. 30, 2021, at 221-22, is preposterous. The candid and contemporaneous communications within the family and Purdue's admissions in its recent federal criminal plea agreement speak far louder than their litigation-inspired excuses.

For example, the Sacklers suggested at argument that their increased distributions post-2007 were merely a result of increased profits at Purdue. Tr., Nov. 30, 2021, at 218. If that were true, then the

Sacklers' distributions as a percentage of Purdue's profits would have remained relatively constant over time, with profits simply increasing. But in reality, the Sacklers' distributions spiked *as a percentage of Purdue's profits* starting in 2008. Prior to 2008, there was only a single year in which the Sacklers took a distribution exceeding eighty percent of Purdue's profits, with several years below forty percent. Dist. Ct. Dkt. # 177-2. But from 2008 to 2016, the Sacklers' distribution exceeded eighty percent of profits *every year*, and exceeded one hundred percent of Purdue's profits in four of those years (2008-2010 and 2016). *Id.* In short, it wasn't just that profits increased, it was that the Sacklers took vastly more of the profits out of the company. Counsel's post-hoc explanations cannot explain this pattern, but the Sacklers' contemporaneous familial communications, detailed above, perfectly explain it. *See also, e.g.*, JX 1703 at 3; JX-3276 at 7 (Dr. Richard Sackler wrote that "we have already distributed $105 million this year (well in excess of our industry peer group norms)".). And in any case, to the extent Purdue's profits increased during this time, it was largely due to Purdue's criminal program to "turbo-charge sales." Purdue App. Vol. 2 at 129-30.

The Sacklers' other post hoc defenses are belied by the evidence and their own admissions. For example, the Sacklers suggested at argument that the Independent Examiner appointed by the Bankruptcy Court found no evidence of Sackler wrongdoing, but the Examiner repeatedly emphasized in his report that his appointment order "narrowly and specifically defines a limited scope of inquiry." Dist. Ct. Dkt. # 160-3 at 27 (Purdue Br., App. Vol. 4 at 692). His job was to investigate the independence of the Special Committee of Purdue's Board solely with respect to its consideration of the settlement with the Sacklers. *Id.* at 45 (Purdue Br., App. Vol. 4 at 710). The Examiner was not asked to make and did not make any findings about the Sacklers' conduct during the years when they were extracting billions from the company.

The Sacklers similarly insist they exerted no control over the company when it declared bankruptcy, and point to various Purdue corporate documents to characterize their hypercharged distributions as normal corporate practice. But Purdue's criminal plea agreement exposes this subterfuge. It is not normal corporate practice to "knowingly and intentionally conspir[e]" to impede lawful government functions "beginning in or about May 2007 and continuing until in or about March 2017" as Purdue admittedly did here. JX-2094 at 17. And complying with minimal corporate governance requirements was all part of the Sacklers' well-advised scheme: as Jonathan Sackler wrote in March 2007, "if there's a future perception that Purdue has screwed up on compliance, we could get murdered." JX-2234 at 1. Similarly, even as the Sacklers claimed at argument that they no longer have control over Purdue, their briefs emphasized that they "are the owners of [Purdue] until proven otherwise" and can snatch back control at any time. Bankr. Ct. Dkt. # 154. By the time that the Sacklers left the Purdue board, creditors had been left with a fait accompli. Purdue was going to be forced into bankruptcy by the ever-increasing number of lawsuits, and the Sacklers had the funds.

In short, the evidence in the record is more than sufficient to demonstrate the abusiveness of the Sackler Release, which is ultimately a legal determination for this Court. The Bankruptcy Court erred as a matter of law in failing to consider how the evidence here demonstrates abuse. By allowing the Sacklers the benefits of a bankruptcy discharge while they continue to shield most of their ill-gotten gains from this Court's jurisdiction in ways they could not do if they filed for personal bankruptcy, the Sackler Release turns this Court into an instrument of their corrupt efforts to escape justice. The Sackler Release cannot meet Second Circuit standards precluding abusive non-debtor releases and should be rejected.

C. No Remand Is Needed for the Court to Rule that The Non-Debtor Release Is Abusive

This Court should reverse confirmation of the Plan without remanding to the Bankruptcy Court for further fact-finding regarding the abusiveness of the non-debtor release. No additional fact-finding by the Bankruptcy Court is necessary for this Court to reach the legal conclusion that is compelled by the facts in the record: the Sackler Release abuses the bankruptcy process. This is true whether or not the Court determines that the Bankruptcy Court lacked constitutional authority to confirm the Plan under *Stern v. Marshall*, 564 U.S. 462 (2011).

If the Bankruptcy Court had authority under *Stern* to enter a final judgment, this Court reviews its findings of fact for clear error and conclusions of law *de novo*. *Beck Chevrolet Co., Inc. v. Gen. Motors LLC*, 787 F.3d 663, 672 (2d Cir. 2015). If the Bankruptcy Court could not enter a final judgment under *Stern*, this Court reviews its decision as proposed findings and conclusions subject to *de novo* review. Fed R. Bankr. P. 8018.1; *see In re Bellingham Ins. Agency, Inc.*, 573 U.S. 25, 36 (2014). The Court may "accept, reject or modify" the Bankruptcy Court's findings and conclusions pursuant to Bankruptcy Rule 9033(d).

As the Court explained at oral argument, the issue is whether the evidence in the record, "of which there is quite a bit," permits the conclusion that "beginning after the resolution of the first round of litigation, the Sacklers began to take steps against the possibility that things would go south again," therefore making their contribution (or refund) to the Purdue bankruptcy estate necessary. Nov. 30, 2021 Tr., at 223. As demonstrated above, the voluminous evidence already in the record requires such a conclusion. Indeed, the Bankruptcy Court acknowledged that the evidence suggested that the Sacklers, aware of the risk of opioid-related litigation claims against Purdue, sought to shield themselves with billions of dollars in transfers from the company, Decision at 95, without drawing the conclusion that those transfers were abusive.

This Court may reverse the Bankruptcy Court's legal conclusion that the Plan was confirmable without any additional fact-finding. The application of law to undisputed facts, and mixed questions of law and fact, are subject to *de novo* review, whether or not *Stern* applies. *Beck Chevrolet*, 787 F.3d at 663.

If the Court finds that the Bankruptcy Court lacked constitutional authority to confirm the Plan under *Stern*, or that the Bankruptcy Court had only "related to" jurisdiction under 28 U.S.C. § 1334(a) to impose nonconsensual third-party releases, this Court may make additional findings pursuant to Bankruptcy Rule 9033(d). Fed. R. Bankr. P. 8018.1; 28 U.S.C. § 157(c)(1) (if proceeding is "otherwise related to a case under title 11 ..., 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 of fact and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected").

If the Court rules that additional factual findings are necessary it can withdraw the reference in order to make the additional findings the Court deems necessary to determine the abusiveness of the non-debtor release. *See In re Burger Boys, Inc.*, 94 F.3d 755, 762 (2d Cir. 1996) (affirming district court's *sua sponte* withdrawal of the reference based on "the efficient use of judicial resources and the delay and costs to the parties"); *see also* 28 U.S.C. § 157(d) (district court may withdraw the reference "on its own motion"). Remanding this matter to the Bankruptcy Court for additional fact-finding would serve only to further delay this case – which all parties agree must be resolved as quickly as possible – and increase the risks of equitable mootness.

In short, the Bankruptcy Court erred as a matter of law in concluding that the Plan could be confirmed notwithstanding its abusive third-party releases, and this Court should either determine that the release is abusive based on the Bankruptcy Court's findings and conclusions, or make any additional findings of fact the Court deems necessary.

D. There Is No Statutory Authority for the Nonconsensual Sackler Release Here

The abusiveness of the Sackler Release is both enabled and compounded by the lack of statutory authority for it. *Metromedia* makes clear that outside the asbestos context, the non-debtor release is an entirely judicially-created device mentioned nowhere in the Bankruptcy Code. 416 F.3d at 142. Yet Purdue claims that this device is exempt from other Code limitations, such as what types of claims can be discharged, because Congress did not specifically mention their application to non-debtor releases. This makes no sense: why would Congress have explicitly applied limitations to a power it didn't explicitly create? It is the job of courts to ensure that the judicially created non-debtor release is only applied, if ever, in ways consistent with the rest of the Code.

At argument, Purdue invoked two sources of alleged statutory authority for the Sackler Release: sections 105 and 1123. Neither is tenable.

Though Purdue never mentioned this, the Second Circuit explicitly held in *Metromedia, Smart World,* and *Dairy Mart* that § 105 does not provide independent authority for granting a non-debtor release and that such authority must instead be grounded in independent Code provisions or federal law. *Metromedia*, 416 F.3d at 141-42; *In re Smart World Techs., LLC*, 423 F.3d 166, 183-84 (2d Cir. 2005); *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003).

This independent authority cannot be found in § 1123. The Second Circuit has never cited § 1123 as providing a basis for a non-debtor release, and with good reason. As this Court noted at oral argument, § 1123 addresses debtors and debtors' estates, sometimes requiring and sometimes permitting certain actions in the disposition of creditor-debtor relations and debtor property. Nowhere in § 1123 is there any mention or indication of Congressional intent to provide sweeping authority to grant non-debtor releases, particularly in ways that would provide a backdoor to disregard explicit Code protections, like the limitations on discharge in §§ 523(a)(7) and 523(a)(2)(A). Indeed, § 1123 explicitly references the whole Code and makes exercise of the Court's residual authority subject to and "not inconsistent with" *all* limits and protections under the Code. *See* 11 U.S.C. § 1123(b)(5) (court may include "any . . . appropriate provision *not inconsistent with* the applicable provisions of this title"). Using § 1123 to grant an effective discharge of claims that cannot be discharged in an individual bankruptcy is clearly "inconsistent" with other provisions of the Code.

At argument, Purdue claimed that the discharge restrictions in 11 U.S.C. § 523 cannot apply to the Sackler Release because § 523 applies only to discharges authorized under specific Code provisions and does not specifically reference § 105(a), § 1123(a)(5), or § 1123(b)(6). But this ignores that neither § 105(a) nor § 1123 make any mention of discharges or releases at all, so there is no reason that Congress would have applied discharge protections to provisions that do not permit discharges or releases in the first instance.

Purdue also claimed that *U.S. v. Energy Resources*, 495 U.S. 545 (1990), adopted a broad reading of § 105 and § 1123 that justified inferring a judicial power to grant non-debtor releases. But the Court there emphasized that these provisions are consistent with a bankruptcy court's "broad authority to modify *creditor-debtor relationships*," not power over non-debtors. *Id*. at 549 (emphasis added). *Energy Resources* never said anything about non-debtor releases. Nor did it suggest that bankruptcy courts are free to ignore explicit Code protections. Rather, the government in *Energy Resources* sought protections above and beyond those provided in the Code. *Id*. at 550 (rejecting Government's request for "added protection not specified in the Code itself."). Here, in contrast, granting the Sacklers a release that *Metromedia* acknowledges is the functional equivalent of a bankruptcy discharge is plainly "inconsistent" with Code provisions that would preclude such a discharge in an individual bankruptcy. *See* 11 U.S.C. §§ 1123(b)(5); 523(a)(7); 523(a)(2)(A). Furthermore, a release of state police power claims creates constitutional issues never considered in *Energy Resources* or Second Circuit decisions.

Tellingly, this 1990 Supreme Court decision that Purdue argues authorizes non-debtor releases has *never* been cited by the Second Circuit for that proposition. As this Court recognized at argument, the only cases in which the Second Circuit has actually upheld a non-debtor release involved sources of authority not remotely applicable here. *See In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992) (release authorized under FRCP 23 provisions governing non-opt-out class actions); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir. 1988) (citing 11 U.S.C. §363(f)(4) and long-recognized traditional power of bankruptcy courts to permit sale of debtor property, like insurance policy, "free and clear" of liens); *In re Quigley Co.*, 676 F.3d 45, 57 (2d Cir. 2012) (release authorized under §524(g)(4)(A)(ii) governing asbestos claims). This Court should not extend the non-debtor release doctrine beyond these existing applications, especially when doing so clearly conflicts with other Code provisions and would allow the Sacklers to perpetrate an unprecedented abuse of the bankruptcy process.

Purdue also referenced the legislative history of section 524(g) to suggest that Congress intended for courts to develop the law around nondebtor releases outside the asbestos context, but the legislative history rebuts Purdue's argument. When Congress added section 524(g), it "decided to provide explicit authority in the asbestos area" while declining to extend the releases "into other areas." Bankruptcy Reform Act of 1994, 140 Cong. Rec. H10752-01, H10766 (Oct. 4, 1994). The

Committee noted that "[h]ow the new statutory mechanism works in the asbestos area may help the Committee judge whether the concept should be extended into other areas." *Id.* And, as this Court noted, other large-scale bankruptcy cases were ongoing at the time that section 524(g) was passed, such as *Dalkon Shield* and *Drexel*, but Congress declined to extend releases to those non-asbestos cases. Nov. 30, 2021 Tr., at 137; *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989); *Drexel Burnham Lambert Grp., Inc.*, 960 F.2d at 293. This history provides no support for the non-consensual Release here.

E. Deadlines Are Based on the Purdue Criminal Sentence Hearing

The Court requested that the parties "bring me up to date on the various deadlines that are presently in force." (Dist. Ct. Dkt. # 234.) Both this Court and the bankruptcy court denied appellants' motions for stay with conditions, based upon representations by appellees. This Court's order (Dkt. # 49, as amended by Dkt. # 69) provides, at 13, that "the Debtors shall give to Appellees [sic, likely "Appellants" was intended] and to every party accorded amicus curiae status in connection with these appeals no less than fourteen (14) days' written notice of the date on which Debtors intend that the Plan shall become effective (the Effective Date)." The bankruptcy court further ordered:

> [t]he Effective Date shall not occur until the **earlier** of (i) the date of a decision by … the District Court on … [the appeals] (the "District Court Decision"); and (ii) December 31, 2021, provided that the District Court is able to hear any motions for a stay of the District Court Decision on or before December 31, 2021.

Stay order ¶2(b). The Effective Date of the Plan is scheduled to be no less than seven days after Purdue Pharma L.P. is sentenced in the criminal matter.[4] Upon information and belief, there are

[4] The Plea Agreement between Purdue and the US DOJ provides, in pertinent part, that "[t]he parties further agree to request that the Sentencing Hearing Date take place no earlier than seventy-five days following the date of confirmation of the chapter 11 plan of reorganization in the Purdue Bankruptcy (the "Plan of Reorganization") under 11 U.S.C. § 1129, ***but in any event 7 days prior***

certain conditions that must be met prior to the sentencing hearing, and Purdue alone is privy to those conditions and when they reasonably might be satisfied. Nonetheless, Purdue is required to not request a criminal sentencing hearing prior to December 31, 2021. Bankr. Ct. Stay Order ¶ 2(d). Purdue is further required to provide notice on the docket within twenty-four hours when the sentencing hearing is scheduled and must provide 14 days advance notice of the Effective Date. Bankr. Ct. Stay Order ¶¶ 2(c), (e).

As a practical matter, if this Court rules on or before December 31, 2021, the bankruptcy court's stay order holds until this Court's decision, and then the automatic 14-day stay period starts running from the date of decision. Bankruptcy Rule 8025. Therefore, any motion for stay by an aggrieved party probably would be filed within the 14-day period provided by Rule 8025.

On the other hand, if this Court rules after December 31, 2021, the sentencing hearing and hence the Effective Date can occur at any time from and after seven days following the sentencing hearing. Information as to when Purdue will be ready for the sentencing hearing is known only to Purdue. Because Purdue contends that the sentencing hearing, in and by itself, is sufficient to trigger equitable mootness, motions for stay by any aggrieved party might be filed in this Court shortly after December 31, 2021; upon notice of the sentencing hearing being scheduled; shortly after receipt of a 14-day notice; or, if necessary, promptly after this Court renders a decision. Thus, for clarity as to when potential equitable mootness may be triggered, the Court may wish to ask

to such Plan of Reorganization becoming effective (Plea Agreement at 4, Ex. B to Motion of Debtors Pursuant to 11 U.S.C. ¶ 105 and Fed. R. Bankr. P. 9019 Authorizing and Approving Settlements Between the Debtors and the United States, Bankr. Dkt. # 1828-2) (emphasis added). The Plan, in turn, provides that the Effective Date cannot occur until "the entry of a judgment of conviction in strict accordance with the Plea Agreement and the payment in full of the DOJ Forfeiture Payment…" (Plan, Bankr. Dkt. # 3726, § 9.1(c)).

Purdue when it anticipates requesting the sentencing hearing and what preconditions, if any, are necessary prior to its being able to make the request.

III. CONCLUSION

This Court should reverse the Bankruptcy Court's approval of the Sackler Release as a matter of law, allowing the parties the opportunity to negotiate a consensual release with a clear understanding of the applicable legal rules.

Dated: December 6, 2021

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Judge McMahon's Individual Rules and Practices, and the type-volume, type-face and type-style prescriptions of Bankruptcy Rule 8015 because, among other things, it is double-spaced and in 12-point Times New Roman font.

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