UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No(s). 22-113(CON), 22-115(CON), 22-116(CON), 22-117(CON), 22-119(CON), 22-121(CON), 22-299(CON), 22-203(XAP)

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

Debtors.

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

Debtors-Appellants-Cross-Appellees,

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

Appellants-Cross-Appellees,

- v. -

THE CITY OF GRANDE PRAIRIE, AS REPRESENTATIVE PLAINTIFF FOR A CLASS CONSISTING OF ALL CANADIAN MUNICIPALITIES, THE CITIES OF BRANTFORD, GRAND PRAIRIE, LETHBRIDGE, AND WETASKIWIN., THE PETER BALLANTYNE CREE NATION, ON BEHALF OF ALL CANADIAN FIRST NATIONS AND METIS PEOPLE, THE PETER BALLANTYNE CREE NATION ON BEHALF OF ITSELF, AND THE LAC LA RONGE INDIAN BAND,

Appellees-Cross-Appellants,

THE STATE OF WASHINGTON, STATE OF MARYLAND, DISTRICT OF COLUMBIA, U.S. TRUSTEE WILLIAM K. HARRINGTON, STATE OF CONNECTICUT, RONALD BASS, STATE OF CALIFORNIA, PEOPLE OF THE STATE OF CALIFORNIA, BY AND THROUGH ATTORNEY GENERAL ROB BONTA, STATE OF OREGON, STATE OF DELAWARE, BY AND THROUGH ATTORNEY GENERAL JENNINGS, STATE OF RHODE ISLAND, STATE OF VERMONT, ELLEN ISAACS, ON BEHALF OF PATRICK RYAN WROBLEWSKI, MARIA ECKE, ANDREW ECKE, RICHARD ECKE,

Appellees.

April 29, 2022

Oral Argument

B E F O R E :

HON. JON NEWMAN

HON. RICHARD WESLEY

HON. EUNICE LEE

A P P E A R A N C E S:

MARSHALL HUEBNER, for the Debtor

MITCHELL HURLEY, for the Unsecured Creditors Committee

ROY ENGLERT, for the Ad Hoc Committee

GREGORY JOSEPH, for the Raymond Sackler Family

J. CHRISTOPHER SHORE, for Ad Hoc Group

JEFFREY A. LIESEMER, for MSGE

MICHAEL SHIH, for the United States Trustee

MAURA MONAGHAN, for the Mortimer Sackler fam

CARL CECERE, for the Canadian Creditors

P R O C E E D I N G S

HON. EUNICE LEE: The next case which will be 22-110, In re: Purdue Pharma, and just before you get started, to let -- remind counsel that you are permitted to remove your mask at the podium if you choose.

And we will start with the first party, which will be on behalf of the Debtors and --

HON. RICHARD WESLEY: Cast of thousands. Okay.

HON. EUNICE LEE: Okay. And so Mr. Hueber?

MR. HUEBNER: Huebner.

HON. EUNICE LEE: Huebner, yes.

MR. HUEBNER: May it please the Court, Marshall Huebner for the fiduciary Debtors. With your permission, I will address three main points in my 18 opening minutes and reserve the balance for rebuttal.

First, this Court's 34 years of unbroken precedent compels reversal. The District Court is the only Court anywhere ever to deem the legality of appropriate third-party releases unsettled in the circuit. The fiduciaries, mediators, and victims relied on

this Court's precedent for over three years in crafting a value-maximizing life saving plan.

Second, even if this Court could or did reconsider the legal issue anew, its precedent is firmly rooted in the code.

Third, this case, illustrates exactly why third-party releases are necessary in rare and unusual cases, to protect the bankruptcy race and enable reorganization. Judge Drain's undisputed findings are that continued litigation of the claims at issue would, one, likely result in the liquidation of these operating Debtors; two, gravely impair the estates' other critical assets.

HON. RICHARD WESLEY: So it's the significance of the settlement that drives the scope of the bankruptcy judge's authority?

MR. HUEBNER: Your Honor, it's -- I apologize.

HON. RICHARD WESLEY: No, no, that -- no.

MR. HUEBNER: It is the impact of the third-party actions on the race of the bankruptcy.

HON. RICHARD WESLEY: So the greater

the impact of the non-Debtor, the greater the ability of the Court to interfere with the rights of non-parties, parties who have no claims against the bankrupt themselves perhaps?

MR. HUEBNER: Your Honor --

HON. RICHARD WESLEY: Who'd interfere with claims against the non-Debtor --

MR. HUEBNER: Your Honor --

HON. RICHARD WESLEY: -- that's given a release?

MR. HUEBNER: In this case, you have to have claims against Debtors.

HON. RICHARD WESLEY: That's not my question. My question is, what's the limiting principle?

MR. HUEBNER: Your Honor, there are at least three limiting principles. Number one is the jurisdictional question which is set forth obviously in many of this Court's decisions, including SPV Osus, Quigley, and others.

The second is the test you set forth in Metromedia, affirmed on Page 88 of Madoff, and again on page 99 of Tronox that there is jurisdiction and authority when the race of the bankruptcy estate is affected. The decisions in

Manville I rest on exactly that principle. And then of course, Metromedia sets forth while the Court's exact words are, "It is not a matter of factors and prongs," it said that "truly unusual circumstances are necessary," and then lists several fact patterns: the impact on the estate, which in that case was a large settlement and the potential insurance policies; secondly, is the issue of the substantial consideration being paid into the estate. You can't bootstrap merely by paying money. There has to be an impact on the estate.

And Your Honor, in this case, Judge Drain tailored the releases verbatim lifting words from Second Circuit case law to ensure that your concern, could there be releases about truly unrelated matters that are brought in and take away creditors' rights, could never happen. No direct claims --

HON. EUNICE LEE: Is it your case --

MR. HUEBNER: -- of a third party is released -

HON. EUNICE LEE: Is it -- can I just - I'm sorry.

MR. HUEBNER: Yes.

HON. EUNICE LEE: So with regard to the effect on the race, the claims, some of the claims that are being released, I mean, this is a very broad release. How is it that they actually -- I mean, it covers their broader -- it's a broader release than prior cases have really addressed and how is it that these claims, in fact, all have an impact, a direct impact on the race?

MR. HUEBNER: Your Honor, respectfully, the releases are actually much narrower than releases in prior cases. Very often, the releases as they were in Drexel and Metromedia simply say any matter related to the Debtors, and in fact, the Court approved releases that have that language. These releases are actually nothing like that.

HON. EUNICE LEE: I've looked --

MR. HUEBNER: The reason they're two pages long --

HON. EUNICE LEE: But I --

MR. HUEBNER: -- if I can explain?

HON. EUNICE LEE: I'll let you explain, but just -- but in those prior cases, weren't those circumstances often where the claims were

deemed to be derivative?

MR. HUEBNER: No, not at all, Your Honor. In fact, let's take the example of Drexel. Drexel was securities fraud cases against officers and directors for which they paid in substantial sums to get releases for all claims, including fraud in connection with the Debtor's estate. Again, in our case Your Honor, if you'll give me a minute, because it's so important --

HON. RICHARD WESLEY: Drexel is a class action where Judge Pollock pulled the class action out of -- pulled it into District Court. It's still within the context of bankruptcy so you can't just say it's just a class action; I get that. But what happened in Drexel was that there were folks who had -- both key litigants who had claims against -- with regard to breach of fiduciary duties or other, perhaps securities fraud, misrepresentations, that may not have had claims necessarily against Drexel. But they were -- but their claims, 850 of them there were in that, in that Class B it was, in that --

MR. HUEBNER: That's right.

HON. RICHARD WESLEY: There was a fund

that was created for them within the context of that class action. So, it's -- Drexel is kind of a unique situation in that you had claims that may not necessarily have been against the estate and had some, you know, connection to activity by some of the junk bond purveyors, but ultimately, that they were paid. By the way, my good friend, Judge Jacobs is wrong in Metromedia to say that those claimants in Drexel weren't paid. They indeed were paid from the fund -- the settlement fund B. So there's -- with all due respect to Metromedia that's not correct in that regard, but that's to the side.

MR. HUEBNER: So let me --

HON. RICHARD WESLEY: So -- and you stand on Metromedia. It's kind of a flimsy ship, isn't it? Judge Jacobs didn't express full throated endorsement, did he? He said, well we've done this before. He cites Drexel. Then he says, well, Drexel and the case that it relies on which is the Fourth Circuit, relies upon Section 105, but jeez, you take 105, all it says is just kind of general powers of the Court and then others rely on 22 -- 524(e) except that there's 524(g) which gives specific recognition

to the uniqueness of the asbestos matter.

MR. HUEBNER: So, Your Honor, weave together if I may, answers to all of those questions and do the best I can because they actually all relate, and this case I think threads all those issues in our view and in the view of the overwhelming number of victims, quite appropriately under Second Circuit precedent.

First of all, Drexel has three sections. The second one was the class action, Rule 23. III was entirely separate which was authority under the bankruptcy code, and exactly as here, your point is exactly one I was going to make, as you'll hear from the PI victims in particular, there is a fund. It's billions of dollars big and there are TDPs and that's exactly where the claims are channeled, which is the exact architecture of the plan.

Your Honor, to get to your question before I return to Metromedia, the releases are not brought. The reason they're two pages long is because they're narrower. First, you have to be a creditor against Purdue in order to have your third-party claim released at all. That's never been done in a case before, and it's

designed to ensure that as in Manville I, III, and IV, it has to actually be connected to the estate. And most importantly, among the other provisions is number four. Judge Drain imported sua sponte the language from Quigley that says that the Debtor's conduct has to be the legal cause or a legally relevant factor, or else the claims are not released if they're owned by third parties.

Your Honor as to your question, I am inclined to agree. The Second Circuit cases, and there are six of them, rest only on 105, beginning of course, with Manville --

HON. RICHARD WESLEY: They all cite to Judge --

MR. HUEBNER: Well, except for Manville --

HON. RICHARD WESLEY: And then Metromedia. It's repetition of one sentence endorsements. There's a footnote. There's a footnote in Madoff --

MR. HUEBNER: Well --

HON. RICHARD WESLEY: -- which says in in Metromedia, we approved this. No one, no one other in MacArthur went through any kind of

detailed analysis as to what -- and of course, that's in the context of -- that's in the context of --

MR. HUEBNER: Your Honor, if I may --

HON. RICHARD WESLEY: -- asbestos litigation.

MR. HUEBNER: And the answer is Judge Drain did. And let me explain. Madoff I of course predated -- I'm sorry, Madoff. Manville I of course predated 524(g). It was this circuit that created the concept of propriety of third-party releases when necessary to reorganization and impacting the race. The Supreme Court in Energy Resources specifically found that 1123(b)(6) which says, and I quote, "A plan may contain any provision appropriate and not inconsistent with the provisions of this title." Two of your sister circuits, the Seventh Circuit in Aero-Dyne and the Sixth Circuit in Dow Corning, expressly ruling on third party releases coupled 1123(b)(6) with 105 and said together there is no question.

Here, Your Honor, we also have two other helper provisions relied upon by Judge Drain. 105 is not doing the lift by itself.

1123(b)(3) which expressly contemplates the Debtor settling its own causes of action, the Debtor's causes of action against the Sacklers are its most valuable estate -- most valuable asset. We are the plaintiffs. The Sacklers are the defendants. We own billions of dollars of claims. Judge Drain found as a matter of fact and it is undisputed those claims could not be settled unless, to use the District Court words, the "congruent claims" that overlap and intertwine absolutely and completely and are inextricable against the Sacklers were settled.

We also have 1123(a)(5), Your Honor, which says that a plan can contain any provision -- not any provision. Plan can contain provisions or shall contain, actually, provisions required for the --

HON. RICHARD WESLEY: But that's not limitless. You don't -- I mean, you don't seriously say that Congress just says that, do whatever you want to do, but you can do A through J but you can do anything else that's necessary for the plan.

MR. HUEBNER: Your Honor, I completely agree.

HON. RICHARD WESLEY: This is a bankruptcy court. This is a creature statute. It doesn't -- it has no more jurisdiction than which Congress gives it.

MR. HUEBNER: Your Honor, that's correct, and --

HON. RICHARD WESLEY: Where's the phrase that says, and anything else the Court thinks is necessary?

MR. HUEBNER: So Your Honor, if I may, let me separate out jurisdiction, and in fact in Celotex, the Supreme Court, which this Court picked up on in multiple decisions, including of course Madoff III and -- Manville III and IV and obviously SPV Osus and Quigley which followed, expressly talk about the new code as being a fundamental change and far broader bankruptcy jurisdiction.

But to be clear, Your Honor, with apologies, jurisdiction is actually not really on appeal. Judge McMahon affirmed Judge Drain and jurisdiction and found multiple profound --

HON. RICHARD WESLEY: Except that we have to consider jurisdiction ourselves, regardless of whether you raise it or not.

MR. HUEBNER: We do Your Honor, and the test in this Circuit most recently and Quigley and SPV Osus verbatim out of Celotex is, is there a -- if the underlying actions might have a conceivable effect on the estate. Here, the effects on the estate are unchallenged and they are absolutely massive. One, the destruction of the Debtors themselves who cannot survive if thousands of lawsuits about their own contact continues. Two, what was found sufficient in Manville I and many other cases, the insurance policies. We share them with the Sacklers and if these lawsuits all continue --

HON. RICHARD WESLEY: Yeah, but that's curious because, you know, when we had Manville which went to the Supreme Court, we said that notwithstanding that, notwithstanding MacArthur, we said those claims, those direct claims that came out of state statutory schemes against the insurance company, Travelers, were direct claims and based upon Travelers' own concept, right, and what's curious about it is that when it went to the Supreme Court, the Supreme Court didn't say oh, the Second Circuit was wrong because indeed the supreme -- the bankruptcy court had

jurisdiction.

It said, well, the notice was sufficient and so therefore res judicata applies. We expressed no opinion as to whether the bankruptcy ---

MR. HUEBNER: That's correct, Your Honor.

HON. RICHARD WESLEY: Be much neater -- I mean, if there was no jurisdiction, you would have thought that the Supreme Court would have told us that.

MR. HUEBNER: Your Honor, your decision in Manville III was absolutely correct and supports the conclusion here. Let me explain why.

HON. RICHARD WESLEY: I knew sooner or later I'd hear this today.

MR. HUEBNER: And I'm going to give you Tronox as its companion. Manville III said unless there is an effect on the race of the estate and the Debtor's conduct is at issue, there is no jurisdiction. Here, we have 100 pages of factual findings, undisputed, and no one disputes it, about the unbelievably terrible effect on the estate, nor is there any dispute

that the Debtor's conduct must be implicated, because Your Honor has answered your question, the very nature of the releases requires it.

It's hard-wired in. In Tronox, of course, what Your Honor did or what this Court did was you talked about derivative in a different sense. In other words, the confusion a little bit or the complexity is that the Manville cases really talking about derivatives being derived from the conduct of the Debtor.

HON. RICHARD WESLEY: Right.

MR. HUEBNER: It's about the underlying cause of action. The more modern usage is direct versus derivative, who owns the claims. Tronox and Madoff are exclusively about finding that boundary and saying if the --

HON. RICHARD WESLEY: You've got a question from Judge Newman.

HON. JON NEWMAN: Can you hear me?

HON. RICHARD WESLEY: Yes.

MR. HUEBNER: Yes, Your Honor.

HON. JON NEWMAN: All right. Before your time runs out, you seem to be spending an awful lot of time sparring, if I can put it that way, with my colleague as to the meaning of

certain sentences in certain opinions of our Court. I take it your position doesn't depend on those sentences. It depends on the code. Is that correct?

MR. HUEBNER: Your Honor, it is. In particular, the Supreme Court's decision.

HON. JON NEWMAN: All right. Now, you were invited by Judge Wesley to consider the question, are you saying anything that's useful is okay; and I think you started to answer that question, but I'm not sure you finished it. I take it your position is no, the code does not allow anything that's helpful.

MR. HUEBNER: Your Honor, that's exactly correct. 1123(b)(6) contains two limiters. Even when you leave aside --

HON. RICHARD WESLEY: -- 1123(g) -- B. I'm sorry, (b)(6), it says it may include any other appropriate provisions not inconsistent with the applicable provisions of the code. So if the plan runs into an inconsistency with the code, the plan is no good, right?

MR. HUEBNER: Absolutely, Your Honor.

HON. RICHARD WESLEY: Okay. So I just invite you to focus on the code before you're

done rather than get tangled up in who said what in one sentence of one opinion.

MR. HUEBNER: Absolutely, Your Honor. Let me address it directly right now. All of the alleged inconsistencies with the code are simply not there. And in fact, this Court has ruled that they are not there in most of the instances. Alleged inconsistency number one is 524(e), which merely states a truism. The Debtor's discharge does not discharge another party for such debt. You discharge a Debtor, not a debt. This Court rejected the argument that 524(e) has any relevance to third party releases in Manville I where it expressly said, "a release is not a discharge. It offers none of the umbrella protections of the discharge."

And both in Drexel and Metromedia, the briefs directly argued to this Court that the releases it issued violated 524(e) because they were discharges and this Court said no, there is no conflict with the statue. The next provision is --

HON. JON NEWMAN: Does -- excuse me. Does the plan discharge any creditor?

HON. RICHARD WESLEY: It's hard to

hear.

MR. HUEBNER: I apologize, Your Honor.

HON. JON NEWMAN: I'm sorry, I'll try again. Does the plan discharge any creditor?

MR. HUEBNER: No, Your Honor. What the plan does is it releases -- it discharges only the Debtors and it releases a narrow category of tailored claims consistent with Second Circuit precedent of specific third parties, which in most cases have capacity limitations. It has to be connected to Purdue in the role with respect to Purdue or as a transferee, and as I said before using the language from Quigley literally verbatim, the Debtor's conduct has to be the legal cause or a legally relevant factor.

There's no other discharge of any kind, and you need to be a creditor of Purdue, which no of the -- none of the third-party cases that have approved much broader releases before have ever had. You must be a creditor of the Debtor or your direct claim is not released at all. These releases were tied to the Debtor, to its conduct, and to the estate in ways that are much tighter than in any predecessor case, virtually all of which just released things related to the estate.

With respect to 524(g), Your Honor, to continue answering your question, the next alleged inconsistency, there is a reason no Court in U.S. history has ever accepted that argument. 524(g) is a description of how asbestos releases work and section 111(b) of the public law enacted in 1994 expressly states, passed by Congress, signed by the President, that it is unlawful to draw an inference from 524(g) and (h) about third party releases outside of the asbestos context.

HON. RICHARD WESLEY: If the -- if an individual has a claim against the prescriber of OxyContin, who got one of these value savings cards that encouraged additional use of OxyContin from his prescriber and he has a claim against the prescriber and he also has a claim against Purdue, he fits within the claimants easily with that, but he has a claim against the prescriber, too; is his claim against the prescriber extinguished?

MR. HUEBNER: Absolutely not, Your Honor.

HON. RICHARD WESLEY: Is the prescriber's claim for contribution from Purdue extinguished?

MR. HUEBNER: No, Your Honor. They're welcome to try to file a claim against our estate and they will not prevail. This is all about maximizing value to creditors by bringing in money from the Sacklers after years of negotiation and litigation, and they are the only released parties. And even there, as I've described, there are multiple capacity limitations and limitations on the release. If you are not on the list of released persons, you are fair game to be a defendant and God knows many of them should.

If I may finish answering Judge Newman's question, if that would be helpful. The only other alleged provision of inconsistency, again, is one that has never been accepted by any Court anywhere in this country, never, which is 523. 523 is a provision that says when an individual natural person goes through bankruptcy, this is what is and is not discharged. Important provision, because millions of people use the bankruptcy code and Congress wanted to make sure that when you go into a Chapter 11, you can't wash certain things through the proceedings.

Third-party releases are entirely different. They come up when critical to a Debtor's reorganization to help and maximize the recovery of innocent creditors. We are bringing in billions and billions of dollars to save lives. That's why there's --

HON. EUNICE LEE: Can I just -- I'm sorry, can I just jump in? One thing, this -- I guess one question I have is this this question of abuse and even in Metromedia, there was this acknowledgement that, you know, these releases perhaps can be okay, but there's a heightened risk of abuse. And in a situation like this where the parties being released are the ones determining the contribution and kind of driving the plan, that suggests concerns about abuse or even in future cases, the idea that the parties who are getting the benefit of this release are determining, you know, how much they give, how essential it's going to be to the plan.

MR. HUEBNER: Absolutely Your Honor. If I can tackle -- there were two things in there. If you don't mind, I'd like to address them both because they're actually so important.

Number one is the question of, is there

abuse. Now when Metromedia talks about abuse, and I think Judge Wiles' quite actually sharp opinion in Aegean Marine is quite helpful on this. What the Second Circuit was talking about was the abuse of overuse of third-party releases and I think the Courts need to be continuously diligent that the many guardrails and requirements that this and other circuits have set forth are continuously monitored for effect on the estate jurisdiction, race, substantial contribution, et cetera.

That really is what the Court meant by abuse which is are they being overused, and we actually went back and looked at the 80 cases that we cited in our brief, all of them because the government said that shows this has metastasized. What they didn't look at was how many of those cases have turned down third-party releases, which is more than half, about 55 percent which means the Courts are doing their job. In this case, Your Honor --

HON. EUNICE LEE: I think -- Judge Newman, did you --

HON. JON NEWMAN: -- on the role of this. Are you familiar with the mediation

process that the judge and Attorney Feinberg went through?

MR. HUEBNER: I am Your Honor. I worked more than 12 hours a day on it for about a year.

HON. JON NEWMAN: In that mediation, was the 4 billion -- what is it, 4 billion point something.

MR. HUEBNER: 4.325, Your Honor.

HON. JON NEWMAN: Was that the Sacklers' opening suggestion?

MR. HUEBNER: So Your Honor, I'm actually glad you asked --

HON. JON NEWMAN: -- was, try to stay with the question. Was that their opening suggestion for their contribution?

MR. HUEBNER: So Your Honor with apologies, mediation privilege actually governs certain aspects of the mediation, but I think it's fair to assume that it was not their opening bid at all. There was a $3 billion publicly announced settlement on the day we filed Chapter 11 that also included 90 percent of the upside of all their foreign companies, all of which had to be sold.

HON. JON NEWMAN: -- fair to assume that it was mediation and Counselor Feinberg who got the Sacklers up from their opening bid to four billion point two.

MR. HUEBNER: Your Honor, there --

HON. JON NEWMAN: (indiscernible).

MR. HUEBNER: Your Honor, there were two mediators, Judge Layn Phillips and Ken Feinberg --

HON. JON NEWMAN: Yes.

MR. HUEBNER: -- who spent 11 months full time, all day every day --

HON. JON NEWMAN: I'm just asking, is it fair to infer that it was the pushing of the mediators that got the Sacklers up from whatever their opening bit was to the eventual 4.2 billion.

MR. HUEBNER: So Your Honor, the mediators were one aspect of helping ensure that a proper and fair deal was reached in this case. No question about it. But as the record makes clear, this was the creditors plan and the Creditors Committee and 11 ad hoc groups of victims -- this courtroom is full of them, litigated opposite the Sacklers. There were

hundreds of millions of pages of discovery produced.

HON. JON NEWMAN: I get all that and I just don't know why -- I mean, I'm giving you what I think is a softball question, which you're standing there and letting go right over the plate. Judge Lee was concerned that the Sacklers, I think her word was determined the contribution. And what I'm suggesting to you and asking you, is it a fair inference that their opening bid was pushed up by the mediator.

MR. HUEBNER: Your Honor, let me apologize for missing a pitch. What I was trying to convey, and I apologize, I obviously did it badly, is there were multiple rounds of mediation between both active judges and retired judges.

HON. JON NEWMAN: Again, is it a fair inference that the mediators pushed the Sacklers up from their opening bid to 4.2? Now, either that's a fair inference or it's not.

MR. HUEBNER: Your Honor, it is a fact that is set forth and described in the disclosure statement, which has an entire section of the history of negotiations. They then went up again after mediation before sitting Judge Chapman.

HON. JON NEWMAN: So to the question isn't a fair inference, the answer is, yes; is that right?

MR. HUEBNER: It is, Your Honor.

HON. JON NEWMAN: Thank you.

MR. HUEBNER: And Judge Lee, just to finish answering your question, because the question of abuse and control is a desperately important one, and I want to give you comfort. Judge Newman's point, which I clearly missed, for which I apologize, is that we had multiple rounds of mediation before sitting and former federal judges who oversaw more than a year of fulltime mediation to ensure the fairness and integrity of the process.

But the reason I was struggling for a minute is, that's only one of the things that ensure the fairness and the integrity of the process because we had all -- virtually all 50 state attorneys general, an Official Committee of Unsecured Creditors, and eight ad hoc victims groups engaged all day every day in this case, over 300,000 hours of professional time poised opposite the Sacklers, which is why this plan has universal support.

The only appellees the U.S. government which is carved out of the releases, cut its deals, and got paid by the Sacklers already --

HON. JON NEWMAN: Careful. When you say the U.S. government, are you referring to the U.S. Trustee?

MR. HUEBNER: Your Honor, the U.S. Trustee is not an economic party in interest. The Department of Justice --

HON. JON NEWMAN: You just referred to the U.S. government. Is it your view the United States is against confirmation?

MR. HUEBNER: Your Honor, the Department of Justice submitted a statement of interest before the District Court that in essence took the same position as the U.S. Trustee which frankly many of us found, to say the least, shocking or confusing given that their deal pro abatement and giving up almost all their recovery to state and local governments to save lives is actually the cornerstone of the plan.

HON. JON NEWMAN: They're pulling in 1.75 billion, aren't they?

MR. HUEBNER: They are allowing 1.75 billion that is coming from the Sacklers in these

various settlements that otherwise would come to them as a plan distribution to go out to communities in desperate need of funds to save lives via our historic abatement structure.

HON. JON NEWMAN: United States hadn't given up its 1.75 super priority claim, the plan would not be the (indiscernible), would it?

MR. HUEBNER: Well, Your Honor, we agreed to the $2 billion claim which was done consensually in a settlement in conjunction with a provision that they would give most of it back for abatement. That actually was the business deal and we actually had to litigate to get that deal through because parties opposed it.

It was a holistic deal where they were given a very large agreed claim, but then also agreed to give almost all of it back to save American lives and ameliorate the opioid crisis because the Debtors announced on the first day of the case -- and this is also just desperately important to me -- we will not do a plan where the money does not go to save American lives. And every creditor group in this case --

HON. JON NEWMAN: But without the give back, it wouldn't (indiscernible). That right?

MR. HUEBNER: Well, I'm not sure, Your Honor, what deal we would have cut with the DOJ had the give back not been part of it. It was a holistic negotiation where the agreement to the allowed claims and the 1.75 give back were both aspects of a Court approved settlement agreement.

HON. JON NEWMAN: Well, is it fair to say it's an integral part of the plan?

MR. HUEBNER: Yes, Your Honor, it is.

HON. JON NEWMAN: Okay.

HON. RICHARD WESLEY: Let me ask a question. An individual has a personal injury claim against the corporation for addiction and they live in a state that allows a direct action, which imposes personal liability on a director or officer. They make a claim with regard to the addiction to the trust, to the appropriate fund, one of the seven funds that you've created. All right. And what happens with regard to the direct action claim in those states where those claims are allowed?

MR. HUEBNER: So Your Honor, those direct action claims are exactly what is channeled under the plan. That is in fact the core of what the third-party release is for. The

Sacklers are paying in $5.5 to $6 billion which is actually the money that is funding --

HON. RICHARD WESLEY: The answer is, they're released, right?

MR. HUEBNER: They're channeled Your Honor, and as the TDPs made clear, both your claims against the Sacklers and your claims against Purdue are what constitute the basis for your recovery against the trust. It's just, there's only one injury, so you measure the injury once.

HON. RICHARD WESLEY: So the release runs to the Sacklers, releasing them individually with regard to direct claims that state law authorizes with regard to various activity of corporate officers and imposes a direct personal liability on the director, not -- for which reimbursement can't be sought from the corporation but which the officer or director is a member.

MR. HUEBNER: So Your Honor, I think the laws may be complicated as to whether reimbursement could be sought from the corporation and whether they could --

HON. RICHARD WESLEY: That's why I said

that it couldn't.

MR. HUEBNER: I think that actually varies by state law.

HON. RICHARD WESLEY: I understand that, but that's why I asked you only about the ones that could.

MR. HUEBNER: Right. And so Your Honor, I guess I would answer it like this. Getting back to our discussion about ten minutes ago --

HON. RICHARD WESLEY: You don't know the answer to that?

MR. HUEBNER: I do know the answer.

HON. RICHARD WESLEY: Okay, good.

MR. HUEBNER: The answer is that is exactly what's channeled. If the claims were owned by the company, we wouldn't need third-party releases.

HON. RICHARD WESLEY: Well, any channel claim is then -- the Sacklers are released from personal liability, right?

MR. HUEBNER: Yes, Your Honor. That's the nature, that's the cornerstone of the settlement that all the victim groups supported as well as all the state attorneys general, which

is the Sacklers pay in to the estate and the claims against both the Sacklers and the company are channeled to the TDPs, the trust distribution procedures. It's actually a lot like the insurance company in Manville, interpleaders were paying in the entire proceeds to the estate and then claims that could be either against the company or against the insurance policy go through the channeling structures. And Your Honor, it's the, actually --

HON. RICHARD WESLEY: Well, there, there was one policy. There was a huge fight about a number of policies and layers of coverage et cetera, et cetera, and Travelers and a number of the other carriers finally reached a global settlement and created this fund. And the situation there was, in Judge Newman's case MacArthur, you had a distributor, but the distributor's claims were going to be made against that fund. But that was the asset that was going to be divvied up one way or the other.

MR. HUEBNER: Right, and --

HON. RICHARD WESLEY: But this is a little different. This is a state statute that imposes direct personal liability upon the

Sacklers and yet the Sacklers' claims are discharged --

MR. HUEBNER: So Your Honor --

HON. RICHARD WESLEY: -- because of the fact that they paid into the Debtor and so state claims are being extinguished by a bankruptcy order, right?

MR. HUEBNER: So Your Honor, this is exactly like every third-party release case ever. In other words, parties have direct claims against third parties and a settlement is reached because the bankruptcy estate is so deeply affected. And again, in most of those cases, it's only about a payment into the estate or it's about an insurance policy. Here, we actually have everything. The Debtors have billions of dollars of insurance that the Sacklers are now walking away from and only --

HON. RICHARD WESLEY: -- bankruptcy court order trumps the state cause of action because of the supremacy of the bankruptcy court?

MR. HUEBNER: I mean, Your Honor, I believe in any case, when a third-party claim is released, that claim otherwise could be prosecuted under either state or federal law.

And so whether it's MacArthur's claim in Manville I, whether it's the securities law claims in Drexel, whether it's the hypothetical third party claims in Metromedia, whether it's the breast implant claims in Dow Corning, and this is another really important point --

HON. RICHARD WESLEY: And they continue to grow these types of cases.

MR. HUEBNER: Well, interestingly enough, Your Honor, if you think back from a policy perspective, almost every mass tort that has ever hit the bankruptcy system in every circuit in this land was only resolvable through third party releases.

HON. RICHARD WESLEY: No doubt. No doubt. The question is, how much can the bankruptcy court give to the Sacklers as it impacts individuals who have a separate independent claim against them for which somehow the Sacklers become absolved because they play a vital role in settling this case?

MR. HUEBNER: So Your Honor, what I would say in -- may I answer?

HON. EUNICE LEE: Oh, absolutely. I certainly want -- respond, and start to wrap up.

We've let you go quite a bit over.

MR. HUEBNER: Sure. I apologize.

HON. EUNICE LEE: Absolutely.

MR. HUEBNER: I thought I was only answering questions. I don't mean to tarry.

HON. EUNICE LEE: No.

MR. HUEBNER: Your Honor, on in Madoff, this Court's exact words were, bankruptcy courts have authority "to approve releases of a non-director's independent claims." That was what you repeated and cited to Page 99 of Tronox and you're right, that is out of Metromedia. Now, Your Honor, if this Court's view is, all of our cases to date rested only on 105 and a bunch of the other cases from the Supreme Court have cited 1123(b)(6) also, because that's actually for a plan of reorganization. In fact, more closely, arguably even on point because it says a plan may contain any provision appropriate and not inconsistent.

And bankruptcy judges all over the code are given leeway, does not discriminate unfairly, is necessary, necessary for reorganization. There are adjectives there in about 40 places in the code where this type of discretion is the

warp and woof of what the broad jurisdiction under Celotex and SPV Osus and Quigley and your decisions, Tronox, Manville III, Manville IV, are all about, and never before has a case like this happened where the entire case for two-and-a-half years was only about the third-party claims and after it was mediated, litigated, and negotiated and every group in the case needs this money to go out to save lives.

HON. RICHARD WESLEY: Okay.

HON. EUNICE LEE: We'll hear from you again on the rebuttal. And so for the next party we're hearing from the Committee of Unsecured Creditors; is that correct?

MR. HURLEY: It is. Good morning. May --

HON. RICHARD WESLEY: Speak right up. Please speak right up. It's hard to hear sometimes.

MR. HURLEY: I will.

HON. EUNICE LEE: And you're Mr. Hurley?

MR. HURLEY: Yeah, I am Mr. Hurley. May it please the court, my name is Mitch Hurley on behalf of the Unsecured Creditors Committee.

The UCC was selected by the U.S. Trustee himself to act as the statutory fiduciary for all of Purdue's unsecured creditors in these cases, and the UCC has faithfully discharged that role in the more than two-and-a-half years since we were appointed.

We can therefore say with confidence that the plan, far from being dictated by the Sacklers, is a creditors' plan. It reflects creditor compromises and advances creditor interests. The U.S. Trustee is correct that the transfer related claims are strong against the Sacklers. We know it was Purdue's creditors who uncovered and developed virtually all of the evidence that the U.S. Trustee cites. But litigation against the Sacklers would take years and tens of millions of dollars at least and success, no matter how likely, is not guaranteed.

In contrast, the settlement incorporated in the plan does guarantee that Purdue's claimants will receive billions in desperately needed relief in the near term and promote abatement and public health goals that could not be achieved outside of a consensual resolution. The settlement also is critical to

the reorganization. Purdue's many creditors negotiated the 20-plus interlocking agreements that allocate value among creditors.

Absent the Sackler settlement and release, as Judge Drain found, all of those credit allocation agreements will unravel by their terms and lead to costly inter-creditor litigation that itself could take years and cost tens of millions of dollars. As Judge Drain also specifically found, the estates cannot withstand the chaos, that kind of chaos and a liquidation with literally no recovery by unsecured creditors would be likely.

This is all the more so because in that event the DOJ could assert the full amount of its allegedly $2 billion super priority claim which is more than some estimates of Purdue's entire enterprise value. Creditors in trial court for these reasons recognized that the releases at issue are not only important to the plan, they are absolutely essential. Even the U.S. Trustee acknowledges that the plan would fail without the release and no party ever identified at the confirmation hearing or before the District Court any alternative to the plan that could result in

a successful reorganization.

That's because there isn't one. Finally, it is estimated that an average of 200 people die every day as a result of the opioid crisis. Our plan ensures that billions in Purdue and Sackler assets will be used now to stem that tide and save and improve countless lives. No other outcome can achieve this result. It is that simple. We urge the Court to reaffirm its holding in Metromedia, uphold the confirmation order, and let the creditors plan proceed forthwith.

HON. EUNICE LEE: Thank you, Mr. Hurley.

Okay so next, we'll hear from the Ad Hoc Committee of Governmental --

MR. ENGLERT: May it please the court. My name is Roy Englert. I represent the Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants which represents the interests of many states, municipalities, and tribes. After protracted negotiation and mediation, this plan received overwhelming creditor support. It will make billions of dollars available for opioid abatement. All of

the voting states and territories have now consented to the plan and its third-party releases. Forty-two voted -- states voted to confirm it and another nine have now withdrawn their objections.

Allocation negotiations among the states began in 2018 and continued for more than two years, resulting in a consensual split of abatement funds. The states and local governments then reached agreement on abatement metrics and mechanisms, an achievement Judge Drain called incredible. As the bankruptcy court also found as fact, the entire race of the bankruptcy estate will likely be lost if this plan does not proceed, costing victims billions of dollars.

I would like to turn to the text of the statute. Section 1123(b)(6) provides that a plan may include any other appropriate provision not inconsistent with the applicable provisions of this title. Seems to me there are three operative words: any, applicable, and not inconsistent.

Any means any. Not inconsistent, has been covered by Mr. Huebner and I would

particularly commend to this court's attention Section 111(b) of the 1994 statute, which is codified. It's sometimes referred to as uncodified, but it's codified as a note to 11 U.S.C. Section 524. The word that does all the work is appropriate. And yes, this is a very broad permission to bankruptcy courts. Now, why shouldn't that worry the Court? Let me say two things. One, there is an article by the great Judge Henry Friendly called "Indiscretion About Discretion," which has been quoted by the Supreme Court of the United States. And Judge Friendly points out that Congress often gives Courts very broad authority, but then it gets worked out by the common law method over time so that it is not abuse.

HON. RICHARD WESLEY: Why'd they bother with 524(g), then?

MR. ENGLERT: 524(g) was meant to ratify this Court's Manville decision.

HON. RICHARD WESLEY: But it's unnecessary. Under your theory, it's completely unnecessary. Or did -- so it just enacted it so everybody knew that they agreed with that one?

MR. ENGLERT: Well, there was

tremendous controversy over Manville, as Your Honor is well aware, and Congress did want not only to ratify Manville, but to put some very, very, very detailed procedures in place. And that's Congress' prerogative is to legislation in detail, but it's also Congress' prerogative, Judge Wesley, to legislate broadly, which is what it did in 1123(b)(6), but with the very important qualification that the provision must be appropriate. If ever there was an appropriate case, this unique mass tort case, this case in which --

HON. RICHARD WESLEY: Appropriate as defined by the circumstance or appropriate as defined by the underlying premises and limitations of the bankruptcy code itself? I mean, I'm not interested in the hype of whether the Sacklers dictated this or not. It doesn't interest me at all. What I'm interested in is whether the Court has the authority to do this or not. And so, is it the substantial contribution that the third-party non-Debtors make?

MR. ENGLERT: That's part of it, but again, I'm standing here representing the States.

HON. JON NEWMAN: No, wait. Don't get

drawn into that. For heaven's sakes. You're --

HON. RICHARD WESLEY: Why don't you let him answer my question?

HON. JON NEWMAN: Well, he'll answer it after I finish.

HON. RICHARD WESLEY: Okay.

HON. JON NEWMAN: Please don't shoot yourself in the foot by saying it's the contribution of the Sacklers that make this plan lawful. Don't do that.

MR. ENGLERT: But what I --

HON. JON NEWMAN: 1123(b)(6) which said they can do anything appropriate, not inconsistent with applicable provisions. So the burden is on the objectors to find an applicable provision that says the bankruptcy judge can't do this, and your position as you started is, there is none.

MR. ENGLERT: Yes.

HON. JON NEWMAN: And the fact that Congress blessed the asbestos thing isn't a contrary provision because Congress said specifically, draw no inference from our doing this.

MR. ENGLERT: Yes.

HON. JON NEWMAN: Draw no negative inference.

MR. ENGLERT: Yes.

HON. JON NEWMAN: So there is no provision on your view that says it can't be done, and that remains true whether the Sacklers put in four billion, one billion, or zero. Right?

MR. ENGLERT: There's no provision of the code that says that can't be done, no matter what the Sacklers' contribution. But I do want to emphasize on behalf of the States, the enormous amount of work that went into creating mechanisms for opioid abatement and why this matter is supported by -- why this plan is supported by essentially the unanimous view of the States, which is very unusual.

Judge Wesley, I thought some of the --

HON. RICHARD WESLEY: So absent a limitation, anything goes, I take it?

MR. ENGLERT: No, this is why I brought up the Friendly article.

HON. RICHARD WESLEY: Judge Newman was asking you, said absent limitation, anything else is appropriate. Is that it?

MR. ENGLERT: Anything else that's not inconsistent. Again, I started by saying, the operative word is --

HON. RICHARD WESLEY: Then what are --

MR. ENGLERT: -- not inconsistent and appropriate.

HON. RICHARD WESLEY: Excuse me. What are the limits, then?

MR. ENGLERT: The limits are worked out by Courts over time in decisions like Metromedia and in the decisions from other circuits --

HON. JON NEWMAN: The statute -- Counsel, start with the statute. It doesn't -- you started with the word any, but it is followed by any other appropriate provisions. Right?

MR. ENGLERT: Yes.

HON. JON NEWMAN: Doesn't the word appropriate have some meaning?

MR. ENGLERT: Yes.

HON. JON NEWMAN: Is it limitless?

MR. ENGLERT: Not going to ask anymore.

HON. RICHARD WESLEY: I'm done. Thank you. Thank you, Judge Newman.

HON. EUNICE LEE: Thank you.

MR. ENGLERT: Thank you.

HON. EUNICE LEE: All right. Next, I believe it's the counsel for the Raymond Sackler family. Is, Mr. Joseph is next?

MR. JOSEPH: Your Honor, we reserve the two minutes for rebuttal, because the issue we address is not the issue that Your Honors have been considering.

HON. EUNICE LEE: Okay, thank you. We'll hear from you later. Okay. And the next party is the Ad Hoc Group of Individual Victims. Is that --

MR. SHORE: Yes.

HON. EUNICE LEE: Okay. And you're Mr. Shore?

MR. SHORE: I am. Again, Chris Shore from White and Case on behalf of the Ad Hoc Group, which is a group of about 65,000 individuals that participated actively in the proceedings below, including in drafting the TDPs, which raised the question, and I'm happy to answer any question you might have about the TDPs, but let me answer the question you asked, Judge Wesley.

The TDPs are premised on one injury, one claim. That was a set of processes that were

put in TDPs that were approved by the bankruptcy court without objection from anybody. The alternate rule in which we would try to determine 160-plus thousand personal injury claims by allocating relative fault between the Sacklers and Purdue, completely unworkable. So the TDPs, one injury, one payment out; but to be clear, they are all being funded with the Sackler contributions which are being made for both release of estate claims and direct claims.

With the rest of my time though, and it's going to sound weird for the victim's lawyer to say this, I want you to look past the cravenness of what the Sacklers did here as officers and directors of this company, and the damages that they brought on everybody. The key question that not only applies in this case, but will apply in every future case is, how do you solve the situation that Your Honor identified where there are claims against the corporation and there are claims against the directors and officers for their participation in those acts?

Those are the claims we're talking about. Those are the claims that were identified by Judge McMahon. Those are the claims that are

raised in everybody's papers, acts by Mortimer, Jr., acts by Richard Sackler, acts by Kathe Sackler, all taken while they were directors or officers of the company. According to the appellants in this case and in every case in this circuit, the only way you can ever solve that problem is taking one of three approaches.

One, you have to get the consent of everybody who has a direct claim. There are 300,000 creditors in Purdue. There is no way to get them all to vote on a plan, much less agree to everything. Two, you can have the directors and officers file for bankruptcy. The U.S. Trustee points out that's what can happen. You have your whole board and officer slate file for bankruptcy in a case in which you're accused of participating in a securities fraud. Or three --

HON. RICHARD WESLEY: That -- it's particularly acute in a closely held corporation, obviously.

MR. SHORE: Absolutely.

HON. RICHARD WESLEY: Go ahead, go ahead.

MR. SHORE: And three, you litigate it to result. It leads to what I call an un-most-

bankruptcy-like result in which the company continues to pay on D&O policies while that litigation goes on. The directors and officers get no comfort, there's no money funded to pay victims, and everybody loses.

HON. RICHARD WESLEY: Is the injury the same being addiction as opposed to some other type of injury?

MR. SHORE: Every --

HON. RICHARD WESLEY: Is that the nature of the reason for the one claim?

MR. SHORE: Yes.

HON. RICHARD WESLEY: Multiple theories --

MR. SHORE: Yes.

HON. RICHARD WESLEY: -- against multiple parties, some of the some of them non-Debtors, many of them non-Debtors, but it's one injury?

MR. SHORE: One injury. In fact, in both the bankruptcy court and the District Court, there were pleas to everybody involved. Please come forward and tell me about the claims you are concerned about that are being released. And what came forward were obvious estate claims.

The Sacklers looted Purdue, walked away with all the money. Those are claims that the estate could settle without third-party releases. And what -- everything else that bubbled up and what Judge McMahon addressed specifically and what Your Honor raised today, are claims against the D's and O's for actions they took in directing the company to distribute products into the stream of commerce and injure people.

Those are the claims we're talking about. They are inextricably intertwined, as Mr. Huebner said, with the claims against the company. So third-party releases are what to date has solved that problem. It allows the D's and O's to waive their claims and contribution claims against the company and kick in money. It channels the claims to insurance or a fund and it releases the Debtors from the ongoing identification claims.

If Your Honors are going to find that that is taken away, that that possibility no longer exists, there are no third party releases, we would implore the Court as we have in our papers to get to the question then of direct and derivative, to exercise your jurisdiction to look

at this situation and say, in a world in which releases don't exist for the for the Sacklers for this conduct, should it be a case in which 300,000 claimants each have their individual claims that they can pursue based on state laws.

We'll have cases going in 50 states, all for the same conduct and all trying to get to the same result, but for which the individuals will hold the payments for themselves just as the nine states who did, who settled. They said, I have a direct claim, I'm going to take $300 million approximately for myself to put it in my pocket and not share for anybody. That's not the result that bankruptcy should promote.

The question that should be addressed, and I think based upon what we put forward our papers, is the Court can rule in a world in which third party releases don't exist, claims like this, there may be direct claims, but the Debtor should have standing to pursue them. It leads to what Your Honor said in Tronox, which is, it leads to an equitable result. Everybody wins. People will have their opportunity to participate. People can question whether the Debtor settlement is appropriate, but you can't

leave a world in which nobody gets anything until the 300,000th person gives up their litigation because that's the factual situation we're in. The Sacklers aren't funding until they get comfort on those claims. It's done, pursuant to a third-party release. If the third-party release isn't available, it should be done pursuant to this Court's existing direct derivative jurisprudence that's been laid out and summarized most recently in Tronox.

So unless you have any further questions, that's what we have.

HON. RICHARD WESLEY: Thank you.

MR. SHORE: We thank you for your time.

HON. EUNICE LEE: Thank you.

MR. LIESEMER: Good morning, May it please, the Court. I'm Jeffrey Liesemer of Caplin and Drysdale for the Multi-State Governmental Entities Group which represents the interests of over 1,000 local governments and tens of millions of their constituents.

Local governmental entities are at the forefront of both opioid litigation and abatement efforts and will be critically affected by resolution of the issues before this Court today.

First, 95 percent of the creditors casting ballots voted in favor of the plan containing the shareholder releases; whereas, Section 524(g) by comparison only requires 75 percent. This overwhelming support shows that creditors believe that the plan containing the releases best serves their interests.

Second, it's hard to imagine third party releases more important and essential to a reorganization than these. Two of the more important achievements of the MSGE Group and other public creditors are, one, an agreed allocation of recoveries among incredibly disparate and complex creditor groups; and two, agreement to use the billions recovered from Purdue and Sacklers exclusively to abate the opioid crisis, bringing billions of life-saving dollars to help those most vulnerable and in need.

Those achievements likely would be destroyed if creditors could continue to sue the Sacklers for Purdue-related claims. This is because the available assets are dwarfed by the claims asserted against them. The public creditors' claims alone are in the trillions of

dollars. Even if one significant creditor were not bound to the releases and got a judgment anywhere near its asserted claim, the Sacklers would not be able to make their agreed settlement contributions, drastically reducing or eliminating payments to all other public and private creditors.

Thus, the releases are essential to protect the victims and creditors. Indeed, the trial court found that at SPA 296 that the Debtors would likely liquidate absent these releases, leaving victims with little or nothing. We ask that the confirmation order be affirmed. Thank you.

HON. EUNICE LEE: Thank you. And is the next party for the Mortimer side, initial coverage Sackler family? Is that --

MS. MONAGHAN: Your Honor, I reserved my time for rebuttal as well.

HON. EUNICE LEE: Okay.

MS. MONAGHAN: Thank you.

HON. EUNICE LEE: Thank you. We'll hear from you. Okay. I'll let you introduce yourself.

MR. CECERE: Carl Cecere for the

Canadian creditors. I'm going to be focusing my time on the issues that are unique to the Canadian creditors, but obviously they cross cut on a lot of different things, including the Court's power to --

HON. RICHARD WESLEY: -- up?

MR. CECERE: Yeah, the Court's power to impose the releases. The appellants in this case have largely attempted to minimize the significance of the Canadian creditors, but the Court shouldn't be taken in by that effort. The Canadian creditors represent much more than a few isolated communities. They're the named representatives of classes that are likely to be certified in the near future that will represent all 3,000 municipalities in Canada, all 600 First Nations in Canada.

HON. EUNICE LEE: Can you -- I actually have one question. Your argument about, regarding sovereign immunity. How did the releases implicate that? There's -- this is not a foreign sovereign being brought into Court or held liable. I just -- I'm confused by that argument.

MR. CECERE: Well, it is an instance in

which our property is being adjudicated, our rights and our property. That is our rights and causes of action that we have against the Sacklers and other shareholder release parties are being adjudicated --

HON. EUNICE LEE: But you're not being forced --

MR. CECERE: -- for the --

HON. EUNICE LEE: You're not being -- I'm sorry. You're not being forced to, dragged into a U.S. Court. You're not being held liable for something. What's --

MR. CECERE: No, but we're being -- I mean, it's the same as if we were defending the declaratory judgment. We are having our rights adjudicated as a defendant. Whether or not we are being held liable for damages doesn't matter in terms of sovereign immunity. It's a question of whether the Court is exerting jurisdiction over us.

HON. EUNICE LEE: But you're coming into this voluntarily. The Court is not forcing you into this proceeding. You voluntarily have been a part of this.

MR. CECERE: Well, we filed a proof of

claim in this case and that's true of the individual representative claimants that are here before you today, not the class, but when you file a proof in bankruptcy, that does not waive claims of sovereign immunity. When it comes to immunity provided under FISA, the only way to waive immunity under FISA is under FISA; 1604 says that, you know, you go through 1604 and 1605 through 1607, but the only ways, the exclusive ways that FISA immunity can be waived when it comes to the common law immunity enjoyed by tribes when they appear and provide and they enter an appearance in bankruptcy by filing a proof of claim.

All they have done is consented to personal jurisdiction to adjudicate their claim and any claims or counterclaims that might offset that claim. There is no consent or there is no waiver of sovereign immunity as to subject matter jurisdiction and sovereign immunity is a matter of subject matter jurisdiction and there is no waiver of other claims.

You can't bring us into Court in bankruptcy and then then have other people adjudicate their rights against us, and that's

exactly what happened here.

HON. EUNICE LEE: I guess, maybe I'm disputing the idea that you were brought into this Court in bankruptcy. You weren't brought in. You inserted yourself into this.

MR. CECERE: Well, we were brought into this -- we came to this bankruptcy to adjudicate our rights against the Debtor. We never raised any issues against any of these shareholder release parties. We've never sued. We never sued them. We never voluntarily consented to be sued and countersued by them. And one of the decisions that the appellants rely upon SG Phillips says you're only waiving when you appear in bankruptcy issues related to setoffs. You're not waiving any other issues regarding subject matter jurisdiction or sovereign immunity or anything else.

And so, your rights against third parties are not an issue and you haven't introduced or allowed yourself to be sued by them, if that makes any sense.

I want to return back to the issue of jurisdiction, the Court's power to enter the releases because I think Judge Wesley, your

instinct is exactly correct. It's extremely problematic for these releases to be so broad because there's no contouring about jurisdiction. There certainly was probably jurisdiction to release some of these claims, but when you release all claims of all states without regard to whether or not there would be rights of contribution or indemnity by statute or anything else like that, you create a really big problem.

And that's an especially bad problem for us because there's literally no connection to the estate at all from our claims. There will be no rights to contribution indemnity or insurance because they haven't established that there's any insurance policy that covers us. They haven't established that, you know, the rights of contribution indemnity with regards to our claims against Purdue Canada, they're going to run to Purdue Canada.

They're the joint tortfeasor in that situation and our contribution act claims, well, contribution -- I mean, our Competition Act claims for those contribution and indemnity and insurance are all affirmatively barred by Canadian law. There will be no recovery for

those claims. There's no connection to the estate there.

And as the Court -- as you suggested, Judge Wesley, it's also extremely problematic for them to say that well, because they've got a right to withdraw, the Sacklers have a right to withdraw the money if they're sued or, you know, there would be a cascade of events that would happen if there were to be a bunch of suits. That is an extremely problematic way of establishing jurisdiction because that establishes that there were effects on a particular plan.

But then you have to leap from the plan to the estate and you're not -- and that is an indirect effect. That is a second order if this happens and then in another event happens and that other people do other things, and that's exactly the kind of attenuated indirect connection that can establish jurisdiction under this Court's precedent.

HON. RICHARD WESLEY: Canadian plaintiffs possess direct claims against the Sacklers individually?

MR. CECERE: So we have not filed any

claims against the Sacklers directly yet. We were prohibited from doing so by the impositions --

HON. RICHARD WESLEY: Right.

MR. CECERE: -- of stays here --

HON. RICHARD WESLEY: Under Canadian law.

MR. CECERE: Under Canadian law, we can sue -- we can and plan to do, yes, exactly that. We plan to sue them both in their capacities, directors as -- of Purdue Canada. We also plan to sue them under the Competition Act, which is a direct action against them individually, not in their capacities as officers and directors, but individually for their conduct in promoting opioid drugs in the United States --

HON. RICHARD WESLEY: You say those types --

MR. CECERE: In the United States.

HON. RICHARD WESLEY: And under Canadian law, you say the -- with regard to those claims, they can't seek contribution or indemnification?

MR. CECERE: with regard to the contribution -- excuse me. With regard to the

Competition Act claims, that's not just unlikely to happen, it's affirmatively barred under Canadian law on all three. There will be no contribution, there'll be no indemnity, there can be no insurance coverage.

HON. RICHARD WESLEY: Okay.

MR. CECERE: Thank you.

HON. EUNICE LEE: Okay, thank you.

MR. CECERE: Okay, and --

HON. EUNICE LEE: I think we --

HON. RICHARD WESLEY: We have.

HON. EUNICE LEE: We have your argument.

MR. CECERE: Okay. Thank you.

HON. EUNICE LEE: Thank you. Okay, and we'll hear now from the Trustee.

MR. SHIH: Thank you very much, Your Honor. Mike Shih for the U.S. Trustee. I want to zoom out to focus on the appropriate framework for assessing the statutory question, and that stems from the long line of Supreme Court cases making clear that Congress needs to enact exceedingly clear language if it wants to significantly alter the power of the federal government over private property, as it

articulated most recently in Cowpasture.

So, under the plan proponents' view, the code authorizes bankruptcy courts to permanently extinguish causes of action, which are a species of property right as the Court made clear in Zimmerman Brush, but no provision of the bankruptcy code expressly authorizes bankruptcy courts to adopt releases of this sort, as the court indeed remarked in Metromedia. So constitutional avoidance requires that the code be construed to prohibit the result that the plan proponents are asking for, and that's a very easy way of assessing the statutory claims here.

Now, the only response to this that I think the other side has come up with is not that avoidance doesn't apply or it's not that constitutional issues aren't at least deeply implicated. It's that the bankruptcy code speaks clearly, and I think Judge Newman was getting at this in his colloquy about 1123(b)(6), but the problem is the other side's interpretation of that statute just can't be reconciled with the way the Supreme Court has addressed these general provisions, codifying bankruptcy courts' residual equitable authority as the Energy Resources case

on which the other side so heavily relies actually underscores.

Energy Resources makes clear that all of these statutes, whether it's 105, 1123, or whatever all of these residual equitable powers derive from the traditional understanding that bankruptcy courts, as Courts of equity, have broad authority to "modify creditor-Debtor relationships." And in assessing statutes of this type, the Supreme Court has repeatedly rejected the idea that the code's general authority provisions are able to accomplish a result that is antithetical not only to the text of the code, but to its structure, purposes, and history.

HON. EUNICE LEE: Well, I think -- I mean, I think the other side's argument is that in fact, this type of release would not be inconsistent with the code and that it's not, in fact, inconsistent with any express provision of the code, so maybe you could you could speak to that specifically.

MR. SHIH: I will, Your Honor. There's two parts to your question and I want to get at them in reverse. So the first question is how

express does the inconsistency have to be? And the other side would have you believe that it needs to be expressly forbidden by the bankruptcy code for there to be an inconsistency and that just can't be right under cases like Jevic, Law, and RadLAX.

So take Jevic, for example. That was about the priority ordering that the bankruptcy code sets forth. Now, those priority orders don't apply to this type of order, called a structured dismissal. So nothing in the bankruptcy code expressly prohibits a bankruptcy court from adopting a structured dismissal that violates the priority provisions. Nevertheless, the Supreme Court said in Jevic that the priority provisions are so fundamental to bankruptcy, that the general provisions granting equitable power to the bankruptcy court can't support the exercise of authority. And so analogizing --

HON. EUNICE LEE: Can I just jump in for a second?

MR. SHIH: Yeah.

HON. EUNICE LEE: Because to me, the Jevic case is distinct from what's going on here. In that situation, you actually have something in

the bankruptcy code that specifically says this is the priority order and it applies to certain circumstances. And yes, in that case, they're applying -- their basically, the bankruptcy court is saying, well, we know these are the standard priority orders, but because the code doesn't say we have to apply it to a structured dismissal, we won't.

That's a clear inconsistency where the code is addressing a particular area in a very specific way about priority and the Court is actually -- the bankruptcy court is saying, well we know this is a priority, but we're going to divert from this because we think there's a good reason, something general like that. Here, there's not some specific provisions about third-party releases in the code where you can look at that, oh, this is some specific standard and we're going to go away from that.

That's -- it seems like a different situation in Jevic because it's highly specific. And so yes, what they were doing wasn't forbidden by the code, but it was addressed in a very explicit way.

MR. SHIH: So, point taken Your Honor.

We disagree with that reading of Jevic because, you know, as the other side would have it, there does need to be some express prohibition. But Your Honor's, I think, point is, I guess slightly different which is, you know, that the sort of inconsistency was more specific because there we're only talking about, you know, the specific priorities framework and here the inconsistency is much broader, but that makes the problem worse, Your Honor, not better.

So virtually every provision of the bankruptcy code is there to restructure the creditor-debtor relationship. That's all the bankruptcy code really talks about. And this Court has held and the Supreme Court has held and other circuits have held that the whole point of bankruptcy is tailored to that relationship. And so it makes sense that the code is replete with statutory provisions directed to that relationship.

It's not just the priority scheme that we're talking about now. We're now talking about, you know, as the other side said, the warp and weft of the entire bankruptcy code. And none of those provisions, except one has anything to

say about the release of a non-Debtor's direct claim against another non-Debtor. The one provision is arising only in the asbestos context, and it doesn't apply to direct claims. It only applies to derivative claims, as this Court explained in Manville IV.

So the inconsistency is, yes, you're right, Your Honor, it's a more general inconsistency, but that just underscores why the power asserted by the bankruptcy court was so remarkable and why --

HON. EUNICE LEE: I guess another way to look at it is, if it's so general, how are you determining that there is in fact an inconsistency?

MR. SHIH: So it's not -- it's a structural analysis, Your Honor, in the same way that the Supreme Court has relied on the similar structural intuition in Jevic, RadLAX, and Law. So, you know, again, the Supreme Court says, where we have a whole bunch of provisions that address a particular type of thing and no provision addresses the sort of thing that the bankruptcy court wants to do but there's obviously a relationship between them, then, you

know, that is antithetical to the structure of the bankruptcy code.

And so that intuition applies with full force here, but it's not just a specific problem.

HON. JON NEWMAN: So your reading of 1123(b)(6) when it says, any -- not inconsistent with any active provision, you think that means inconsistent with another provision that deals with a specific topic and inconsistent with any provision that doesn't deal with a specific topic. Is that right?

MR. SHIH: No, Your Honor. We agree that appropriate has meaning. What we're saying is that the specific topic relevant to the question of a non-Debtor release is indeed the topic of whether a discharge in bankruptcy can provide relief not only to the Debtor but also to the non-Debtor and not only for derivative claims, but also for direct claims. And so we disagree with the premise of the question that there is somehow some divergence between, you know, that fundament of the bankruptcy code and somehow that's irrelevant to the power that the bankruptcy court has asserted.

But it's not just these general

provisions, Your Honor, that the release offends. The release also grants the equivalent of a discharge to the Sacklers without ensuring that the Sacklers submit to the code's procedures for protecting creditors. So there's no reasonable dispute, for example, that if the Sacklers had declared bankruptcy themselves -- they haven't, but if they had, the result would have been much different and the deal would have looked quite different.

So the Sacklers would have --

HON. JON NEWMAN: Excuse me. Didn't we say in Manville I that a release was not a discharge?

MR. SHIH: That was certainly part of Manville I, but Manville I doesn't sweep that far for two reasons. The first is, Manville I only addressed derivative claims as the later cases in the Manville line make clear. And the second is that in Metromedia, this Court explained that indeed, a third-party release could be the equivalent of a discharge. But you know, just to go back to the inconsistency, if the Sacklers had declared bankruptcy themselves, they would have needed to account for all of their assets. They

would have needed to put them in the bankruptcy estate subject to certain exemptions.

They wouldn't have been able to obtain relief for claims for fraud and certain other forms of intentional misconduct. And --

HON. JON NEWMAN: The other doesn't doubt anything you just said.

MR. SHIH: No, they don't. They don't. They don't --

HON. JON NEWMAN: If go into bankruptcy, the bankruptcy laws apply to them has a discharged creditor. They don't dispute that. Their argument is, this is not a discharge. And you say in effect, it's a discharge, right?

MR. SHIH: Yes, Your Honor. But that makes the problem worse.

HON. JON NEWMAN: It it's not a discharge, is it?

MR. SHIH: It is the same relief that a discharge grants. All a discharge -- discharge is not a magical term in bankruptcy. All a discharge means is that there is a permanent injunction on bringing a particular claim. That's exactly what this release does. This release operates as a permanent injunction on

bringing a particular type of claim.

HON. RICHARD WESLEY: It extinguishes the claim.

MR. SHIH: It permanently extinguishes --

HON. RICHARD WESLEY: -- that it's a permanent defense against?

MR. SHIH: Exactly. And that's exactly what a discharge in bankruptcy does. And so they say it's, well, not technically a discharge in bankruptcy. That's true, Your Honors, but that just underscores why this is so weird to try to say, is consistent with the bankruptcy code. If the relief they're given by the bankruptcy court is identical to a discharge, but the bankruptcy discharge provisions emphatically do not cover the sort of relief that they got, that is a tremendous assertion of power on behalf of the bankruptcy court that you would think Congress would have specified more clearly if it had intended the bankruptcy court to wield such authority.

And of course, notwithstanding the asbestos exception, which applies only to derivative claims we are not aware of and the

other side hasn't cited a single example of Congress saying that in something like the 222 years in which Congress has been legislating in the bankruptcy space. But, you know, to return to the point about the relief that the Sacklers could have gotten in individual bankruptcy just illustrates why this case is on all fours with Jevic and RadLAX and Law.

By not declaring bankruptcy, the Sacklers didn't have to give up all of their assets, got broader relief, release for claims for fraud than they would have gotten under bankruptcy, all under the umbra of bankruptcy. And that's the sort of assertion of authority by the bankruptcy court that evades specific restrictions on what a discharge could do that the Supreme Court found so problematic.

HON. RICHARD WESLEY: Where in the language of the release, you find they're released from fraud?

MR. SHIH: Sorry?

HON. RICHARD WESLEY: Where in the language of the release do you find they're released from fraud, fraudulent claims?

MR. SHIH: So it's found in the

definition of cause of action, Your Honor. And if you bear with me --

HON. RICHARD WESLEY: I just want to make a note.

MR. SHIH: Yeah, if you'll bear with me, let me find it in our brief. Yeah, so we begin discussing this on Page 19 of our brief --

HON. RICHARD WESLEY: Page 19. Yeah. Okay.

MR. SHIH: And it continues on -- when we discuss the changes to the release on Pages 222 -- 21 through 23.

HON. RICHARD WESLEY: Okay.

MR. SHIH: And so the operative definition of cause of action is any claim within the meaning of the bankruptcy code, as well as any claim of any kind, character, or nature whatsoever. And that to me seems broad enough to encompass a claim for fraud against the Sacklers.

HON. RICHARD WESLEY: All right.

MR. SHIH: So the other inconsistency to point out is with respect to 524(g) itself. When Congress enacted 524(g), it specified that that was being enacted notwithstanding Section 524(e), which of course states that a discharge

in bankruptcy is for the benefit of the Debtor.

The other side has no explanation for why Congress would have wanted to include the notwithstanding language. As far as they're concerned, Congress didn't need to enact that language at all, and indeed Congress, wouldn't have needed to enact 524(g) at all, because in their view, bankruptcy courts have traditionally wielded such power, but --

HON. EUNICE LEE: What do we -- I mean with regard to 524(g), when it explicitly states, don't read into, don't assume or read anything into -- from this rather, about the bankruptcy court's authority, it seems like it's a wash. Like, how can you say, well, even though the statute has an explicit provision telling -- saying, you can't rely on this or read into this, we should still read into it.

MR. SHIH: So it's not -- because that over reads the rule of construction, Your Honor. All the rule of construction says is, if Courts believe that bankruptcy courts have always had this authority, then the enactment of 524(g) shouldn't restrict that. That, I think, is the best reading of the rule of construction, but

Congress didn't take a view as to -- in the rule of construction as to whether bankruptcy courts have traditionally wielded that authority.

And although the other side relies on cases such as Katz that talk about the bankruptcy court's traditional authority at the time of the framing, they have notably failed to identify any framing era example of a bankruptcy court reaching out to terminate a non-Debtor's direct claim against another non-Debtor and we're not aware of any example of such historical power being exercised under equity, which is another reason why if a bankruptcy court is to exercise that power, one would expect Congress to have spoken quite clearly. And of course, as Metromedia itself recognized, there is no express provision of the bankruptcy code authorizing the release in question. I --

HON. JON NEWMAN: So is it fair to say that with respect to non-asbestos claims, Congress didn't speak one way or the other with respect to releases?

MR. SHIH: That's fair, Your Honor.

HON. JON NEWMAN: Okay.

MR. SHIH: It's difficult to parse

because again, Congress in 524(g) said that 524(e) is a bar. And so, you know, we should credit what Congress said insofar as Congress relied on the notwithstanding language. If Congress hadn't thought of 524(e) as a bar, it's hard to understand why Congress would have put in the notwithstanding term. But, you know, even if Your Honor is right, that the bankruptcy code has nothing to say, the District Court correctly held that the tie goes against the bankruptcy court's exercise of authority here, and that's true for two reasons.

The first is of course the rule of construction that the Supreme Court articulated in cases like Cowpasture, that requires an exceptionally clear statement of congressional intent. And second, the fact that in Jevic, the Supreme Court said to the extent that the bankruptcy court wants to assert a power that is inconsistent with the structure, purposes, or text of the bankruptcy code, there needs to be much more than congressional silence. So the fact that --

HON. EUNICE LEE: Isn't that -- that's the whole issue though, whether or not in fact

this is inconsistent with the bankruptcy code and we know that there's no explicit provisions addressing that. That's the whole sort of issue here.

MR. SHIH: So Your Honor, if you don't think that there's any inconsistency with the bankruptcy code, then of course, this difficulty is -- that's going to be hard for us to overcome.

HON. EUNICE LEE: Right, but I mean, I guess what I'm saying is, point me to the thing that shows there's an inconsistency.

MR. SHIH: If you haven't agreed that the inconsistencies that we've identified here are not inconsistencies, right, then Your Honor has a very specific understanding of inconsistency that just can't be squared with how that is used in normal parlance because inconsistency doesn't mean inconsistent with just the express terms of a statute.

Imagine a plain language example, library says members can only borrow books for two weeks, and that's all. And then so a nonmember marches in and says, well I'm not a member so I can borrow books for as long as I want. I think everybody would go, that's a

little bit weird, notwithstanding the fact that the rule for the library doesn't have anything to do with what nonmembers can or can't do. And so that's analogous to the sort of inconsistency that's present here where a non-Debtor says, I can get the benefit of a discharge and the bankruptcy gets to grant me the equivalent of a discharge, a permanent injunction, as Judge Wesley has pointed out, but I don't need to comply with any of the rules of the bankruptcy code and I don't need to contribute all of my assets, and by the way, the permanent injunction that I'm getting is broader than the permanent injunction, I would have been entitled to had I declared bankruptcy myself.

That's the fundamental inconsistency here and the fact that it's not just with limited provisions such as the priority scheme makes the problem worse and not better, Your Honor. And so, you know, to the extent --

HON. JON NEWMAN: Is it your position that there cannot be a lawful release of the sort in this case unless Congress explicitly authorizes such a release?

MR. SHIH: Yes.

HON. JON NEWMAN: That's your position?

MR. SHIH: Our position is that if Congress has not expressly authorized the release of a direct claim of a non-Debtor against another non-Debtor, then a bankruptcy court lacks authority to adopt a plan that contains a release of that sort, an expressed congressional enactment, such as 524(g) except applicable to direct claims and not just derivative claims. That's the sort of thing that would be required before a bankruptcy court or any court could exercise authority in bankruptcy to do something like that. And the due process --

HON. JON NEWMAN: Go ahead.

MR. SHIH: No, Your Honor, I did not mean to interrupt.

HON. RICHARD WESLEY: He's --

HON. JON NEWMAN: Oh, I thought you had to leave (indiscernible), no? Am I wrong?

HON. RICHARD WESLEY: No, no. No.

HON. EUNICE LEE: Continue.

HON. RICHARD WESLEY: It's very hard to hear you, Judge Newman.

HON. JON NEWMAN: Okay. I'll try to do better. Now sure if counsel wants me to, but

I'll be glad to --

HON. EUNICE LEE: You can --

HON. JON NEWMAN: -- process. I'm trying to get the volume up. What in your view will happen to the existing and potential plaintiffs if the plan is not confirmed?

MR. SHIH: So I'm glad for the opportunity to address that, Your Honor, and I want to make something very, very clear. The U.S. Trustee fully recognizes the pain and suffering that the opioid crisis has caused and the U.S. Trustee agrees with the District Court that the proposed plan with these contours could provide a lot of things that are very good to a lot of people. But those don't bear on the core legal question which is whether the release is constitutionally sound or statutorily authorized.

And moreover, these predictions about what will happen if the District Court is affirmed are speculative. So for example, the bankruptcy court approved the plan based in significant part on representations that it was the best plan and based on, it seems, significant efforts by the mediators to extract the best plan and that led to a $4.3 billion contribution by

the Sacklers.

But once the District Court vacated the plan, the Sacklers agreed to contribute an additional, like, one point something billion more, which was not on the table until the plan was vacated. So these suggestions that everything is going to fall apart are a little hard to credit. But even if the Sacklers decide to take their proverbial ball and go home, that doesn't mean that no plan can be confirmed. So for example, the estate has billions of dollars in fraudulent conveyance claims against the Sacklers that presumably the estate could pursue if it chose.

The states and plaintiffs could recover from the various lawsuits against the Sacklers that the bankruptcy court put on ice and more people could file lawsuits such as, presumably, the Canadian municipalities whose ability to file lawsuits has been pretermitted by the injunction that the bankruptcy court put in place and to the extent that --

HON. JON NEWMAN: Where would they sue the Sacklers?

MR. SHIH: I don't know, Your Honor.

You'll have to ask the Canadians about that. But the point is, to the extent that the Sacklers protest --

HON. JON NEWMAN: Claim is, their money is in the bailiwick of Jersey.

MR. SHIH: That's right, Your Honor. But these representations about the value of the claims are also a little bit hard to credit. So at the confirmation hearing, the Debtor specifically said that the merits of the District Court's -- of the direct claims against the Sacklers and the other released parties were irrelevant. I think one illustrative statement is on Page 806 of the SPA where they said, we chose the train that we're riding and train we're riding is not the merits.

At the bankruptcy hearing, they never analyzed the value of the claims. They never retained any experts to value the claims. They didn't invite or receive any presentations from potential plaintiffs with such claims. So it's hard now to say, well, you know, the claims are essentially worthless. And they also emphasize how successful the Sacklers have been, as Your Honor has said, at shielding their assets from

recovery. But that's also difficult to square with the Sacklers' own behavior where they agreed to pay a billion dollars more to get these releases after the release was vacated, to try to make this lawsuit go away.

So it's difficult to understand how, in light of the absence of anything in the record about the value of these direct claims against the Sacklers and in light of the Sacklers' willingness to pay an extra billion dollars just to get the release to try to make the lawsuit go away, that the fact that some of their assets may make the Sacklers hard to collect against, makes the claims that the non-Debtors have against the Sacklers worthless.

HON. EUNICE LEE: But your view is that that doesn't --

HON. EUNICE LEE: I can't year you.

HON. EUNICE LEE: I'm sorry. I just was going to say, but your view is that that doesn't really -- even if the Sacklers were putting in 10 billion, your view is still that these releases are bad and the deal can't go through?

MR. SHIH: That's right, Your Honor,

but I understood Judge Newman's question to be focusing on the equitable components of this and the sole point --

HON. RICHARD WESLEY: The claims -- what claims against the Sacklers could be released and only the claims held by the estate?

MR. SHIH: So the claims that are not -- the releases that are not at issue here, Your Honor, are the derivative releases, so releases of the sort that were approved in Manville I such as against the proceeds of an insurance policy that was basically property of the estate. The Trustee has not contested the propriety of that sort of release and, you know, we don't understand any of the objectors to be focused on that either.

So that would certainly still survive an affirmance of the District Court's holding. But the sort of thing that can't be released is exactly the sort of claim --

HON. RICHARD WESLEY: Indemnification claims they might hold against the against the Debtors, should they themselves as corporate directors be cast in the liability where they have the right to indemnification?

MR. SHIH: Who is bringing --

HON. RICHARD WESLEY: The Sacklers. Could the -- could they be released from that?

MR. SHIH: I'm not sure, Your Honor. I think the way we would think about it is whether, you know, that is a claim belonging to the estate.

HON. RICHARD WESLEY: One of the problems with this is that it seems like a hypothetical. There's no definition to this. That's why it was -- when the victims' council stood up, it was helpful in some ways to put, you know, some definition to it. And his view was, there's one injury. I understand that. That's exactly what -- that's MacArthur. That's exactly MacArthur because there was exposure to asbestos by a product that MacArthur sold that Manville made.

So it was all contained within that and that's why that, recognizing the importance of the insurance policy or the insurance coverage and Judge Newman analogized to claims against a common res -- for which could -- people could make. That makes perfect sense to me. But it's hard to see the -- it's hard to conceptualize how

this plays out as inappropriate beyond the bankruptcy court's authority without putting the actors together because they're so fact specific in some times, and that's why I've continued to ask questions about the state direct claims.

MR. SHIH: Yes, Your Honor.

HON. RICHARD WESLEY: And asked your Canadian colleague there, representing the Canadian claimants to expound to that. So, I mean, these are claims that you premise exist, but have -- no one's definitely asserted because of the injunction, right?

MR. SHIH: No, Your Honor. So there's two sort of sets of claims that could be fit into an answer to you. The first are, all of the claims that already existed brought by a lot of the states, for example, that were put on ice, but had survived motions to --

HON. RICHARD WESLEY: Unfair business practices, fraud --

MR. SHIH: Right. State, False Claims Act cases or something along those -- so those all survived motions to dismiss, as I understand it, on the basis that they were actually derivative claims and not direct claims, and our

brief sets out a couple of instances of cases surviving motions to dismiss on that basis under state law. So that's one category of claims that would be erased permanently by the release that would be able to go forward under the District Court's order if that's affirmed.

Another category, of course is claims that haven't been brought in virtue of the injunction that has been in place and to the extent that they likewise assert direct liability on behalf of the Sacklers, then those two would be permanently extinguished, but individuals would be able to proceed on them to the extent that the District Court is affirmed.

But, you know, to your point that there's essentially one injury, that's potentially true as a factual matter in some of these cases, but the fact is, we just don't know because as Your Honor has pointed out, that is a necessarily fact-specific inquiry and the point of the release is that it pretermits any such inquiry. Nobody gets to go to Court to try to test whether their claims are sufficiently overlapping.

And Your Honor, even if the claims were

sufficiently overlapping, that wouldn't solve the constitutional problem because, you know, as Your Honor is quite aware, it's just a fundamental principle of tort law that even though you may suffer one wrong at the hands of multiple actors, you have an individual claim, an individual cause of action against all of the actors who have injured you and it's that cause of action, that property right under Zimmerman Brush, which is being permanently terminated by the Sackler release and that's something that there must be a clear statement from Congress before a bankruptcy court can assert that authority.

And I want to close by underscoring the importance of that constitutional question, which didn't get a lot of air time in the presentation of the other side.

HON. EUNICE LEE: Could I just -- I'm sorry to jump in.

MR. SHIH: Of course. Yeah.

HON. EUNICE LEE: It's related to this, the constitutional question. I guess I'm wondering how the constitutional problem you see here in terms of extinguishment of property rights and claims, how does that not also apply

to 524(g)? Is that unconstitutional?

MR. SHIH: No, Your Honor, and that's true for two reasons. The first is. Congress enacted 524(g) and when --

HON. EUNICE LEE: Well, Congress can't go against the Constitution.

MR. SHIH: That's right, Your Honor, but as the Supreme Court and other cases have held, Congress' rearrangement of the economic relationship between actors is subject to rational basis review, but the reason that's true is because the Constitution vests authority in Congress, and Congress alone to make decisions about how to balance the countervailing policy interests and the heightened procedures in 524(g), which by the way were not followed here, only underscore the extent to which Congress took seriously those constitutional concerns.

Here, Congress has not acted and so for the bankruptcy court to assert the authority to just copy/paste provisions that might be constitutional in the limited context of derivative claims in asbestos bankruptcies and say, well, we think that these provisions are good enough in this context for direct claims in

non-asbestos bankruptcies, that's a key separation of powers problem and nobody in this case has cited any authority for the bankruptcy court to craft remedies that is, you know, a power traditionally allocated by the Constitution to Congress and Congress alone.

I see my time has expired.

HON. EUNICE LEE: If you --

HON. JON NEWMAN: I just want to ask two short questions, if I may. Is there any finding of fact made by Judge Drain that you think is clearly wrong?

MR. SHIH: Yes, Your Honor. So if this Court holds --

HON. JON NEWMAN: -- the number. Can you do it by numbering to save us time?

MR. SHIH: I'm sorry, Your Honor, I couldn't hear the second part of that.

HON. JON NEWMAN: Could you identify them by their numbers, just to save us time.

MR. SHIH: I'm -- not off the top of my head but I can tell you the categories. The first are --

HON. JON NEWMAN: Okay.

MR. SHIH: -- Judge Drain's findings

with respect to the Metromedia standard. So to the extent that the Court believes that the Metromedia standard controls, which it does not, Judge Drain made certain findings.

HON. JON NEWMAN: The way he interpreted Metromedia?

MR. SHIH: Oh, no, no, no. Judge Drain said Metromedia adopted factors that a judge must find for a release to be approved. We disagree with that reading of Metromedia, but to the extent that this Court agrees with Judge Drain that Metromedia controls, those findings are clearly erroneous for the reasons we set forth in our brief. Moreover, we disagree with Judge Drain's findings with respect to the constitutional issues.

Judge Drain found, for example, that notice was sufficient but for the reasons set forth in our brief, the fact that the notice may have gone out to a lot of people does not mean that the quality of notice was sufficient to put those people on notice of what this plan was going to do.

HON. RICHARD WESLEY: What it said, as opposed to who saw.

MR. SHIH: Absolutely, Your Honor.

HON. RICHARD WESLEY: Right.

MR. SHIH: And so there are a number of other factual disputes that we raise in our brief related to, for example, the necessity of the release to the plan and so on, so please don't take the response from the podium as being the exclusive source of the disputes that we have with the findings of fact from the District Court -- from the bankruptcy court, rather. But the point is, there are several important disputes that the Trustee has set forth with the reasoning of the District Court's findings of fact.

HON. EUNICE LEE: Okay.

HON. JON NEWMAN: Okay.

HON. EUNICE LEE: All right. Other questions. Thank you, Mr. Shih.

MR. SHIH: Thank you very much.

HON. RICHARD WESLEY: Thank you, Mr. Shih.

HON. JON NEWMAN: And now we're ready for rebuttal from Mr. Huebner.

MR. HUEBNER: Your Honor, one -- Your Honors, one side of the -- before I begin, just procedurally. Sorry, I apologize. One side of

the Sacklers has ceded their two minutes, so they don't intend to speak, but I think the other has not, so I think if it's okay I have six minutes, if that's okay --

HON. EUNICE LEE: Okay that's fine. Yes. Thank you.

MR. HUEBNER: Your Honor, we just heard a great many things from the U.S. government that are extremely surprising, to say the least. I think most importantly, a lot of the argument you just heard assumes that 34 years of Second Circuit precedent is either illegal or unconstitutional and that the majority of circuits in this country have been violating both the law and the Constitution for decades, none of which is true.

Judge Wesley, to answer your first question, why was 524(g) needed? There's a very precise answer. The managing Trustee of the Johns-Manville Personal Injury Trust went to Congress and said, for every dollar the stock price goes up, the trust gets another $100 million. Can you please clarify to leave no doubt that the trusts are rock solid, and in light of that testimony, Congress agreed to pass

a specific statute?

Number two, Your Honor, with respect to inconsistency, which we heard a fair amount of argument on, let me remind the panel, if I may, that at Page 64 of the government's brief, they concede it is their burden to prove inconsistency under Hardage, not ours. That burden most assuredly has not been carried. In response to many questions from this panel, they retreated again admitting time and time again that they actually could find no inconsistent provisions but that it was a gestalt. So let's first talk about what the cases actually say.

What Law v. Siegel which he relied on actually says, is that 105 which is actually not the section implicated here, can violate the "express terms" Page 422 "explicit mandates," Page 421, and "specific provisions" at Page 421-22.

HON. RICHARD WESLEY: Well, that's no doubt true, but it also can't violate the due process clause in the Constitution of the United States.

MR. HUEBNER: Your Honor, I agree completely and --

HON. RICHARD WESLEY: Okay.

MR. HUEBNER: -- with that, let me turn to Jevic and Energy Resources. What Jevic said was that the structured dismissal there, which was a permanent final disposition of the Debtor's assets in radical violation of the priority conduct of the code violated the code's "first principle and most important and famous rule" and violated the procedures "specified by the code." Jevic v. Siegal and Law -- sorry, Law v Siegel and Jevic support our side entirely.

Your Honor with respect to sovereign immunity for the Canadians, we'll largely rest on our papers except to say four very quick things. Number one, their class is uncertified. They represent less than 1 percent of the population of Canada. Number two, we settled with all of the Provinces of Canada and did a huge carveout of all Canadian claims and everyone else in Canada including provinces representing the entire population was satisfied. Three, in response to your questions, Your Honor, there was no answer. Section 106 for 18 years has been found by every Court to ever breach the issue to trump the Foreign Sovereign Immunities Act and,

as he admitted upon questioning but not quite, your -- this Court's own decision in Phillip Constructors expressly says you file a claim, you "necessarily submit to the bankruptcy court's equitable power." That's at page 707.

To hear him represent to this panel that their claims are unrelated to the Debtors is completely shocking given what his brief actually says, and I quote at Page 62. The claims are "based in part on allegations that the Sacklers acted through the Debtors using them as an instrumentality to commit Canadian fraud." Simply stated, they retain all their claims against Purdue Canada just like everyone in Canada does. The only thing that is released are claims that relate to the Debtors.

Your Honor, with respect to the arguments made by the U.S. Trustee, let me tick them down very quickly. Number one, the authority to modify debtor-creditor relationships expressly lauded in Energy Resources, sometimes in rare cases requires the resolution of third-party claims that are inextricably intertwined. That is not intuition. Those are the findings of fact of a trial court that heard 41 witnesses and

it's actually pretty amazing to hear the appellate expert from the DOJ testifying to this court about what he believes will happen.

I'm not sure where the belief is from, because we had a trial and here's what the undisputed findings of fact of the trial court were. The Debtors would likely liquidate. Unsecured creditors would likely receive nothing, instead of more than $6 billion and insurance and identity claims would be massive. To hear him say, here's what we dispute factually is unbelievable. The District Court said, in the middle of the appeal, the facts in this case are totally undisputed. Does anyone disagree? She actually said it twice and there was no response.

Connecticut was up at the podium at the time, which is why the District Court opined in her opinion at Page 50 -- 81, Footnote 54, "No one has challenged any of the findings of fact." He wasn't there and it's not true. She also said it on Page 6. The bankruptcy court's facts were "essentially unchallenged." That's not the trial court, that's the District Court.

Your Honor, on to some of the other questions that were asked. There is no

inconsistency. You asked and asked and asked, and the Second Circuit, the Third Circuit, the Fourth Circuit, the Sixth Circuit, the Seventh Circuit and the Eleventh Circuit have likewise found no inconsistency. Energy resources creates incredibly broad authority to modify credit relationships. Here's a little known interesting fact. Energy Resources in fact was kind of a third-party release case. You can't tell it from the Supreme Court's opinion, but I'll tell you what actually happened because it's in the bankruptcy court opinions and the briefs.

The officers, directors, the Debtors wanted to settle with them and they said, pay money into the estate and facilitate the reorganization. And the D's and O's said, we'll only pay if you pay the IRS in the order we like that lets us off the hook for our responsible person liability under 6672. And the Court put it in the plan. And then the IRS said, are you insane? You're going to order the IRS over its objection in the what order to apply the Debtor's tax payments to benefit officers and directors who paid money into a bankruptcy estate?

And guess what the Supreme Court said.

They said yes. And that's why both Aero-Dyne in the Seventh Circuit and Dow Corning in the Sixth Circuit expressly rely on Energy Resources for third-party releases. This Court created the whole doctrine before 524(g) was enacted because the world needed it and virtually everyone has adopted it because when you get to mass torts like this, the money for the victims is often up at the parent company.

Your Honor, another factual finding that clearly counsel was unaware of, is that Judge Drain found as a matter of fact that more discovery was provided in this case than any case he has seen in his, I think he said, 34 years as a lawyer and judge, and more than the Sacklers would have provided had they been in Chapter 11. Another fact that he appears not to know is that the majority of the Sacklers' wealth is not in their own name. It's in trusts, many overseas, that are not bankruptcy eligible.

So the fantasy in their brief, which is nowhere supported by the record and is in derogation of extensive trial with 41 witnesses, is that we got more discovery, more money, and more transparency than any other. Your Honor,

Judge Wesley, you asked several times about fraud and I will be very upfront about it. Are claims for fraud released? Yes. That's what they're paying $5.5 to $6 billion to the joint creditors because that was your problem with the PIs. It's all joint creditors. You have to be a claimant against Purdue or your claim against the Sacklers is not released.

And that's why the Canadian carveout worked with the real representatives of Canadians' population because if they have claims directly against Purdue Canada --

HON. RICHARD WESLEY: Let me ask you a question. If someone who has a claim against Purdue also has a claim because one of the Sacklers unfortunately crossed a centerline, struck them, so they have -- it's a completely different, separate tort, but they have a claim against Purdue also; is that claim, that the personal injury claim released?

MR. HUEBNER: The answer, Your Honor, I think is no, and that's the point. The original use of derivative in Manville I -- and this is why it is a little bit analytically confusing -- is derived from the conduct of the Debtors. Our

leases are tied exclusively to opioids and to the Debtors.

HON. RICHARD WESLEY: Yeah, that's the one injury theory that --

MR. HUEBNER: And the Debtor's conduct and the fact, the idea -- the fact patterns were engaged -- again, counsel wasn't -- just wasn't there at the time. There were extensive colloquies before both the bankruptcy court and the District Court ensuring a fact pattern much tougher than yours which is --

HON. RICHARD WESLEY: That's why Drain amended at 10.7 to say legally relevant.

MR. HUEBNER: Exactly, Your Honor. And it already only limited opioid claims. And the example was exactly that one, which in fact, strangely enough in Judge McMahon's prior decisions that came out exactly the other way, if you read her Kirwan decision it cites about 140 cases and comes out the other way on every single issue from her decision here. She went to that exact fact pattern in Kirwan and Karta and narrowed the releases as Judge Drain did also, to be 100 percent sure not only your fact pattern, Your Honor, but closer one. What if Susie

Sackler -- that was Judge McMahon's phrase --

HON. RICHARD WESLEY: I can't -- I'm sorry I couldn't hear you. What did you say?

MR. HUEBNER: What Judge McMahon asked in the hearing was, what if Susie Sackler sold oxy to her roommate out of her dorm room. Is the mere fact that it's OxyContin, so you could say it's Purdue? Answer, not within the ambit of the releases because it doesn't involve the Debtors' conduct and it's not a legally relevant cause.

Your Honor, just a couple of finer points, because the U.S. -- the Trustee said so many things that are troubling. Judge Lee, in response to your question about the rule of construction, I'm not sure where the gloss on the rule of construction came from but it is totally clear on its face that it forbids exactly the 524(g) analysis.

If you look at the Supreme Court decision in Verizon, the Supreme Court literally said, I want to find X. It's clearly the right answer under the statute, but the rule of construction there, which was identically worded, bars me. Here, there's no reason to want to find anything they're asking for, because it will

result in the death and suffering of thousands of people and the destruction of a plan that every creditor in this case worked for years to build to ensure a lifesaving outcome.

Your Honor, just one final thing if I may. We also heard some testimony about the fact that he doesn't believe or is not sure that the claims are intertwined. Not one but two judges already found that to be untrue. Judge McMahon's prior decision in Dunaway which was about the earlier -- about the preliminary injunction expressly addressed this. Judge McMahon's decision below on appeal expressly found the claims congruent -- her words -- and totally intertwined. And Judge Drain surveyed the complaints and actually found as a matter of fact that the claims were intertwined and inseparable.

And Your Honors, that's the whole point. It's not only that we would lose billions of claims against the Sacklers in this fire tornado of thousands of litigations where we're competing against our own creditors for years to recover from the Sacklers. It's not only that the 24 inter-creditor deals that obviated years of fighting among creditors about who is entitled

to what. It's not only that our insurance, which now is 100 percent ours to get and give to innocent victims and save lives would instead be in a war with the Sacklers who have dozens of entities that are beneficiaries. It's actually the estate itself.

Even the companies couldn't survive the firestorm. And so the Debtor's conduct is always at the core. The Debtor's very reorganization is at the court. Judge Newman asked counsel, what is the alternative? The answer was an appellate lawyer saying, you know, like, maybe we could all litigate for a long time and it would be a better outcome. There is a trial about this. They are not an economic party. They don't die if they don't get funds for abatement and remediation, but the clients of everyone else in this courtroom is at risk of doing exactly that.

Four years of my life have been devoted to doing the best I can for the victims of Purdue to get them the most money, fair abatement, and victims to save lives. The notion that we should gamble that an alternative that two estate fiduciaries and 11 groups spent years exploring every pathway because they think it sort of might

violate their vision of the gestalt of the code because they have some generic cases that say normally bankruptcies, about the Debtor, is an insult to 34 years of Second Circuit precedent as well as the victims in this case.

HON. EUNICE LEE: Okay.

MR. HUEBNER: I think I will leave it at that unless the panel has question.

HON. EUNICE LEE: Thank you, Mr. Huebner. I believe there's still one appellant who has not argued yet.

MS. MONAGHAN: That's a hard act to follow and I won't take long. Maura Monaghan on behalf of the Mortimer side, initial covered Sackler parties. I just wanted to address one discrete point that Judge Lee had raised, which I think went to the question of what the Sacklers' role was at Purdue at the time that these releases and contributions were negotiated, because it would be troubling if a party got to be on both sides of that transaction and in fact determine their own fate.

And I wanted to note that that was absolutely not the case. The last Sackler left the board of Purdue long before Purdue filed for

Chapter 11. Judge Drain actually appointed an independent examiner to look at the question of whether the Sacklers had exerted any influence over Purdue in the arms-length negotiations and concluded that they didn't. These negotiations were overseen by eminent mediators who had a very strong view.

To answer Judge Newman's question, it certainly was not the Sacklers' opening bid by any means that ended up being the amount. And then of course it was all subject to a very thorough scrutiny by the Court at the confirmation hearing. So that's all I wanted to say just to make sure that was clear.

HON. EUNICE LEE: Okay, thank you.

MS. MONAGHAN: Thank you, Your Honors.

HON. EUNICE LEE: And so I think we've covered all the parties now. Thank you everyone for your arguments today and thank you to all of our Court staff for making everything run smoothly. With that, we'll take that -- we'll take it under advisement.

(Whereupon these proceedings were concluded)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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