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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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In re: 21 Civ. 7532 (CM)
et seq.
PURDUE PHARMA BANKRUPTCY APPEALS

Oral Argument
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New York, N.Y.
November 30, 2021
9:00 a.m.

Before:

HON. COLLEEN MCMAHON,

District Judge

APPEARANCES

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and
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Consolidated Appellant

(In open court)

(Case called)

THE COURT: Hang on. Okay. Let me call out party names. It will just be easier. For Purdue?

MR. HUEBNER: Good morning, your Honor. For the record, Marshall Huebner of Davis, Polk and Wardwell. With me is my partner Benjamin Kaminetzky, also of Davis Polk.

THE COURT: Thank you. For the State of Washington. I would appreciate it if you would stay seated and use the mic. It will be so helpful.

MR. PURCELL: Will do, your Honor. Washington Solicitor General Noah Purcell on behalf of the States of Washington, Connecticut, Delaware, Rhode Island, Vermont, Oregon and the District of Columbia.

THE COURT: Okay. Also appearing for that group of states?

MS. KINDALL: Clare Kindall, Solicitor General for the State of Connecticut, your Honor.

THE COURT: Okay. California?

MR. ESKANDARI: Bernard Eskandari on behalf of California. Good morning, your Honor.

THE COURT: Good morning. For the Canadian Appellants?

MR. CECERE: Carl Cecere for the Canadian Appellants.

THE COURT: The United States trustee?

MS. SAKATA: Sumi Sakata for the United States Trustee.

MR. HIGGINS: And Benjamin Higgins for the United States Trustee.

THE COURT: Okay. Is the United States Attorney's Office here?

MR. ARONOFF: Yes, your Honor. Peter Aronoff, U.S. Attorney's Office, Southern District of New York for the United States.

THE COURT: Thank you. Okay. All right.

For the Mortimer Sackler family?

MS. MONAGHAN: Good morning, your Honor. Maura Monaghan from Debevoise and Plimpton.

THE COURT: Good morning, Ms. Monaghan.

For the Raymond Sackler family?

MR. LEES: Good morning, your Honor. Alex Lees of Milbank. I'm also joined by my partner, Gerard Uzzi, and our co-counsel, Mara Leventhal. She's at the firm Joseph Hage and Aaronson.

THE COURT: Thank you.

For the multi-state governmental entities group?

MR. LIESEMER: Good morning, your Honor. Jeffrey Liesemer of Caplin & Drysdale on behalf of the MSGE group, and with me is my colleague, Lucas Self.

THE COURT: The ad hoc group of individual victims?

And Mr. O'Neil has set up a microphone in the back.

MR. SHORE: Good morning, your Honor. Chris Shore from White and Case for the group.

THE COURT: Thank you.

The official committee of unsecured creditors?

MR. HURLEY: Good morning, your Honor. Mitch Hurley with Akin Gump, and with me is my partner Erik Preis.

THE COURT: Thank you.

The ad hoc committee of NAS children?

MR. BICKFORD: Good morning, your Honor. Scott Bickford from Martzell and Bickford in New Orleans.

THE COURT: Good morning. Thank you for coming up.

The ad hoc committee on governmental and other contingent litigation claimants?

MR. ECKSTEIN: Good morning, your Honor. Kenneth Eckstein of Kramer Levin. I'm with my colleague, David Blabey.

THE COURT: Is Ms. Isaacs on the phone or in the courtroom?

MS. ISAACS: Yes, your Honor. Good morning.

THE COURT: Good morning, Ms. Isaacs.

MS. ISAACS: Everybody is very muffled, and I can't hear properly, but this is based on behalf of my son, Patrick Wroblewski, myself and the American people. Thank you, your Honor.

THE COURT: Thank you.

Is Mr. Bass on the phone this morning? Not yet. These pro ses aren't going to be heard from until later in the morning; so I expect perhaps we'll have people joining us.

Any of the Eckes? Okay. Fine.

That's where we are right now.

Good morning. A couple of things. Right at the outset, I rarely begin my day by reading briefs on the subject of contribution indemnification and insurance coverage. These happen to be more interesting than anything that's in The New York Times. They're just superb reads, and they answered my questions.

I really want to thank all of you, and this message is going out to those of you in the overflow room, who I know really did the work and those of you who are on the phone, who didn't make it into the courthouse this morning.

The briefs in this case have just been outstanding, and for the bankruptcy judges who are immersed in this stuff day, after day, after day, maybe they're, you know, not quite as necessary as they are for the district judges who dip a toe into the waters periodically. They have been extraordinarily helpful to me.

You've done exactly what I wanted and needed you to do, and I just want to thank you for that and I put that on the record.

I want to put particular thanks to three people on the

record. My law clerks, Caroline Fish and Amanda Barkin, walked into their new jobs and discovered this and it has consumed much of their fall, and they have just done a superb job, aided and abetted most ably by Hannah Reichelscheimer, who is my Alexander fellow from Cardozo Law School, who is sitting over here to my far right. Hannah has really been a third law clerk on this and member of the team, and the record should reflect the extraordinary work far beyond what one would expect from a 3L that she has done on this matter.

And the last thing I want to say before we get started with the arguments, is that if this case, which is one of the most complicated and difficult cases I've worked on in a very long time, proved one thing, it is that the bankruptcy judges in this district have the hardest job of any judges in this district by a factor of about a thousand.

And I want the record to reflect my undying admiration for them all, particularly to Judge Drain. I don't know how he did what he did, but he left me with a clear, good, helpful record. Justice Ginsberg, speaking to the judicial conference about 20 years ago, once expressed great admiration for District Court judges, whose job, she said, was to prepare the record for the Court of Appeals. The district judges in the room took some umbrage at that statement. That wasn't really how we think of our jobs. But what Judge Drain has done here is just nothing short of astounding.

Okay. I'm hoping that I can open Microsoft Word so that I can take notes, and I turn to the Appellants. Who will be speaking first?

MS. SAKATA: Good morning, your Honor. Sumi Sakata for the United States Trustee.

THE COURT: Okay. Here's what you all know, how you divided up your time. Can I know?

MS. KINDALL: Your Honor, if I may, Clare Kindall from Connecticut. We have agreed for the U.S. Trustee to take 35 minutes.

THE COURT: Okay.

MS. KINDALL: The State parties will have 60 minutes.

THE COURT: Will have what?

MS. KINDALL: Sixty minutes, broken up by 25 for the State of Washington, 15 for Connecticut, ten for California and ten for Maryland -- and I see my colleague from Maryland has arrived -- 20 for the Canadian parties and another 20 for the U.S. DOJ.

THE COURT: Okay.

MS. KINDALL: And that should get us to about 11:15.

THE COURT: That will get us to about 11:30 and that's okay.

MS. KINDALL: Thank you, your Honor.

THE COURT: I think it would be helpful if the speakers used the podium and took off their masks.

So the first person that we're going to hear from is Ms. Sakata. And please remind the court reporter of who you are when you begin to speak.

MS. SAKATA: Good morning, your Honor.

THE COURT: Good morning.

MS. SAKATA: May it please the Court, Sumi Sakata for the United States Trustee. As your Honor directed, I will not repeat our brief here. I just want to highlight three short points, and I will turn to the questions that the Court issued last week.

First. Bankruptcy has a specific purpose. It's designed to give the honest but unfortunate debtor a fresh start, and to provide for an equitable distribution of the debtor's assets to its creditors. The non-debtor releases do neither.

Second. The plan takes people's constitutionally protected property rights, their rights to sue the non-debtors, and it terminates those rights without their consent. The Supreme Court has held, in the class action context, that settling someone's claims for money damages without giving them a chance to say, "No, thank you; I'd rather take my own chances and litigate my own claims," violates due process. We think the same concerns apply here.

And, third. The releases are not authorized by the bankruptcy code. In fact, the plan grants the non-debtors

really greater than they could get if they were individual debtors, and that just doesn't make any sense.

Given the serious constitutional concerns raised by the review system, the code should not be read to implicitly authorize when they are not expressly authorized.

Now, turning to the questions that the Court has issued. For the first question, we think the standard of review that applies to -- reviewing of the releases is the same as to all the Sacklers and all the non-debtors. We posit that under Stern and Executive Benefits, this Court should review all of the factual findings and legal conclusions as to non-debtor releases *de novo*.

To the extent the Court was asking whether there is a distinction as to the validity of the releases among the Sacklers, depending on their involvement in Purdue management, we still think the answer is no. The constitutional infirmities and the lack of statutory authorization for the releases are the same.

Moving to question 2. Again, we believe that there is a problem under Stern and under Executive Benefits and Bankruptcy Rule 8018.1. This Court may treat the bankruptcy court's order like a magistrate's report and recommendation and review it *de novo*. So this Court may review the record and issue its own findings.

If the Court disagrees and believes that the

bankruptcy court was acting within its constitutional authority, it may remand the matter back to Judge Drain for further factual findings, but we don't think there are any findings that could make the releases permissible here.

THE COURT: I mean, I have to say I don't have much fault with Judge Drain's factual findings, and nobody seems to be attacking the factual findings. People seem to be attacking the conclusions that are drawn from the factual findings.

MS. SAKATA: And the standards that he applies.

THE COURT: Right. That's all law. Okay? And, you know, I'm an appeals court. I review the law *de novo* no matter what, right?

MS. SAKATA: Yes, your Honor.

THE COURT: So fascinating, though, the third question is, it's kind of a frolicking detour. If nobody in the room has a problem with the basic factual findings, and they are extensive, then we are where we are.

MS. SAKATA: To the extent that the finding is an ultimate finding, one that blends factual finding and law together, we do have some challenges, which we have.

THE COURT: Right, okay. But those are the kinds of the things I would review *de novo* anyway.

MS. SAKATA: Yes, your Honor.

THE COURT: Basic facts. That all the Sacklers got off the board by 2018, nobody is disputing that. I mean, it's

a fact. Okay.

MS. SAKATA: Three is addressed to the States; so I'm going to skip to question 4. This question asks about the claims that have been brought against the Sacklers and the other non-debtors. There's a summary chart of the 400 lawsuits against the Sacklers and other non-debtors that were enjoined. That's set out in Exhibit B to the preliminary injunction complaint, and that exhibit is included in volume 7 of the United States Trustee's appendix.

Separately, the U.S. Trustee also submitted seven complaints that were filed against the Sacklers as part of a motion for judicial notice. Those materials are available at ECF 90 of this docket. We discussed some of those complaints and causes of actions on ECF pages 57 to 61 of our opening brief and ECF pages 12 to 27 of our reply brief.

In terms of who brought the claims, they've been brought by states, municipalities, individuals, hospitals, health insurance companies, among others. But it's important to note, as well, that the preliminary junction has been in place for over two years now. So even this is a limited sample of the universe of claims that could be out there.

Taking us to the complaints that we submitted for judicial review. Five were filed by individuals; two were filed by drug rehabilitation centers. Claims have varied, but they have been asserted under State statutes, including for

unfair trade practices and consumer protection, for common law courts such as for negligence, unjust enrichment, fraud and conspiracy. And two have been brought under the federal RICO statute.

As to what state laws might apply, some of the complaints are putative class actions. One claim states of wherever class members may live, another is a claim on behalf of people living in --

THE COURT: No wonder Judge Drain didn't bother to review all of the State laws. The poor man.

MS. SAKATA: Your Honor, there is a particular limitation as to what State laws might apply for claims brought by individuals.

THE COURT: Well, I think given the posture of the case before me, which is that I have eight states and the Canadians and the District of Columbia as actual, you know, Appellants, and a number of pro ses as well and actual Appellants, I guess I'm kind of focused on what their claims are. They not only objected but they bothered to take an appeal; so to me, they're representative and most relevant litigants.

MS. SAKATA: Your Honor, we posit that the debtors --

THE COURT: I'm sorry, I didn't understand you.

MS. SAKATA: I apologize. We believe that the debtors out of the plan proponents bear the burden of showing that the

bankruptcy court has subject matter jurisdiction over all of the claims that it reached out and terminated. And so to the extent that they were not -- the debtors did not try to show that every potential claim that the plan terminated against non-debtors might have -- would definitely be subject to contribution or indemnification or insurance coverage, they didn't meet that burden.

Your Honor, I have a list of these seven complaints. I can go through them individually, if you want, or I can just move on to the questions.

THE COURT: That's okay. I don't mean to interrupt you. It's one of those, you know, established signifying nothing things. Okay. So what if he didn't have subject matter jurisdiction? I do.

MS. SAKATA: Your Honor has subject matter jurisdiction over this appeal.

THE COURT: Right.

MS. SAKATA: Yes, I agree with that, your Honor.

Okay. Moving on to question 5. So there's a lot to unpack in this question.

THE COURT: And also, I mean, I understand what you're saying, that it's the debtor's burden to show that in every case there was subject matter jurisdiction. But if in any case there was subject matter jurisdiction of Judge Drain, then there's something that's validly before me that I can opine on,

right?

MS. SAKATA: So the appeal that is currently before this Court, absolutely this Court has subject matter jurisdiction over.

THE COURT: Okay. I just don't want there to be any -- I don't want to do all of this only to discover that somebody is going to go up to the Second Circuit and say I didn't have subject matter to decide it.

MS. SAKATA: No, your Honor. Whether or not the bankruptcy court has subject matter jurisdiction to terminate all of the claims that it purported to terminate under the plan, I think is a separate question. The bankruptcy court only has subject jurisdiction over the bankruptcy case, and this Court has subject matter jurisdiction over the appeal.

THE COURT: Okay.

MS. SAKATA: So as to question 5, there are a number of different factors that are sort of included in the question, and there are just five points that we'd like to address here.

First, we disagree with the premise that there is authority for non-consensual non-debtor releases.

THE COURT: I know you do. That's why you're taking an appeal.

MS. SAKATA: I beg your pardon?

THE COURT: That's why you took the appeal.

MS. SAKATA: Yes, your Honor, exactly right.

Second. We also disagree with the idea that just because a claim may have a conceivable affect on the bankruptcy estate that the bankruptcy court also has authority to release it. A court may have subject matter jurisdiction to adjudicate a claim, but it would lack constitutional or statutory authority to just terminate it without adjudicating it because, in the court's opinion, everyone would be better off if it does so.

Third. And we discussed this point on page 24 of our reply brief. It may make sense for a court to exercise authority at the outset of the bankruptcy case, to the full extent of its authority related to subject matter jurisdiction to pause any claim that might confuse the impact of the estate while the case is being administered.

But it's a completely different thing to terminate those claims at the end of the case, when a plan is going to be confirmed, given that any continued claims against the estate can be treated in the plan itself. It can be paid for, it could be disallowed, it could be -- many different things could happen to them.

Fourth. The Court raised in its question the idea of a consensual release, and theoretically, parties can agree to give up their claims. It's the U.S. Trustee's position that any such consensual release has to be narrowly and affirmative. And, of course, there's been no attempt to seek or get

affirmative consent from any of the releasing parties here.

And fifth, which is I think the Court being pointed to the question, if there were authority to release non-debtor claims on a non-consensual basis, it would not extend to claims that would otherwise be non-dischargeable. It makes no sense for a bankruptcy court to be able to use its power to grant a non-debtor greater relief than it could grant an individual debtor, when Congress has expressly stated that a particular liability cannot be discharged.

For question six, again, there are a number of points here, three, to discuss here. First, again, we heard your point about the distinction between subject matter jurisdiction and authority to permanently extinguish claims.

Second. Even if there were the possibility of an indemnification claim, as we explained in ECF page 25 of our reply brief, that by itself should not justify a third-party release. The Fourth Circuit said in National Heritage Foundation that if you were to -- if you were to grant a third-party release anytime there was such claim for indemnification, that third-party releases would be the norm and not the exception. It would no longer be a rare case.

THE COURT: Yes. Okay. I think that's a very interesting opinion, but I sit in the Second Circuit, where they take a very broad view of conceivable effects.

And so as I understand what Judge Pooler said in SPV

Osus, if there's a reasonable legal basis for a party to assert a contingent claim, then the bankruptcy court has subject matter jurisdiction, even though the test, the old wording of it, the old Celotex wording of the text, is that you look to the outcome of the case, not the fact that the case could be brought.

And there's a tension between those two things that I've gotten hung up on. So that's what I'm hoping that you will all, collectively, from your different vantage points, help me through because I really do see a tension there.

I also see a tension between saying that, on the one hand, the bankruptcy court has subject matter jurisdiction over the contingent claim, but somehow the contingency would rise to subject matter jurisdiction over an underlying claim if, in fact, there is no subject matter jurisdiction over that underlying claim.

MS. SAKATA: Your Honor --

THE COURT: Because I think what Judge Pooler was talking about in SPV Osus, and she was suggesting that subject matter jurisdiction, because of the contingency, you have subject matter jurisdiction over the underlying claim. So lawsuit B, which is your ultimate lawsuit for contribution out there, is what gives you subject matter jurisdiction over lawsuit A, which isn't the lawsuit for contribution. And I got kind of hung up on that, too, okay?

So I'm hung up on two things with respect to subject matter jurisdiction, and maybe I said it more clearly here than I did in asking the question, which I did come up with four days ago, before I thought about this some more.

MS. SAKATA: But, your Honor, we appreciated the advance claim that you provided us on Friday. I agree there's tension in the SPV case. I would posit again, the subject matter jurisdiction, given how broad related to jurisdiction could be, is still a separate issue from whether or not the Court has authority to terminate them on a non-consensual basis.

Metromedia did list the possibility of indemnification and contribution as a factor when it was talking about factors that have been applied by cases when they issued non-debtor releases. But that factor that it listed in Metromedia came from A.H. Robins in the Fourth Circuit. And A.H. Robins had many other factors it was looking at, including the fact that it was a class action that had been certified, the fact that -- and more importantly, I think, to the Fourth Circuit's analysis is that plan paid for everyone's claims and --

THE COURT: That was a big deal.

MS. SAKATA: That was a big deal.

THE COURT: That was a very, very big deal.

MS. SAKATA: So I think that's why it's important that it's the Fourth Circuit in National Heritage Foundation, who

later said that indemnification by itself is not enough.

THE COURT: Which was the Robins circuit. No, I appreciate that nicety.

MS. SAKATA: So third. As to question 6, again, we agree that the fact that there could be claims against the Sacklers that would result in judgments against the Sacklers that would be paid by the Sackler, is not an outcome that itself impacts the bankruptcy estate.

Now, we're not sure if the Court is highlighting the State claims in the case for a particular reason because there are possibilities for individual claims to also not be covered by insurance, or not be subject to indemnification or contribution.

THE COURT: Well, I got this great set of briefs, very informative, very well done.

MS. SAKATA: All right. Moving on to --

THE COURT: Can we go back to this tension between Celotex and SPV Osus, between outcome and a contingent claim with a reasonable legal basis for its assertion having a conceivable effect on the States.

I have two questions. The first one is, I sit in the Second Circuit. Don't I have to let the Second Circuit address and resolve that tension? Don't I have to just march behind Judge Pooler over the edge of the cliff?

MS. SAKATA: I think, of course, the Second Circuit is

the mandatory precedent, but I think also to be --

THE COURT: I've written a lot of opinions criticizing Second Circuit precedent and inviting the Second Circuit to think about things. I'm kind of notorious for doing that, but don't I really have to follow it?

MS. SAKATA: You do have to follow it, your Honor.

THE COURT: Okay.

MS. SAKATA: Again, it's just because there might be broad subject matter jurisdiction isn't the same thing that you can terminate it. I will continue to --

THE COURT: No, just because -- to move on, just because there's subject matter jurisdiction and statutory authority and maybe even some of the Metromedia factors, it doesn't mean that the bankruptcy court or District Court has to approve the releases. I mean, there nothing mandatory about this.

MS. SAKATA: Well, your Honor, we disagree that there's statutory authorization.

THE COURT: I know you do. Let's assume if everybody has the power to do everything, can we agree it's not mandatory that these releases be approved? It's not mandatory. All right. I understand the question. I don't remember what it is. Keep going.

MS. SAKATA: Okay. Moving on to question 7. So --

THE COURT: Oh, I know what the question is. The

question is, and this may be better addressed to the States. As a theoretical legal matter, does the ability to recoup, say, an advancement of insurance costs, does the ability to recoup on a contingent claim if, in fact, after a trial, the Sacklers were found to have done the horrible things that you accuse them of doing? Not you, but that others accuse them of doing.

Does the fact of ability to recoup mean that, ultimately, there really isn't any effect on -- have any conceivable effect on the estate?

Say you had a right to defense costs being advanced, but the defense costs could be recouped if they lost the lawsuit. Happens all the time under D and O policy. Not a lot of recoupment going on, but the policies do provide for that. If the estate could recoup the money that the insurance policies advanced to the Sacklers to defend the lawsuits, does that mean there's no conceivable effect, ultimately, on the estate?

MS. SAKATA: On the broad region --

THE COURT: They lose some interest, I guess.

MS. SAKATA: -- of the subject matter jurisdiction, I think there is an impact, but I'm sure other Appellants can --

THE COURT: Yes, the States are probably better to address that. Okay. Now I'll shut up and you talk.

MS. SAKATA: No, your Honor. So question 7 is -- so the question is more in the debtor's brief and how it's

explaining how the plan works; so I will leave it to the debtors.

THE COURT: A number of these questions, I didn't say Purdue, please, answer this question, but I think they've figured out a number of these questions. When you're the appellee in an appeal, you get a lot of questions.

MS. SAKATA: We have points that we wanted to address, your Honor. The way the release is written, it's not limited to the release of the claims that belong to the estate. If it were, then the non-debtor releases in section 10.7 of the plan would not be necessary.

THE COURT: I know that. That's not how it's written.

MS. SAKATA: So --

THE COURT: Globally, I know this. Purdue can relieve its claims against the Sacklers. Perfectly free to do so.

MS. SAKATA: Even if they were to agree that the release doesn't actually impact debtors' claims, it's not with the authority of statements of intent about the release. It's the language of the release itself that matters, and we think it does extend beyond that.

Moving to question 8. So we agree with your Honor. We don't think the language of the release is limited to the effects that the Sacklers claim. Again, to the extent that the Sacklers claim that they only want to have protection from having to litigate their fraudulent claims that they have

settled with Purdue, that is accomplished by section 10.6. So section 10.7 is not necessary.

Moving to question 9, which is the hypothetical, this is, unfortunately, not as simple as it might seem.

THE COURT: Ahh, we have spent a lot of time with Suzie Sackler, okay, in chambers because, as you know from every communique you've gotten, we've been trying to dream up claims that could be ascertained against these other Sacklers, the non-officer, director, manager Sacklers. And this is our favorite example; so....

MS. SAKATA: Okay. So, well, with regard to these hypotheticals, it depends on the timing and other factors. So if the claim happened after the effective date, then the release would not terminate it because it would fall within the definition of the concluded claim.

THE COURT: I should have said before the effective.

MS. SAKATA: All right. So if it happened before, then it depends on whether or not Purdue's conduct is otherwise legally relevant, and because the plan defined code of action very broadly, which means there's defenses, it could come up in different circumstances. So, for example, could Purdue's conduct be otherwise legally relevant if the roommate thought OxyContin was safe because she heard the false marketing from Purdue.

THE COURT: Okay. Let me make this as simple as

possible. All right? She never heard any marketing from Purdue about OxyContin or anything else. Her roommate gives her a bottle of pills, says, these will take care of your backache. Purdue's conduct is factually relevant because Purdue manufactured the pills. Okay?

But is there a claim that's released under the release? Is Purdue's conduct -- Judge Drain came up with this language on his own. Is Purdue's conduct legally relevant such that that claim could be released?

MS. SAKATA: So could be that the -- if you have a claim -- if the roommate would bring a claim against Suzie that she is conspiring with Purdue to get people addicted to OxyContin, then Purdue's conduct as the part of a conspirator would be legally relevant.

Also, your Honor, in terms

THE COURT: You've added facts about my hypothetical. We're dealing with two college students.

MS. SAKATA: Up to --

THE COURT: One has a bottle of pain pills.

MS. SAKATA: But you could have variety of different factual scenarios in which these could arise, and so you can't anticipate all the different ways in which someone could allege whether it's part of a claim or it's part of a defense, Purdue's conduct. It's, frankly, very confusing what legally relevant means, but it could be in such a case --

THE COURT: What does it mean to you?

MS. SAKATA: Also, with regard to, you know, hypothetical --

THE COURT: That's a serious question. What does legally relevant mean?

MS. SAKATA: It would seem to include claims against the Sackler family in which Purdue's conduct can be part of a legal claim or a legal defense.

THE COURT: I don't know what that means. In my very simple Suzie Sackler hypothetical, Purdue's conduct is factually relevant because Purdue makes the pills, but that doesn't make it legally relevant.

So what does legally relevant -- "legally relevant" is not a term that I am familiar with, after 45 years in this profession. What's legally relevant?

MS. SAKATA: Your Honor, we don't understand the meaning of it either, fully, which is, again, part of the problem.

So with regard to also your Honor's question about like a hypothetical about the less-involved Sackler family members and what claims there could be brought against them, there's also the possibility of unjust enrichment. Which would be a claim that somebody, for example, who spent his life savings paying for these addictive medications could claim that it's unjust for the Sackler family to retain the proceeds of

all the things that he had paid.

And, you know, whether or not Purdue's conduct would be legally relevant in that case, is something that could be raised, could be argued. I don't know.

THE COURT: Well, and Purdue takes the position that the other Sacklers, the non-officer, director, manager Sacklers are liable -- are being relieved only from claims against them as transferees. I assume an unjust enrichment claim, just like a fraudulent conveyance claim, is asserted against them as transferees of the funds. I mean, Purdue earned the money.

MS. SAKATA: But they retained the profits, your Honor. You can have an innocent beneficiary who is still subject to unjust enrichment.

THE COURT: I understand that. I understand. And that would be as a transferee; so that claim would be released.

MS. SAKATA: Well, if they are being -- if they are releasing claims, the estate claims, which would be estate claims for fraudulent transfer --

THE COURT: Forget about fraudulent transfer.

MS. SAKATA: Okay.

THE COURT: If there's one thing I agree -- there are many things I agree with Judge Drain about. One thing I agree is that it would be very hard to prove a fraudulent transfer claim in this and harder to collect on it.

I don't think that's a particularly relevant issue on

this appeal, whether Purdue could prove a fraudulent transfer claim. But an unjust enrichment claim is a different claim than a fraudulent transfer claim. And you're saying that the nub is that I've been missing the forest for the trees. The real claim against the other Sacklers is that they were unjustly enriched by the profits that were earned by Purdue selling this awful stuff causing people to be addicted.

MS. SAKATA: Your Honor, that's just one example. And your Honor was right to think of all different hypotheticals there. It can come up in different ways.

THE COURT: Okay.

MS. SAKATA: Question 10 is a wonderful question, and we completely agree with it.

THE COURT: What does that mean?

MS. SAKATA: We believe that the claim is going --

THE COURT: Oh, the channeling the question.

MS. SAKATA: Exactly. It's not channeling it.

THE COURT: My numbering is off. That's really a question for them.

MS. SAKATA: Okay. For question 11 about the director and officer liability insurance; so just Jessie Delconte, who was the debtor's only witness on the insurance issue, he submitted a trial declaration that disclosed D and O policies only for the period from 2003 to 2004 and 2016 to 2018. No other evidence was produced.

We assume if it existed, the debtors would have produced it, and we agree that it would have been clear error for the bankruptcy court to hold that insurance to be impacted when insurance didn't exist.

THE COURT: Okay. The Newco question is really a question for Purdue. Your time is coming to a close; so I would actually like you to address the question about if I conclude that Judge Drain went off the rails at some point, are there issues I can avoid deciding?

MS. SAKATA: Your Honor, we think that there's no obligation to reach Stern or any specific issue if this Court reverses because it determines the non-debtor releases are impermissible. There's no need to reach constitutional issues if you can construe the bankruptcy code to avoid the constitutional issues.

THE COURT: That's what I was taught in law school, is that I'm supposed to avoid constitutional issues if I can do so.

MS. SAKATA: Yes.

THE COURT: I mean, the Second Circuit in Metromedia avoided constitutional issues, it avoided statutory issues, it avoided every issue. It said the bankruptcy court didn't answer questions. Reversed. Oh, and we're not sending it back. Equitably moot. It's a nice law review article, Metromedia. Not particularly helpful as a precedent.

MS. SAKATA: One thing, your Honor. If your Honor were inclined to send us back to Judge Drain for further, more robust factual filings, then we would ask the Court to address the challenges made to that, and there would be more direction and we wouldn't have to be back here before your Honor.

THE COURT: Right. Got that. Okay. All right. Do you want to just kind of bring it to a close?

MS. SAKATA: Oh, that's it, your Honor.

THE COURT: That's it? Great. Sit down. Thank you.

Who's up next? Okay. All speakers, from now on, put on a microphone cover and then take your microphone cover with you when you leave.

MS. SAKATA: Sorry, your Honor.

THE COURT: That's okay. We didn't tell you. Okay.

MR. PURCELL: Morning, your Honor.

THE COURT: Good morning. Mr. Purcell, I'm sorry. You're in the box. We decided that a lawyer had to be in the box, not the criminal defendant, that that was not an optic that I could deal with. So you need to speak a little more slowly and a lot more loudly.

MR. PURCELL: Okay. Can you hear me better?

THE COURT: Oh, much.

MR. PURCELL: Okay. Washington Solicitor General, Noah Purcell, arguing on behalf of the States of Washington, Connecticut, Delaware, Rhode Island, Vermont, Oregon and the

District of Columbia. And I will be addressing why the non-debtor release of State police power claims here by the bankruptcy code and the Second Circuit precedent and answering your Honor's questions related to those topics.

My counterpart from Connecticut will be addressing jurisdictional issues and the messengers of municipalities. And then California and Maryland will be presenting their own arguments.

THE COURT: Okay.

MR. PURCELL: So, your Honor, I want to start by addressing why it's a violation of code to use non-debtor relief to distinguish these power claims. No Federal Court has ever done that, and this Court should not extend the non-debtor release doctrine so far. The first reason is simple. It violates the bankruptcy code, and most clearly, 11 U.S.C. 523.

THE COURT: I know you said 523, but she doesn't.

MR. PURCELL: I'm sorry. 11 U.S.C. 523. But in particular, 523(a)(7) prohibits individual debtors from using the bankruptcy process to escape government-imposed fines and penalties, which is exactly what the Sacklers were doing in this case, preemptively escaping from the State police power claims that would impose government fines and penalties against them.

Similarly, 523(a)(2)(A) prohibits individuals from using the bankruptcy process to escape debts for money that was

obtained by false representation or fraud. And that, too, would cover many of the States police power claims against the Sacklers for misrepresenting the dangers and addictiveness of OxyContin.

But because the release violates clear and specific code provisions, it cannot be approved under Supreme Court Second Circuit precedent. The other side's primary response is that what they've obtained here, what the Sacklers have obtained, is a release and not a discharge. But Metromedia rejected exactly that wordplay when the Court said non-debtor release, in effect, can be a bankruptcy discharge --

THE COURT: Well, he said not that it is a bankruptcy discharge, but it has the same effect as a bankruptcy discharge.

MR. PURCELL: Exactly.

THE COURT: So what's the point?

MR. PURCELL: Well, the point, your Honor, the overarching point is this is fundamentally a question of what Congress intended in enacting these statutes, and it's just unfathomable that an individual debtor could not release certain claims in their own bankruptcy but escape those same claims in another party's bankruptcy.

There is no reason on earth why Congress would have wanted that system, and so in interpreting those provisions, it makes no sense to read them the way that the other side has.

Now, one question your Honor asks that goes to this issue is whether the same principle, I think it's your fifth question, the same principle goes to certain claims against the debtors, and the answer is, generally, yes. 1141(d)(6) prohibits corporate entities from discharging debts owed to governments based on money obtained by fraud or false pretenses. Which, again, would cover many of the States' claims here. So that is yet another example of how the plan, approved by the bankruptcy court, ignores clear protections in the code for State police power claims.

The releases here also violates Second Circuit precedent in several respects. First, they are exactly the type of abuse that the Second Circuit warned of in Metromedia and that this Court warned of in Karta.

THE COURT: Right. Okay. So that there was a warning, but a warning isn't Second Circuit precedent. A warning from Judge Jacobs is a slow down, caution, yellow light, take a look, take a really hard look. That's what a warning is. A warning -- that's why I say it's a great law review article. Honestly, it is.

MR. PURCELL: Fair enough, your Honor. What I would say is Metromedia emphasized that there are only a very limited number of cases in which the Second Circuit has actually approved a non-debtor release. And in every one of those cases, there was some other statutory authority, whether it was

the federal rules in Drexel, whether it was 360 --

THE COURT: They didn't approve a non-debtor release in Drexel. They approved a certification of a class.

MR. PURCELL: Exactly my point, your Honor. That really --

THE COURT: That couldn't be certified today.

MR. PURCELL: Well, and so really --

THE COURT: Under current class action law.

MR. PURCELL: So really, the only cases we're talking about are Quigley, where you had 524(g) --

THE COURT: Asbestos cases don't count. Asbestos cases are asbestos cases.

MR. PURCELL: So now the only --

THE COURT: Real easy to flag. You have to understand, I've taken all the asbestos cases as exemplars of approval release, and I put them over there because they are clearly allowed. They are clearly authorized under 524(g).

MR. PURCELL: Precisely, your Honor. And so really the only one you're left with then is *MacArthur v. Manville*.

THE COURT: But Manville is an asbestos case.

MR. PURCELL: But before 524(g) --

THE COURT: Before 524(g) it was still an asbestos case. It just didn't have the statute.

MR. PURCELL: And the Court clearly cited 363 and the power to control the debtor's property. And so there's no

Second Circuit case where a release has been approved that is remotely like this one.

THE COURT: Okay.

MR. PURCELL: And so the point of the warning, your Honor, is the warning was: Don't let this -- you know, the same -- along the same lines of what this Court said in Karta, if you just accept the idea that this is necessary to achieve a contribution from the non-debtors, it's going to become the norm, which is exactly the danger that's happening here.

And, your Honor, in terms of abusiveness, here you have -- the States are alleging, very credibly, that the Sacklers repeatedly violated state and federal law for years, exacted over $10 billion from Purdue, steered the company into bankruptcy, and then attempted to use the bankruptcy to protect themselves for their own liability in the massive opioid crisis.

If that is not an abuse of the bankruptcy process, it's unclear what would be, and it is undermining public confidence in the bankruptcy system all together. So we think the Court could reverse on that ground alone, but moving onto other aspects of the precedent --

THE COURT: And if I reverse on that ground alone, I wouldn't have to do any more work.

MR. PURCELL: Fair enough, your Honor. And we do think it cannot be sustained as an abuse of the bankruptcy

process. Even if you just look narrowly at the factors the Second Circuit outlined in Metromedia, which is what the Court in Metromedia said not to do, don't just look at these one by one, but if you do --

THE COURT: Law review article.

MR. PURCELL: You can say that, your Honor. I can't.

-- the release still fails, and several of your Honor's questions highlights why.

And so to begin with, as your Honor pointed out, the States' claims are not -- the States' claims against the Sacklers, I'm sorry, are not in any meaningful sense channeled. They are just extinguished. The plan does not provide the States with any payment, much less full payment, for our claims against the Sacklers. And so that violates the sixth and seventh Metromedia factors.

THE COURT: I thought there were only five Metromedia factors.

MR. PURCELL: Well, the list I have, your Honor, is seven, the way I wrote it down. But I guess among the reasons why the law review article -- I will tell you what I'm referring to, which is that the plan does not provide full payment and --

THE COURT: Right. That's five.

MR. PURCELL: -- and the question of whether claims are channeled or extinguished.

Moving on to some of the other factors, the release is wildly overbroad, as some of your Honors' questions also get at. It releases hundreds of people, who have no plausible claim for indemnity or insurance against the estate, and who there's absolutely no evidence made any contribution whatsoever to the estate.

And those two facts both violate key parts of the Metromedia test. I looked at them as the fourth and fifth factors, but whatever number you want to call them, your Honor. And moreover, moving to other Metromedia factors, this is a blanket --

THE COURT: Well, I think the real problem may be -- and this is just a question for, I think, the Sacklers -- is that I'm having a hard time telling who put up the money. I mean, for all I know, the Sacklers have arranged it so that everybody is putting in something, but I don't know that.

MR. PURCELL: We agree, your Honor. There's absolutely no finding in the record about who's contributing the money or why the release of those specific individuals -- these specific individuals is necessary to the plan.

And if you look at the Sixth Circuit decision in the Dow Corning case, they reversed on exactly that basis; that there were just these generalized findings about who was contributing and why that was important and why releasing them was important. No specific findings about why the non-debtor

release as to particular entities was necessary.

Your Honor, turning to the final --

THE COURT: Judge Drain, has plainly found that it was necessary because you couldn't have a plan that would have been acceptable to a super majority of all of these different creditor groups, which he eventually was able to get, without having, you know, a pot of money.

And Purdue had a limited pot of money, and so the Sacklers put money into the pot and sweetened it enough that a super majority of all of these creditor groups, not you, but the super majority of all of these creditor groups said, okay, we'll take that. So he did make a finding, and for a specific reason, he made a finding. He just didn't break it down among Sacklers. I'm not sure how instructive Dow Corning really is in that context.

MR. PURCELL: I guess I want to respond by pointing out two fundamental flaws of that approach. First of all, that's exactly what the Supreme Court rejected in the Jevic abatement. In Jevic, the bankruptcy court had found the exact same thing; that, basically, if I don't do this everyone is going to be worse off. I have to approve this structured dismissal, even though it's not explicitly contemplated by the code.

And the Supreme Court emphatically reversed and said, no, just because your goal of planned confirmation cannot allow

overriding specific code terms, like we have here with the overriding of 523 and other protections. And part of the reason the court said that, it emphasized that while you might be able to confirm a plan or a particular case on some sort of rare case, quote unquote, exception, it actually harms the bankruptcy process in the long run because it upsets the bargaining process. It leads to greater uncertainty about what is not allowed, and it undermines confidence in a stability in bankruptcy.

And the second point, also emphasized in Jevic, is that you can't credit these dubious assertions, as the Court said, about what would happen if the proper legal rules were applied. Here, there is no reason to assume that if the non-debtor release were off the table, the outcome would be liquidation.

The Sacklers -- I mean, Purdue's own brief makes clear that many of the individual Sacklers would face personal bankruptcy if the non-debtor release were not approved, and they have no interest in that. The States and the other creditors have no interest in receiving nothing, obviously. And so there would be a strong incentive --

THE COURT: What you're saying is there would be a whole new round of negotiations, that the Sacklers would throw more into the pot and there would eventually be a number that -- ding, ding, ding, ding, ding -- would satisfy the eight

of you?

MR. PURCELL: Your Honor, I'm saying that there's no reason to assume otherwise, which is what Judge Drain did. And if you reverse the legal errors here, there is every reason to think that that is a significant likely outcome. I do want to emphasize that the States' interest in this case is not just pecuniary. There is precedent from all over the country --

THE COURT: Yes, yes, I know. I don't want to get into a fight with you the way Judge Drain got into a fight with you about whether your interest is really pecuniary, isn't it really pecuniary. I understand that you have a *parens patriae* interest in what's going on here, but I have sensed, from some things that have been said by at least some of the objecting states, that while the United States Trustee is objecting to this on principle, the States are objecting because there isn't enough money; that there is a number at which the State of Washington would join the other 38 states that have approved this and say -- there's a number at which you would stop standing on principle and say, fine, I'll take the money.

MR. PURCELL: Your Honor, I think one of the key principles that we're after here is accountability for the Sacklers. Leaving them, as this plan does, richer at the end of this process than they are today, is not accountability. There are alternative resolutions that I think our States would find count as accountability for our States' purposes. And so,

you know, I don't -- I don't think it's a matter of compromising our principles. It's a fundamental --

THE COURT: I don't think it's a matter of compromising your principles. It's not compromising your principles at all, but okay.

MR. PURCELL: I guess I just want to emphasize that State police power claims, the precedent, including the Second Circuit decision in the MBTE litigation, emphasize that State police power claims are primarily about punishing wrongdoing and deterring future wrongdoing.

And here, what you have through these releases, is the Sacklers largely escaping accountability for their role in this horrific nationwide crisis, and that is what the States are objecting to.

But, your Honor, I do want to just quickly point out that you asked about insurance coverage, and the debtor's brief, at page 86, note 18, says that there was debtor -- sorry, director and officer insurance from 2005 to '15, but it doesn't cite any citation for that.

And it says that there were no claims filed, no opioid claims filed against the policy during that time. So, presumably, if there really was insurance, there would be no coverage because no claims were filed; so I guess I just ask you to keep that in mind.

THE COURT: Well, it depends on whether it's a claims

made policy or --

MR. PURCELL: Fair enough, your Honor. It's not in the record, but the point is --

THE COURT: It's not in the record. I have no idea whether it's a claims made policy or not.

MR. PURCELL: I guess I would just ask --

THE COURT: I would find it odd if a D and O policy were limited to claims made during the active life policy.

MR. PURCELL: Your Honor, I believe the main policy that is in the record at Appendix 1305 required that claims be filed within a limited period of time. So if it's similar to that policy --

THE COURT: And has that period of time expired?

MR. PURCELL: Sorry?

THE COURT: And has that period of time expired?

MR. PURCELL: Yes. Yes. It was a very short period of time in the main policy. I believe it was 90 days, or something similar, after the policy ended.

THE COURT: Okay.

MR. PURCELL: Your Honor, unless your Honor has any further questions about topics I have covered, I will turn it over to my counterpart from Connecticut.

THE COURT: I will be happy to hear from Connecticut.

MR. PURCELL: Thank you, your Honor.

(Continued on next page)

THE COURT: Good morning.

MS. KINDALL: Good morning, your Honor. Clare Kindall from the State of Connecticut. We were remiss in our introduction. So I also want to note that Irve Goldman of Pullman & Comley and Matthew Gold of Kleinberg Kaplan Wolff & Cohen are here also with us as co-counsel.

THE COURT: Excellent. Thank you.

MS. KINDALL: And for the same group of states.

Your Honor, I'm here to discuss the two statutory challenges to the non-party releases. First, they fail under the best interest test of 1129(a)(7). And, second, by their wide scope, they fail from lack of subject matter jurisdiction pursuant to 1334. But we are very grateful to the Court for giving us advance notice of your questions because I could not have answered them on the fly here.

So I would ask -- I would like to focus my argument, but I will focus it anywhere you want to go. The Suzie Sackler hypothetical, on *SunEdison* on the best interest tests.

And on question 2, I think you had asked whether or not you could treat this as proposed findings of fact. We know that the Southern District of New York's standing orders permits you to do that, but we would also say that if you are going to do that, then I think it's 90 -- Bankruptcy Rule 9033. We would ask that we would have that due process process of going through. We have not approached it in that fashion in

this case. My understanding was we were treating everything as final findings; but if the Court decides everything is going to be proposed, we would ask that the 9033 process be used.

So, turning first to Suzie Sackler. Your Honor, what's missing in the analysis is the impact of the definition of non -- let me get it exactly right -- non-opioid excluded claim and Section 11.1 of the plan where the bankruptcy court is acting as a gatekeeper. And so the definition of a non-opioid excluded claim has four points, and if you fail any of them, you are released; you can't go forward. And the last point of that is you go to the bankruptcy court for any claim that you would proceed for -- with and the burden of proof--

THE COURT: Any claim that you would?

MS. KINDALL: You would proceed. In other words, the claimant bears the burden of proof of saying that it's not -- it's a non-opioid excluded claim. And I realize it's a double negative there. And so because Suzie's roommate is dealing with opioids, by definition she could not satisfy that test. She would first have to go to the bankruptcy court and try to prove that it's a non-opioid excluded claim, and it can't be because she's dealing with opioids.

THE COURT: Maybe this is a drafting problem, but wasn't Judge Drain trying to carve out a -- by using the words "Purdue's conduct is legally relevant," I thought he was suggesting that there were opioid claims that might not -- that

could not be released because they were not legally dependent on any conduct of Purdue's. Nothing Purdue did would contribute to the liability of Suzie for her negligence in giving this bottle of pills to her roommate with dire consequences. It's opioid related, but it's Purdue's conduct -- I was trying to say the same thing, Purdue's conduct was not legally relevant, whatever that means. And I don't pretend to know what it means. I'm trying to figure out what it means.

But if that is so, then I don't care about the non-opioid excluded claims. This would be an opioid excluded claim. And I think that Judge Drain made it pretty clear that not every claim that related to OxyContin was going to be releasable.

MS. KINDALL: Well, your Honor, the language doesn't reflect that.

THE COURT: Okay.

MS. KINDALL: In other words --

THE COURT: It doesn't reflect that because -- and I'm so glad you're pointing to the language. So let's look at the language of the release and explain to me why it's at least unclear that the claim against Suzie is not released.

MS. KINDALL: Well, within 10.7 itself, it says there's an exclusion for non-opioid excluded claims, but there's nothing in the release language that says but there are

also a category of opioid related excluded claims.

THE COURT: Except that they're only released under the language of the most recent iteration, the 13th draft, or whatever it is, of 10.7 if Purdue's conduct is a legally relevant factor.

MS. KINDALL: And a legally relevant factor came from *Quigley*, and it wasn't dealing with releases at all. It was dealing with factual versus legal causation, and it is not a defined term. Moreover, the Sacklers were very clear that the intent of this release was to release everybody from everything.

THE COURT: Well, that was their intent. That wasn't exactly what they got.

MS. KINDALL: I think it is what they got, your Honor, and I would ask you to take a look at the number of people who are being released or, perhaps better put, who isn't being released because the whole world is released, and there is no linkage --

THE COURT: I'm not released.

MS. KINDALL: It's people who are yet unborn, all the heirs. The list of who is being released is truly astonishing, and it's not just sort of one source of the releases.

THE COURT: The only claim that you could have against the unborn is a claim of either fraudulent conveyance or unjust enrichment. The only claim that could exist against someone

who is not yet born is a claim that the money in the trust fund doesn't really belong to you. That's the only claim that it's possible to assert.

MS. KINDALL: And so any claimant on that would have to go to Judge Drain under 11.1 and get permission from Judge Drain -- or from the bankruptcy court in order to proceed with it. And so there is -- the gatekeeping function, which I will note was a similar gatekeeping function was rejected in the *Johns-Manville III* case, is basically serving as yet another blockage and assumes that any kind of claim whatsoever brought against the --

THE COURT: I was surprised there wasn't more in the briefs about the gatekeeping function.

MS. KINDALL: I have to say, your Honor, your hypothetical had us going through each element of the release in a careful fashion and said, okay, so how does this work and how does this work and how does that work? And we said, there's this whole gatekeeping function --

THE COURT: Well, and do you have a problem with that?

MS. KINDALL: I'm sorry, what?

THE COURT: I was surprised that there wasn't more of a challenge to the gatekeeping function. It kind of got lost in the shuffle. I think it maybe was mentioned in one brief. It was not a focus of anybody's argument, and I wondered about that.

MS. KINDALL: And, your Honor, you know, if the release was a narrow tailored release for a specific releasees who actually have contributed, who are covered by insurance, who are indemnified, who whatever, then the gatekeeping function you could say, okay, you can see where it would be appropriate. But where you have a release that is as, you know, as broad as broad can be covering literally thousands of people where Purdue, which, you know, the debtor bears the burden of saying why this is -- they're subject to --

THE COURT: I'm curious about the jurisdiction of the bankruptcy court to be a gatekeeper. Furthermore, it's not even going to be Judge Drain because you've driven him into retirement. So it's going to be some other bankruptcy judge.

MS. KINDALL: That's correct, your Honor.

THE COURT: And I'm not familiar with this gatekeeping concept with the notion that you go and ask someone for permission to file a claim. Is this something that gets done in bankruptcies? What's the authority for it?

MS. KINDALL: My understanding is that it is not necessarily done in bankruptcy. In fact, it was rejected in the *Johns-Manville III* decision. And so whether, you know, what the authority of it is, I assume they would say would be the general authority of the court. I would say that is questionable, but -- and maybe in a limited fashion there might be something, but this is too broad.

There is no time limit on this release. So, ten years from now, someone is going to have to go to bankruptcy court and bear the burden of proof that they can go proceed because it's not covered by this incredibly broad release, and that is all the reasons --

THE COURT: I don't know why the bankruptcy judges would want to be stuck with that.

MS. KINDALL: That's the reason why *SunEdison*, your Honor -- you know, this release violates 1334 for all the reasons *SunEdison* did. There was no time limit. There's no connection saying that who -- has any of these releasees contributed whatsoever to the race. There's no saying there's any impact on the outcome of any claim against these releasees on the race of the debtor, and there's no linkage. And the burden of proof is on the debtor to prove that linkage. And so -- and there's an unidentified releasees. So for all the reasons why the non-party release in *SunEdison* was rejected, this one should be rejected as well.

Turning, your Honor, briefly to the best interest test, again, the debtor bore the burden of proof, and their only expert on this --

THE COURT: Judge Drain used the best interest test in a kind of a different way in his opinion. He used it, as I read the opinion, as a way of establishing one of the *Metromedia* factors.

MS. KINDALL: I think, your Honor, he's -- I mean, obliged to apply the best interest test as a screening and a protection for dissenting creditors. It's a requirement under 1129(a)(7). The debtor bears the burden, and they gave him nothing. In fact, the debtors conceded that they did not include the value of the non-party releases in the Chapter 7 analysis. And so that liquidation -- so, although Judge Drain says, well, it's somewhere in the liquidation analysis, it's not. And the testimony makes it clear, and the report makes it clear.

THE COURT: Look, maybe you're supposed to be hypertechnical in the bankruptcy context, but Judge Drain found -- and I have no reason to question this finding -- that so far trillions of dollars of claims have been asserted against Purdue and the Sacklers.

MS. KINDALL: No, your Honor. All that's in the record below you is that trillions of dollars of claims have been asserted against Purdue.

THE COURT: Okay.

MS. KINDALL: There is no evidence whatsoever on the value of the claims against the Sacklers. And given the fact that there is no evidence whatsoever on the claims against the Sacklers, you couldn't possibly do the balancing test required by the best interest standard.

THE COURT: Well, you're saying that Judge Drain could

not -- it was not in his power to say I got trillions of dollars of claims here against Purdue, which has, I don't know, a billion six in the kitty. And I can hypothesize that at least the officers, directors and managers of Purdue who are members of the Sackler family have been or are going to be sued on those claims because that's what always happens.

And if Purdue is being sued for trillions, I can fairly assume the Sacklers are being sued for more than 11 billion. And you're saying Judge Drain couldn't -- I mean, you don't need direct evidence. You can infer from circumstantial evidence. I tell that to jurors all the time. You don't think Judge Drain could infer from the circumstantial evidence in the case that there was going to be more in claims against the Sacklers than there was -- in derivative as well as direct. Forget about your direct claims; also in derivative claims.

MS. KINDALL: No, your Honor, he could not.

THE COURT: Couldn't do it. Not allowed. Okay.

MS. KINDALL: Not allowed. There's no evidence. And, moreover, he shouldn't have had to. It's the debtors' burden.

THE COURT: I'm not suggesting that it was your burden. I'm saying that -- your position is there is literally not enough evidence in the record about the tsunami of litigation and the value of the claims that are being asserted just in the class actions, that Judge Drain could not fairly

infer that the Sacklers, like Purdue, would be wiped out by all those claims.

MS. KINDALL: No, he could not. And, moreover, there is no evidence what would happen in a Sackler individual bankruptcy. There is no evidence of all the claims against the Sacklers, and there's a reason for that, because the Sacklers are not declaring bankruptcy. They want all of the benefits of bankruptcy protection with none of the --

THE COURT: I'll grant you that. I'll grant you that.

MS. KINDALL: And so none of that information was provided because they are saying, and if your Honor, if the release had been completely consensual to complete, it's a litigation release. You can say, okay, it's broad, it's fine; but it's not consensual, and it's not being done in litigation. It's being done in bankruptcy with all the power of the bankruptcy court, and it's improper.

So, with that, your Honor, I believe that the -- I have one more point, and let me make sure I got it there.

THE COURT: Good.

MS. KINDALL: No, your Honor, that's it for me. If there are any questions from the Court --

THE COURT: Thank you very much.

MS. KINDALL: Thank you.

THE COURT: Who is next?

MR. ESKANDARI: Good morning, your Honor. Bernard

Eskandari on behalf of California. Can I be heard? Am I being heard well?

Bernard Eskandari. I want to emphasize a couple points, two points. I'll be very brief. I don't think I'll take more than three minutes, and I will give the rest of my time to my brother from Maryland.

My able colleagues from Washington and Connecticut have done an excellent job. California joins in their argument, and there's no need to repeat it.

First point: I don't think the 523(a)(7) point can be overstated, particularly in light of California law. It is absolutely 100 percent beyond any dispute it's Black Letter Law that California's Unfair Competition Law and False Advertising Law claims for penalties against individual Sacklers are automatically non-dischargeable if those Sacklers were to file personal bankruptcy. No Sackler individual, if they filed bankruptcy, could discharge these penalties claims, but somehow by piggybacking off the corporate bankruptcy, the Sackler individuals can override what the bankruptcy code expressly forbids in a personal bankruptcy. The U.S. Supreme Court in *Law v. Siegel* says otherwise.

THE COURT: I'm sorry, the U.S. Supreme Court what?

MR. ESKANDARI: In *Law v. Siegel*.

THE COURT: L-A-W v. Siegel.

MR. ESKANDARI: This alone is grounds for reverse of

the order confirming the plan.

Second, I want to respond to your Honor's question about what you can do if there is a *Stern v. Marshall* problem. We believe there is one, and I won't rehash that legal argument. I'm going to be really honest. I think run-of-the-mill state law claims that are released under a plan, your Honor may be able to adopt Judge Drain's conclusions of law and findings of fact. I think it's a really close call.

Thankfully, we don't need to go there with the states' claims. Congress has already spoken on the issue with respect to police powers claims, like those California has asserted against the Sacklers. Under 28 U.S.C. 1452(a), those actions cannot be removed to federal court. A necessary prerequisite of the *Stern* argument if it's successful is that by releasing claims, the court is entering a final judgment on them, but 1452(a) expressly forbids this Court from entering a final judgment on California State Law Police Powers claims that are pending in California State Court because they would need to be removed to this court in order to enter a final judgment on them. 1452(a) expressly forbids that. So no on the police powers claims, I do not believe this Court can simply adopt Judge Drain's --

THE COURT: Okay, so I know -- thank you, and that's a really interesting point. I know -- there's no intention under this plan to enter final judgment on anything. There's an

intention to extinguish the claim. I know that for former adjudication purposes that is equivalent to entering final judgment. It has the same downstream impact as having entered a final judgment, but that doesn't -- the fact that it has the same downstream impact doesn't turn it into a final judgment, so I'm having a hard time understanding why the bar against removal is applicable here.

MR. ESKANDARI: So I think *Stoll*, the Supreme Court decision in *Stoll* and the Supreme Court decision in *Travelers* are instructive here. Those two decisions say that by releasing claims under a plan, it has a res judicata effect.

THE COURT: Yes, it does. That's the downstream impact.

MR. ESKANDARI: Right. And the absolute elemental, you know, fair essence of res judicata is a final judgment on that claim. Res judicata cannot exist without a final judgment on the claim. So by extinguishing them under a plan --

THE COURT: But nobody is going to enter a final judgment. Judge Drain is not going to sign a document that is called a final judgment.

MR. ESKANDARI: You know, the argument we advance is res judicata cannot exist without a final judgment. So while we agree that, yes, an actual final judgment, a piece of paper hasn't been entered, a confirmation order itself operates as a final judgment on the claim. If it didn't, then --

THE COURT: De facto final judgment.

MR. ESKANDARI: I'm sorry?

THE COURT: It's a de facto final judgment.

MR. SKWRAO: Exactly. Otherwise, res judicata could not exist. I think that's element number one for res judicata in all jurisdictions.

THE COURT: Okay.

MR. ESKANDARI: That's all I've got, your Honor. I appreciate the time.

THE COURT: I appreciate the brevity.

Maryland. Good morning.

MR. EDMUNDS: Good morning. Thank you, your Honor.

THE COURT: I think you need to put in your appearance because you weren't here at the very beginning.

MR. EDMUNDS: I do, and I will. I will do that shortly.

THE COURT: You will do it right this minute.

MR. EDMUNDS: Brian Edmunds for the state of Maryland.

THE COURT: Thank you.

MR. EDMUNDS: May it please the Court, I'm also going to largely adopt the arguments made by my colleagues in other states, but I do want to -- and I won't repeat what they have said. What I thought I would do is simply address sort of the overarching constitutional principles quickly that apply and then answer two of your Honor's questions.

So let me start with the Constitution.

THE COURT: By the way, you weren't here when I was giving appearance. Your brief was super. Thank you. The brief that you filed this morning. Super. It's a great brief.

MR. EDMUNDS: Thank you, your Honor.

The Constitution -- the constitutional principle of federalism is likely the least reachable issue before the Court. It is the one, as your Honor said this morning, the Court should avoid; but it is one that governs and is sort of an overarching principle that applies to the statutory arguments that your Honor is considering, including whether the bankruptcy code provides the power to grant these releases of state police power claims and whether the bankruptcy court had subject matter jurisdiction.

The law -- and I won't go into detail of the law we've laid out in our brief, but there are three strands of constitutional jurisprudence that the releases here violate. The first is simply the fact that when the court has held in cases like *Lopez* in cases like *Morrison*, in cases like the *Sebelius* case on the Affordable Care Act, but when Congress goes too far, even if it's acting under the logical extent of its powers, even if there is some logical connection or some factual connection, such as the connection to interstate commerce that was proven in *Lopez* and in *Morrison*, when it gets into traditional state powers, that's territory in which

Congress can't enter. And we think in this case given that the bankruptcy clause gives Congress the power to regulate the subject of bankruptcies, that when Congress or -- when Congress to the bankruptcy court pursuant to an act of Congress intrudes on state police power claims with respect to non-debtors, individuals who are not the subject of bankruptcies, who are not within the principles or the history that the Court went through in *Katz*, that it reaches too far and it disrupts the state's power to regulate conduct.

There are also cases that we have cited like *New York v. The United States* and *Printz v. The United States* and other cases that hold that Congress cannot and the bankruptcy court cannot pursuant to act of Congress interfere or direct state activities. The court cannot -- Congress cannot and the court cannot require the states to adopt certain policies.

It cannot use the states to implement national policy, which it's done here.

It cannot affect the state's property rights.

It cannot force the states to spend money.

It cannot force the states to give up property rights.

It can't force the states to take title, all of which it does here.

And, finally, the Court has said that the judicial power does not extend to making decisions whether to settle, especially when those decisions are in the hands of state

executive branch officials. The

Court can certainly adjudicate the state's claims against the Sacklers. What it cannot do is make the decision for the states that is vested in their executive branches to settle those claims, and all of this -- so, there's three principles that are at work here, and there is extensive case law that supports that. But all of this is to say that what is going on in this case, what confirmation of the plan in this case does is to strip the states of important law enforcement powers that we believe -- and that's why we are here and have been here in the bankruptcy court and now this court -- are necessary to protect the public from harm. That is why we're doing it.

There is perhaps an amount, as your Honor asked this morning, at which every state would agree, but what is critical is that the amount hasn't been reached, and that our state policies are interfered with. We've provided for -- our legislature has provided for the penalties, but our powers are not fully implemented unless they are significant enough to deter conduct.

In our supplemental brief this morning, I cited the precise statement by the legislature that our statute is designed to effect deterrence, and that is really what is at stake here. Deterrence not just of the Sacklers, not just of Purdue, but deterrence of all who in the future would commit

this conduct, and, of course, the conduct is not limited to these actors directly at issue in this case alone.

So what we would submit is going on here is actually an abuse that is more substantial, worse than the one that Judges Jacobs and Wesley warned against in *Metromedia* and *Manville III*. This abuse end runs the state law enforcement mechanism that is designed to promote and protect the public health. That is all I think I need to say now on the constitutional principles that ought to -- that permeate throughout this case and all the issues in this case.

THE COURT: And to permeate, but I shouldn't reach them. I should find some other way to do this?

MR. EDMUNDS: I'm not suggesting you shouldn't, your Honor. I'm suggesting --

THE COURT: They will be last, I promise you.

MR. EDMUNDS: I'm sorry?

THE COURT: They will be last, except for possibly the bear in the Canadian woods which has eaten me.

MR. EDMUNDS: Your Honor, I think generally it is appropriate to avoid hard constitutional questions when the basis can be found in statutory interpretation which ought to be guided by constitutional principles anyway.

THE COURT: That's a good way of putting it.

MR. EDMUNDS: And I would note that for reasons we've cited in our briefs, and the other states have cited in their

briefs, there's really no reason to think there's no express language authorizing the releases that Congress intended to release at least state police power claims against non-debtors. In this case where the states are involved and where law enforcement is involved, there is definitely a stronger case against releases than in other cases.

I would turn to SPV just to address your Honor's question earlier. I think the Court is correct that SPV and conditioning jurisdiction on the outcome of a future case is attenuated. But I think the Court is also correct that under the facts of SPV, if they were presented here, the Court would have to follow it under *stare decisis*. What is not clear here though is whether -- the Court does not have to extend SPV. The facts here are more attenuated for the reasons we've shown in the supplemental brief and in our other briefs, that there is no claim for statutory indemnity under the statutes under which we and the other states have proceeded, and that any contractual indemnity, one, is illusory because both the insurance policies that we've been through and the partnership agreement condition the right to indemnity on things like good faith, which cannot possibly be shown.

THE COURT: And that's why I keep asking about recoupment because I know that you've accused the Sacklers, whom you've sued, the ones you've sued, the seven, eight or nine of them. It's not the whole group, you've accused them of

taking actions in bad faith. And I've certainly seen in the evidence in the record what you would present or at least some of what I would assume you would present to a trier of fact to establish that claim.

The claim hasn't been established yet. It has not been established yet that they have acted in bad faith. The fact that you say so doesn't make it so. And that being the case, I'm trying to figure out what the limits might be on, okay, they're going to assert claims for indemnification and they're going to claim against the insurance policies maybe for some period of time applicable to some portions of your claim and assert indemnification claims under the LPA. They said so in their brief. It was quite adamant that they were going to do that. And Judge Drain so found, and I have no quarrel with that finding.

So that's why I ask about recoupment. Ultimately, if you can get all of that money back, I suppose, money goes out, but if it has to come back in at the end of the day, if you win, if the outcome of your case is in your favor, not their favor, then the outcome of the contingent case would not seem to have any permanent impact on the *res* of the estate. A temporary impact on the *res* of the state, not a permanent impact. No case talks about the difference between a permanent and temporary impact on the *res* of the estate. And I'm up on that, as I told you earlier this morning.

MR. EDMUNDS: I think that that's correct. Ultimately, even if costs have to be advanced, which, I mean, I think that we have reasons in our supplemental brief, such as the control of the bankruptcy court that mean that they don't likely. But even if costs would have to be advanced for the Sacklers' defense --

THE COURT: You're the people who actually -- I loved your brief. You're the only people who actually said that the bankruptcy court would have to okay that.

MR. EDMUNDS: Well, I think that that's true.

THE COURT: It is.

MR. EDMUNDS: I think that it's property of the estate, so I think that the bankruptcy court's approval is necessary.

But even if that were to happen, even if money were to go out, I think the Court is correct that what we're dealing here with is trying to predict the ultimate outcome in the end, and the fact that it would come back -- and that's not unusual in a bankruptcy case. In fact, that's something that regularly goes on, and I think that's what SPV also sort of indicates that the Court should do.

But the fact it would come back, the fact there is a questionable right anyway, and the fact even if it would go out in advance of its termination of that right and would ultimately would come back means that there isn't an affect on

the *res*.

THE COURT: There is an effect; there is ultimately no effect?

MR. EDMUNDS: Ultimately none. The bankruptcy court regularly deals with the need to reduce probabilities to present circumstances to determine what the outcome might be, what is at stake now, and the value of such claim for indemnification is zero under facts that, granted, the bankruptcy court did not resolve them around page 99 to 101 of the bankruptcy court's bench ruling, the bankruptcy court acknowledges that there could be substantial liability, and that from the evidence it heard, there is sufficient evidence to support -- it would be a question for trial, but there would be evidence to go forward to establish that the Sacklers are directly liable.

THE COURT: Oh, yeah. Well, and you've got three district courts I think who already -- three state trial courts that have already said these claims can go forward. These complaints are not dismissible on their face.

MR. EDMUNDS: Right.

THE COURT: There's a reason -- to use Judge Pooler's term, there's a reasonable legal basis for you to proceed against the Sacklers. The issue, however, from my perspective is there a reasonable legal basis for them to assert a contingent claim over against Purdue?

MR. EDMUNDS: I think that that requires examining the law and the documents.

THE COURT: That's why I asked you for the briefs.

MR. EDMUNDS: So we provided that in our briefs, but I think there is no reasonable legal basis to think that the Sacklers will come out of this with indemnity from Purdue for what they directed Purdue to do, what were their acts for which Purdue is liable in respondeat superior.

THE COURT: That, by the way, was another clever notion that I hadn't thought of, that what we're really dealing with here is not -- is Purdue being liable on a respondeat superior basis for the acts of the Sacklers, not the Sacklers being liable for the acts of Purdue derivatively.

MR. EDMUNDS: Well, we think that's what in this case is at stake and a lot of cases brought under our statute and a lot of other states' statutes, really the corporation is a legal fiction.

THE COURT: All corporations are legal fictions. They're persons, but they're legally fictitious persons.

MR. EDMUNDS: Right. Exactly right.

The other thing I would just briefly address is the issue of necessity --

(Pause)

THE COURT: Please try to speak up. The pro se, Ms. Isaacs, who is on the phone, is having difficulty hearing

and understanding.

Ms. Isaacs, you were welcome to come. I could not pay your way.

MS. ISAACS: No, but you couldn't provide me with my disability accommodations that I needed, and rule on that either.

THE COURT: Okay, Ms. Isaacs, we're trying to make it so that you can hear everything.

Please continue.

MR. EDMUNDS: Thank you, your Honor.

I quickly wanted to address the issue of necessity under *Metromedia*. I think the Court gets it right in *Karta* where it says that if necessity for the plan itself is the standard alone, then virtually every case that comes up will satisfy the requirements of *Metromedia* because you can simply build it into the plan, as has happened here, but it has to be something more than that, and I think that's the issue.

There is no question that the releases are built into this plan here and have shaped what the parties have done. But that can't alone be sufficient to justify confirming the releases here because it would be in every case, and because it would give rise to the same abuse that the Second Circuit has repeatedly warned against.

THE COURT: Well, *Karta* -- you know, *Karta* was sort of present at the creation. I'd forgotten about *Karta*. 2006,

that's long since out of my memory banks, but I must say that reading Judge Wile's opinion in *Aegean* made me feel a little bit prescient.

MR. EDMUNDS: I didn't quite get the last word, your Honor.

THE COURT: Prescient.

MR. EDMUNDS: Yes.

THE COURT: When you're done, we need to take a break. Is Maryland the last state?

MR. EDMUNDS: Yes, your Honor.

THE COURT: And then we're going to go Canada and the U.S. Attorney? Okay.

So we should take a break. We should take a ten-minute break.

MR. EDMUNDS: Thank you, your Honor. That's all I have. So if the Court has no questions for me, I request the Court reverse.

THE COURT: Thank you very much.

(Recess)

THE COURT: Can I ask the Connecticut Attorney General one question. You can sit and use that microphone. You had said that if I were to conclude that I should treat Judge Drain's opinion as proposed findings of fact and conclusions of law clerks, that you believed it was necessary for me to do something in order to comply with some bankruptcy rule, which

I'm not familiar because I don't practice bankruptcy law.

And I have to say, it was my understanding from the Supreme Court's decision in *Executive Benefit* that if I were to make that determination and then were to review everything, facts as well as law *de novo*, that it would be no harm no foul. Am I wrong about that? What is it that you were suggesting that I would need to do other than review *de novo*?

MS. KINDALL: In reviewing *de novo*, your Honor, there would need to be some notice and due process for the appellants.

THE COURT: You mean like what we do with the magistrate where you get to make objections and -- but that's ridiculous. You've done that. You've filed briefs. I mean, you've had notice. You filed objections in the form of, you know, taking an appeal. You've filed briefs, and I think that's what the Supreme Court was saying was, okay, if all that happened and the district court reviewed the matter *de novo*, I think that's what Justice Thomas was saying in *Executive Benefit* was no harm no foul. I think.

MS. KINDALL: Well, your Honor, I mean, there's a whole process that was a different kind of process if it had been presented to you as proposed findings of fact and law that you would --

THE COURT: Is there a single solitary argument that you would have made under bankruptcy Rule 9033 that you have

not made?

MS. KINDALL: We have made arguments that, for example, in the best interest test that there is insufficient evidence to support the legal conclusion because it's all based on conjecture, speculation and the --

THE COURT: And you made that argument.

MS. KINDALL: Right, and we made that argument. And so did there need to be further evidence taken or further expiration of that, we would need to go through it. I also believe, your Honor, that our colleague from the DOJ is going to address that issue as well.

THE COURT: *Okay.*

Oh, Canada. I loved the bear. I did. He gave me comfort. But he did eat me. I didn't really understand some of your arguments, so... I'm dealing with foreign sovereign. Educate me.

Good morning.

MR. CECERE: Good morning. May it please the Court, Carl Cecere for the Canadian appellants.

THE COURT: Mr. Cecere, remember, we're speaking loudly.

MR. CECERE: Yes, ma'am.

At the outset of this case, the Court asked the parties to identify exactly which non-debtors' claims would be subject to the plan's releases but be beyond the Court's power

to release. We haven't answered that question, and it is us perhaps more than any appellant before you today. The claims belonging to the Canadian appellants could not be released because of the unique features of our claims and the plan's unique treatment of our claims.

That said, if the Court does invalidate the releases entirely, that does simplify things considerably. The Court doesn't need to reach sovereign immunity. The Court doesn't need to reach due process. It wouldn't need to reach our individual *Metromedia* arguments; it would only need to reach the inequality argument we raise.

THE COURT: The inequality argument.

MR. CECERE: The inequality argument, yes, ma'am, the argument that we were improperly categorized as general and secured creditors, and we should have been placed in classes four and five instead. That's the only one that's independent of the releases that's the categorization of our claims.

THE COURT: So that argument I need to reach no matter what.

MR. CECERE: Yes, ma'am, you do need to reach that one.

THE COURT: Okay. Now, if I understand your position, vis-a-vis your claims, correctly, it is this: The plan carves out claims against Purdue Canada from the release, and it carves out, I'll call them, Canadian claims from the release,

but you say Canadian claims are -- the conduct of Purdue is legally relevant to the Canadian claims, so it doesn't really carve them out. Is that what you are arguing?

MR. CECERE: My argument is a little bit different than that.

THE COURT: Good. Then explain.

MR. CECERE: It involves the interplay between 10.7(b) and then the separate exception to the releases in the definition of excluded claims. To get in to 10.7(b), a claim needs to be based on, related to, or arising out of conduct of the debtors. It also has to be legally relevant or a legal cause, or the debtors' conduct has to be legally relevant or legal cause. That's what gets you in. The exemption is two-pronged.

THE COURT: Wait. Wait. The exemption is what?

MR. CECERE: The exemption is two-pronged for Purdue Canada. So it says, on the one hand, if claims relate to Purdue Canada, they fall into the exemption, but there's a further provision that says if they relate to the debtor, they fall into the release -- they fall into the exemption unless they relate to the debtor, in which case they're recaptured again. So --

THE COURT: Explain that to me. Explain how they are recaptured.

MR. CECERE: Okay. I'm going to go back to the plan

language.

THE COURT: Oh, thank you. The first person to actually look at the plan language.

MR. CECERE: All right. So, I actually don't have the definition of excluding claims in front of me.

THE COURT: But it's the essence of your argument.

MR. CECERE: The definition of excluded claims. Well, I mean, I can walk you through it. The definition of excluded claims Purdue Canada says, if a claim relates to Purdue Canada, it is exempted unless it relates -- it's based on conduct of the debtor.

THE COURT: Okay. If a claim is against Purdue Canada.

MR. CECERE: Yes.

THE COURT: Purdue Canada. I'm sorry, I'm not typing Purdue correctly. That's a big ten issue.

Against Purdue Canada, then it is exempt from the release.

MR. CECERE: Yes. But then there's a --

THE COURT: Unless -- unless what?

MR. CECERE: Unless it is based on conduct of the debtor or the debtors.

THE COURT: Of Purdue, the debtor.

And your position is that everything that Purdue Canada did is based on the conduct of Purdue?

MR. CECERE: Well, I wouldn't say everything. I would say --

THE COURT: Lots of things.

MR. CECERE: Lots of things, yes. So that means that, you know -- and it's because of the overlapping management style that the Sacklers used. When they're doing -- they do meetings where they direct everybody all at the same time. So that's conduct that's based -- so, you know, that's based on conduct of the debtor just as much as it's based on conduct of Purdue when they're wearing both hats at the same time.

And I'd like to go ahead and walk through our claims to give you a sense of how we think it works.

THE COURT: Sure.

MR. CECERE: So when you take our Competition Act claim, for example, that's pretty clearly not exempt under any circumstances. It may have something to do with Purdue Canada, but it falls within the provisions of the release because it's based on conduct of the debtor, and the debtor's conduct is legally relevant under any definition of the term legal relevancy because in our Competition Act claim, we're claiming that the Sacklers acting through the debtors caused fraud to the United States and that fraud reached Canada. And that's what makes out a claim under the Competition Act.

So that's legally relevant even if legally relevant means, like you said, it's got to be a legal foundation or the

debtor has to be intertwining or an alter ego relationship or something like that. They're doing tort feasers in that circumstance that is legally relevant. But even if it relates to Purdue Canada, and even if you say it relates to Purdue Canada, it's still based upon conduct of the debtor, so it gets recaptured into the release. So we think it --

THE COURT: I think the use of the word recaptured is helpful.

MR. CECERE: I'm sorry?

THE COURT: I think the use of the word recaptured is helpful.

MR. CECERE: Yes. I mean, I think it is -- a claim goes into the release, it's exempted out of the release, and then recaptured is the way we try to think of it.

THE COURT: Okay.

MR. CECERE: Now, as we said, we think that falls within the release provisions. Now, the Court posed in its questions an alternate reason why you might read our competition claims out of the release that has nothing to do with conduct in or out or recapturing. You posited whether or not we ought to read the plan -- and I'm assuming you mean the language legally relevant and legal cause to require there to be a contribution and indemnity relationship in order for it to fall within 10.7(b) in the first place. And while as much as we'd kind of like that to be the case, we don't think the plan

can be read that way.

10.7 captures claims based on the nature of the claim and the nature of its relationship to the debtors, whether it's based upon, arising out of, or related to the debtors, and not its relationship to the SRPs or their legal rights. So we don't think that you can say that the plan never mentioned contributions or indemnities specifically. It just talks about those factual relationships between the conduct that we're complaining about of the Sacklers and the conduct of the debtors. So we don't think legal relationships between the shareholder release parties and the debtors can be read into that language.

That said, our Contribution Act claim is not going to be subject to the contribution or indemnity. I think we've provided in our brief three different provisions that all kind of reinforce that point. It's not -- a Competition Act claim is not subject to contribution or indemnity or joint and several liability because Canada takes a very strong view of the theory that intentional tort feasers are just not entitled to collect against each other.

THE COURT: Well, you've got at least some of the states objecting states have made the point that contribution wouldn't be available because this is a statutory claim. It's not a tort. In Canada, would the violation of the Competition Act qualify as a tort?

MR. CECERE: No, it would not qualify as a tort, and we just have specific case law saying that the Competition Act claim specifically is not subject -- that statutory claim just isn't subject to contribution or indemnity, but for tort reasons, right? It's a tort principle interpreted into the statute.

THE COURT: Right. For reasons derived from classic tort law.

MR. CECERE: Yes, it's a principle -- and it's kind of older -- it seems like Canada is a little slower to move away from old tort law than we are. In some cases you might be able to get -- you know, when you get to the third restatement in the United States, they say, well, contribution or indemnity for intentional conduct is fine. But that's more of a recommendation than it is necessarily the state of the law.

Contractual indemnification, whether under the LPAs or under insurance policies, isn't going to be available either. Both UCC and the Sacklers admit the claims for intentional or bad faith conduct would be excluded under all of the debtors' insurance policies, and the partnership agreements, I think the states have done a great job of walking through the specific language that gives that to you, but Canada also adds a legal reason why contribution or indemnity wouldn't be available.

In Canada, the legislature has -- the Canadian legislature has authority like the United States Congress has

authority under the Congress laws, it has the authority to enact criminal statutes. It enacted the Competition Act as a criminal statute, and that doesn't mean that everything about it is criminal. It's got both regulatory components and civil components, but it's a criminal law for the purposes of Canadian separation of powers.

(Continued on next page)

MR. CECERE: And when a claim alleges a violation of a criminal law, like the Competition Act, and the act is intentionally intended to harm others, then it is not subject to contribution or indemnity. It just is not available to it, and so there's no insurance payout that could be given for it.

So even if the contracts were to covered, the Sackler's conduct, that, we allege, violates the Competition Act.

THE COURT: And it was not enforceable --

MR. CECERE: And --

THE COURT: -- provided the Sacklers were actually found guilty of the terrible things of which you accuse them.

MR. CECERE: And that is correct. And just to put the final pin on it, if insurance proceeds are advanced under reservation of rights in Canada, Canadian law will enforce the reservation of rights and allow it to be recouped later.

Problems like this are exactly why the debtors and the Sacklers are resorting to the advancement of fees and fights over coverage. But I think your intuition is exactly right. It can only be the outcome of the fight that matters because if we -- and it arises in kind of two different scenarios.

When it comes to insurance, the insurance actually has got to be drained. If the insurance is not drained, ultimately, then there's been no effect in the estate. There's been no case that's addressed the problem that you've been

wrestling with, of what if it's paid out and there's an effect on the estate, and then is it paid back and is there no effect on the estate?

Ultimately, what matters is whether or not there is more or less money. Does the estate have more or fewer rights than it did otherwise? Is it prejudiced in some way? If money goes out and it comes back in, there's no real prejudice absent some kind of extenuating circumstance.

Fights about coverage are similarly not a grounds to say that something has a connection to the estate. When -- especially for claims like ours that have not yet arisen because we were barred by the imposition of the stay and the stay-related orders from actually naming our Competition Act claim against the Sacklers and the SRPs.

So we are hoping to be able to do that, if we get the releases validated. We don't think that that matters. We think that being barred from either raising a claim is just as bad as losing the claim that you have.

THE COURT: Well, it was only a preliminary injunction.

MR. CECERE: Yes, it was a preliminary.

THE COURT: It's not a permanent injunction.

MR. CECERE: It's going to become not preliminary if the releases become -- if the plan goes into effect, it will likely --

THE COURT: That's true.

MR. CECERE: Like, it's going to be extinguish utterly in that circumstance.

But just going back to it, it's only the outcome that matters in fights about insurance coverage because in a claim that hasn't yet been filed, the people who are going to be doing the fight, after the effective date of the plan, and when we actually are able to file a Competition Act claim and give rise to contribution indemnity, that's going to be a fight that's going to be fought by Newco and the MNT and the reorganized debtors.

It's not going to have anything to do with the now-defunct debtors or their estate. So there is no effect on the estate, unless there's an actual outcome that does something that affects the property or actually takes money away from the estate itself.

THE COURT: Well, the insurance -- Okay. Forgetting about insurance, let's just stick with indemnity. Newco, which I want to talk to Mr. Huebner about, Newco is not going to offer any kind of indemnity to the Sacklers, right? There's not going to be an LPA between Newco and the Sacklers?

MR. CECERE: If the releases stay in place, if their releases of their claims stay in place -- and by "them" I mean the Sacklers -- if their releases stay in place, no, there's going to be no -- there's no potential for indemnity. And

moreover the Sacklers have -- they've actually surrendered their rights to any insurance payout. That's in the Delconte declaration.

So, yeah, there's not -- going forward, with regard to Newco, they're not going to be paying the Sacklers anything. There's no money that's going to go to them. The only way they can even try and claim a connection to the estate is connected to their unsecured contingent claim that they filed in bankruptcy.

They're basically saying that, well, if we got contribution indemnity, then we would have to -- then we would be able to go into the bankruptcy court and say, well, here's our unsecured claim, pay us our pro rata amount of $15 million, which is going to be nothing -- but not exactly nothing, so it would have some kind of effect on the estate.

But the debt is only about, again, the ultimate outcome, the right of contribution indemnity. That's the only time their contingent claim, right, was an actual claim. So that has nothing to do with the fight.

You know, if Newco, the MNT, if they incur attorneys' fees fighting the Sacklers over insurance coverage that isn't really there, if they do that, then that is a debt that belongs to Newco. That is not a debt of the estate. It's got no connection to the estate at all. Only the outcome has an affect on the estate.

THE COURT: Okay.

MR. CECERE: Now, Judge, I'm running short on my time because we've been talking, but I did want to mention one other point, and I also want to answer any questions you have. But you really raised a really prescient point with regard to Metromedia and the people who have channel claims, but I want to emphasize that --

THE COURT: People who have what claims?

MR. CECERE: The creditors who have channel claims, how it is unfair to them that they -- they don't actually get a channeling of their claims against released parties. They only get to channel the claims against debtors, and they don't have a forum now to raise their claims. That's bad for them, and we think that could be a fatal problem under Metromedia.

But it's far, far worse from us because we are in a general unsecured class. We have no rights to channeling. We have no trust that we get to access. So we are even worse harmed. We get absolutely nothing of the infusion of $4.5 billion dollars into the estate. None of it flows to us. We get nothing.

So you know, as the Court mentioned in Metromedia, that famous law review article that we're all revolving around, the only time that releases have ever been upheld has been when the creditors get something in return. Maybe some creditors get something in return. Although, we've got to ask the

question whether that's actually true.

We certainly don't get anything in return, and we think that's an independent problem. That means the releases need to be entirely invalidated for us. Unless the Court has got any further questions, that's all I have.

THE COURT: Great. Thank you. Thank you very much. That was very helpful.

Okay. So the government? Meaning no insult to the United States Trustee, by the way. But in this courtroom, the "government" is him.

MR. ARONOFF: Good morning, your Honor. Peter Aronoff, U.S. Attorney's Office, Southern District of New York for the United States.

THE COURT: Hi, Mr. Aronoff. How are you?

MR. ARONOFF: I'm very well. How are you? Thank you.

THE COURT: Just fine. Thank you.

MR. ARONOFF: I just wanted to -- you know, I'm mindful we're appearing here as an amicus, and I want to be helpful to the Court. I have a few discrete points that come out of the Court's questions before argument and a few during argument, and then, of course, anything else that the Court may have questions on, I'm happy to address.

I'd like to start just briefly with your Honor's questions 14 and, to some extent --

THE COURT: I took the numbers off. So just tell me

what the questions are.

MR. ARONOFF: Sure. This was the question that you were also addressing to Connecticut, and that is, what should the Court do in the event that there -- the Court finds that there may be a Stern problem. I'd just like to point the Court the committee notes for Bankruptcy Rule 8018.1 go into some additional detail about what the Court might consider doing.

Among the options that the Court has, would be to proceed under Rule 9033, which allows for parties to file objections, just as they would for an R and R from a magistrate judge. But the Court may also treat the parties' briefs as essentially accomplishing the same thing.

THE COURT: I think they have. I think they have. They're very fulsome briefs.

MR. ARONOFF: Yes, your Honor. Along these lines, I also, of course, mindful of the parties own preferences for how the appeal would proceed, but I think everyone would appreciate -- you know, on the one hand, I understand your Honor doesn't want to, you know, reach questions that may not be necessary, particularly constitutional questions or other kind of relatively abstract questions.

At the same time, I think having guidance from this Court, in the event of a remand, would be very helpful, and I think, you know, we would want to avoid a situation where there's a relatively narrow basis for a remand, and then the

parties come back before your Honor quickly. I think everyone -- I mean, I'll let the parties speak for themselves, but I think everyone would appreciate it.

THE COURT: Well, since you're my best friend, suppose I were to decide that there was some infirmity with the releases. What would be the next step, remand or an appeal to the Second Circuit?

MR. ARONOFF: Your Honor, I think that's a question for the parties to the appeal, and the parties would have to, you know, decide whether incurring additional delay and expense of a further appeal would be worth it. I suppose it would depend on exactly what the nature of the remand or the nature of the error was.

THE COURT: I mean, I could affirm. Is there the possibility of an immediate appeal to the Second Circuit? I don't think it matters how I rule. Is this thing going to the circuit, or is it going back to Judge Drain?

MR. ARONOFF: I would like to be helpful --

THE COURT: You are my friend; so you don't know the answer to that question.

MR. ARONOFF: That's right, your Honor.

THE COURT: Okay.

MR. ARONOFF: I'd also like to address your Honor's question about the restitution and the criminal case.

THE COURT: Thank you.

MR. ARONOFF: Yes. So just to remind everyone of where the criminal case is --

THE COURT: New Jersey.

MR. ARONOFF: Yes, and I was referring procedurally. So the company has entered a guilty plea, but it has not yet been sentenced. And the plea agreement itself provides that there will be no restitution order in this case, and so as long as the District Court in New Jersey accepts that plea agreement, there will be no restitution, which I think answers the Court's question.

THE COURT: Okay. But as I understand it, assuming I were to affirm the confirmation of the plan, the government is going to kick back some portion of the fine, the forfeiture, the criminal financial penalty, into the pot, which at some point this afternoon, someone is going to tell me exactly what's in this pot.

MR. ARONOFF: Yes. I'm sorry, I couldn't entirely hear the last word that your Honor said.

THE COURT: I'm sorry. It's my understanding that some significant portion of the criminal financial penalty is going to get kicked back into the debtor's estate --

MR. ARONOFF: That's correct, your Honor.

THE COURT: -- if the plan is upheld, confirmation of the plan is upheld.

MR. ARONOFF: Yes, if --

THE COURT: And if confirmation of the plan is not held, you're going to take your marbles and go home. I mean, the U.S. Attorney for New Jersey is going to pick up its $2 billion worth of marbles and go home.

MR. ARONOFF: Well, your Honor, I do want to make clear, the order -- first of all, the action in New Jersey is a separate criminal case.

THE COURT: Right.

MR. ARONOFF: I don't want to speculate about the steps that the government might take in that case, depending on how this separate case goes. But I do want to emphasize, in the bankruptcy court, the order that the bankruptcy court entered granting the 9019 motion that approved the claims treatment for DOJ's civil and criminal fraud resolutions, that order, which is bankruptcy docket 2004, at paragraph 9 provides that the criminal forfeiture claim of the United States does not come into being until the company is sentenced, and that sentencing has not yet occurred.

THE COURT: Right. I mean, it's one thing, Mr. Aronoff, to say that it's a separate proceeding, but never have I seen a criminal proceeding in one district so closely intertwined with a bankruptcy proceeding in another.

MR. ARONOFF: I appreciate the connection between the proceedings, your Honor, but I just want to make clear for the purposes of this case, that the consequences in bankruptcy of

that criminal action are not yet complete and may not become complete.

THE COURT: To be clear, Judge Drain, whose overriding goal is perfectly obvious to me, was to get as much money into the estate so that it could be used for laudable purposes as it was possible for him to get.

He was testy, I don't know if it was you or the U.S. Trustee, about that $2 billion and the fact that the United States was objecting to the confirmation of the plan on the principal grounds articulated by the United States Trustee, and echoed by your office, because if the plan were not confirmed or were overturned on appeal, that there would be no obligation on the part of the United States to give anything back into the estate, which would reduce the pot by another $1.75 billion, and the United States would pick up its marbles and go home. That's how it seems, to me, Judge Drain saw this playing out.

MR. ARONOFF: Yes, your Honor. I think that, too, that understanding, is speculative, and it overlooks, among other things, most importantly, that the United States does not have a forfeiture claim and there is no forfeiture credit *a fortiori* until Purdue is sentenced. Purdue has not yet been sentenced, and as your Honor is aware from the stay litigation, the question of when Purdue is sentenced and the disposition of these appeals are, themselves, closely related and so --

THE COURT: Right.

MR. ARONOFF: I'm sorry?

THE COURT: Right.

MR. ARONOFF: So, you know --

THE COURT: Is there a sentencing date that's been set yet?

MR. ARONOFF: I don't believe so, your Honor.

THE COURT: Right. Okay. All right. Go on, Mr. Aronoff.

MR. ARONOFF: Thank you. I do -- unless the Court has further questions, I did have -- I just wanted to go back to a few points that came up during the parties' arguments.

THE COURT: Please do.

MR. ARONOFF: So I have a word about SPV Osus. You know, we've raised due process and I, of course, understand that the Court would, you know -- both, would rather not reach due process and is obligated not to reach that point if there are narrower grounds to get to. But --

THE COURT: It's not that I'd rather not reach. It's just there are circumstances in which I think it would be unwise to reach it. On the other hand, if I tend to affirm, I've got to reach it.

MR. ARONOFF: Yes, your Honor.

THE COURT: I can't affirm without reaching it. Let's put it that way.

MR. ARONOFF: Correct. And SPV Osus, to outline, you

know, ties together some of the points that the parties have been addressing about related to jurisdiction, on the one hand, and due process on the other.

That case -- it is worth mentioning, that case was an action originally filed in State court that was removed to Federal District Court and was before a Federal District Court before it went to the Second Circuit. And so what happened there was the court was -- the Second Circuit was interpreting the scope related to jurisdiction, but as we have argued and as the U.S. Trustee has argued, that wasn't the beginning and the end of the inquiry. The Court then went on to actually adjudicate the merits of the claim once it determined that it had related to jurisdiction.

THE COURT: The District Court did.

MR. ARONOFF: Both the District Court and the Second Circuit. And --

THE COURT: Second Circuits don't adjudicate claims. They affirm somebody else's adjudication of claims.

MR. ARONOFF: Yes, your Honor.

THE COURT: Justice Ginsberg said it was our job to prepare the record for the Court of Appeals.

MR. ARONOFF: Well, the Second Circuit upheld the merits determination of the District Court, which, among other things, rested on a determination of whether there was personal jurisdiction in a Federal District Court over some of the

defendants.

So, if anything, although we take issue with the breadth, which I'll get to in a moment, of how SPV Osus interpreted related to jurisdiction for bankruptcy purposes, the case also illustrated what we think due process requires.

If a claim is related to a bankruptcy jurisdiction -- sorry, a bankruptcy case, then, you know, there needs to be an adjudication of that claim which is consistent with due process, which is exactly what happened in SPV Osus.

On the question of the breadth of related jurisdiction --

THE COURT: And since it arose in a bankruptcy court, you're suggesting there could have been an adversary proceeding?

MR. ARONOFF: Well, that case went directly to -- it was filed in --

THE COURT: Yes. Well, that case was that case, but these cases are not.

MR. ARONOFF: Well, yes, your Honor, and it's possible that the -- you know, it would depend on the particular facts and circumstances of the case. But you know, it's possible for a case to be -- a bankruptcy case to be heard, in the first instance, in the District Court if the Court withdraws the reference.

But the point is not really so much mechanically how

it would proceed. The point is that, however it proceeds, in whatever form, it must still be consistent with due process. Otherwise, the court is not hearing a case, which is how the jurisdictional statutes refer to the jurisdiction that a district court or a bankruptcy court has.

You know, on the question of how to interpret related to jurisdiction, I think the other question that SPV Osus raises is, you know, if the language in that case is sort of taken at face value and the result is extended, it really does raise the question of whether there is a limit to the bankruptcy jurisdiction that Congress provided. We've argued here that, you know, because of the interrelated contribution and indemnity or distribution -- I'm sorry.

THE COURT: I mean, every corporate bankruptcy -- we're going to get into this this afternoon, but I have some issues with the uniqueness of this case. Judge Drain said the case was unique because of the interrelationship between the claims against the Sacklers and the claims against Purdue. And they're the same issue in every single corporate bankruptcy that ever has been filed or ever will be filed, and it's an issue that arises in every case. The case is not unique for that reason. That is the antithesis of uniqueness.

So I agree with you that if the language is taken at face value, this could mean that there is limitless bankruptcy jurisdiction over, you know, all kinds of stuff that's not

specifically mentioned in the code.

MR. ARONOFF: Yes.

THE COURT: And, yes, that bothers me.

MR. ARONOFF: Well, I think this starts -- and I just have one last point that goes back to due process, and in some ways ties to an argument that the States have made in a somewhat different context.

Ultimately, we're talking here about interpretation of the bankruptcy code, and the question is: What is Congress' intent? And I think part of the reason that we've had to -- or that the parties have resorted to discussing, you know, basic questions like, is there subject matter jurisdiction, or, in our case, was there due process, it demonstrates that, you know, if you have a doctrine like third-party releases here, that is completely untethered from any kind of statutory framework, then parties have to resort to these ultimate constraints of things like subject matter jurisdiction and due process.

That, itself, demonstrates that the third-party release doctrine, such as it is within the circuit, it really mangles the bankruptcy code. In contrast to the bankruptcy code, which provides for a special remedial scheme that's extremely detailed, the third-party release gloss on the bankruptcy code has no statutory framework, and so it has no constraint.

And that's, I think, as I was saying at the outset, that's the reason that we get into questions of, well, what's the, you know, full breadth of the bankruptcy court's subject matter jurisdiction, or what does due process require? It's because pressure is being put on these, you know, basic constraints on court power because, you know, the courts have blown past the statutory framework.

So unless the Court has any further questions....

THE COURT: No. Thank you, Mr. Aronoff.

MR. ARONOFF: Thank you very much, your Honor.

THE COURT: We are exactly on schedule.

And, Ms. Isaacs?

MS. ISAACS: Yes, ma'am.

THE COURT: The floor is yours.

MS. ISAACS: Thank you. Good morning, your Honor. How are you?

THE COURT: I'm fine. How are you this morning? Where are you?

MS. ISAACS: Where am I?

THE COURT: Where in the United States are you?

MS. ISAACS: I'm sorry?

THE COURT: Where in the United States are you?

MS. ISAACS: Right now, I'm in Virginia, ma'am.

THE COURT: In Virginia. And how is the weather in Virginia?

MS. ISAACS: It's cold.

THE COURT: Okay. It's cold here, too.

All right. Ma'am, take a few minutes and tell me whatever you want to say, from your own perspective as a litigant who is pursuing your own claim.

MS. ISAACS: Okay. Thank you, ma'am. I really appreciate your time and energy today. I apologize that I could not be present today. It's unfortunate that I require special accommodations, as well as financial assistance. Please imagine my frustration that both of these barriers are a correct result of the Sacklers malicious action.

I come before you today telephonically on behalf of my deceased son, Patrick Ryan Wroblewski, myself and the people of the United States of America.

I am not going to waste everyone's time with everything that's gone on with all of the illogical case laws that have been made up since 1789. I am going to tell you this is all wrong.

These illogical laws only provide wealth for the attorneys and the government with their outrageous fees and linguistic gymnastics that are wasting a lot of time as people are dying at an unprecedented rate from overdoses, drug-induced homicides, drug-related suicides and murders.

The Sacklers and the government are drug dealers. This confirmation is by far the worst legal action in American

history. There continues to be a huge overall lack of concern for the health and public safety of the American people. This confirmation shall create another illogical opinion for the law books, while creating a vehicle for every corporation to do the same as Purdue Pharma and create further legal insanity across our land and harm more precious families.

We are in the midst of what the President has deemed a nationwide public health and safety emergency from drugs. It is a domestic and international genocide that began with the Sacklers.

I will just simply say the third-party non-consensual releases for nearly 1,000 individuals and entities and failure to give fair notice to the American people of these proceedings is unconstitutional, a Constitution that was also illogically made up for people to believe and has a gaping legal loophole to allow every government employee to do whatever they want with very little to no consequences because everything is at their discretion.

Discretion in America equals freedom. How are we in the land of the free with elected government officials abusing their power of discretion? Just who in America is free with over one million dead and the expansive fallout of grief in the grassroots of our communities, with insufficient resources to put the families back together and properly deal with everyone's mental health?

There is no way that the overall of the one million people harmed were notified of these proceedings with only just over 130,000 claimants, and of those claimants, less than 20 percent of the claimants actually voted.

The UCC completely missed protecting the claimants' rights. Further, the UCC has a conflict of interest. A representative of CVS is on the UCC, and CVS has been found guilty in Ohio for contributing to the public health and safety emergency.

My son is not free due to Purdue Pharma and the government. He is dead. It is on the record of September 13, 2021, how Purdue Pharma/the Sackler's created the slow cancerous death of my son, and how it fractured my entire family. It has also caused me tremendous pain and suffering for over 20 years with physical and emotional disease trying to keep him alive and the aftermath of grief.

The night my son passed on, I immediately declared enough is enough and went on a full-blown excursion to finally get to the bottom of the Sacklers' sinister actions. I was no longer distracted having to deal with the State of Florida's inequalities and corruption to keep my son alive.

It was now about saving my family members, the American people and myself from the ruthless actions of big pharma; specifically, the original of the domestic genocide designers, the Sacklers, FDA, pharmacies, physicians, hospitals

and the insurance industry as a whole.

Their reckless actions are harming everyone, is all based on greed and now they are all here seeking money and it is disgusting.

It is also unconstitutional for the NAS babies that are born dead or permanently injured post the claim deadline, for the Sacklers to be shielded from accountability forever.

It was and continues to be excruciatingly physically painful for me daily due to the doctors overprescribing me Oxycontin that started in 1999 after a surgery. Not one physician knew how to safely pull someone off of Oxycontin back then.

When I put myself in detox to get off the medication, the chief medical doctor at the time, Dr. Agresti, continued to prescribe me 40 milligram of Oxycontin in detox and told me I had to take it. Then he discharged me with yet another prescription. I went through years of mental torture trying to pull off of the devil's drug.

During this time, physicians began creating a cocktail of medications for the anxiety I was experiencing from my amygdala’s need for more of the synthetic heroin in Oxycontin. This changed my brain chemistry further, including Purdue Pharma’s Valium. Years of these medications have permanently damaged my central nervous system, with a few times in my life being physically paralyzed. This is how dangerous these

chemicals are.

I am in severe physical pain daily, severe pain that I no longer and will not take pain medication for. I have found holistic practices and self-embodiment to ease the permanent pain and discomfort. Yet, I am still incapacitated to function like I did before Oxycontin. I do not revert back to the poisons of big pharma's pain medications. I would prefer to have clarity than concede to further poisoning my brain, poisons that are still being prescribed and filtered throughout the nation, killing and harming loving humans, with feelings and emotions at an alarming rate.

Pain comes in many forms. Most pain comes from somatic issues that are repressed in our bodies that can be dealt with without pain medication. In the early 1800's a great injustice was done when the Rockefellers got involved in drug manufacturing following the beginning of western medicine performing surgeries. Now most people have unnecessary surgeries because the physicians guess that they need surgery when it is a somatic experience and then prescribe pain medication for a surgery that was never needed to begin with.

The individual still has the pain after the surgeries, and then are labeled chronic pain patients. Then the loop continues with the pain doctors' greed for money and continuing to write unnecessary prescriptions. Very few truly know how to treat individuals that have somatic experiences.

These somatic experiences arise intergenerational, in-utero --

THE COURT: Ms. Isaacs?

MS. ISAACS: I'm sorry, your Honor.

THE COURT: Ma'am? Ma'am, excuse me?

MS. ISAACS: I said I'm almost done.

THE COURT: You're almost done. Okay, good, because I need you to bring it to a close. This is a slightly -- this is a very different proceeding than the one in front of Judge Drain.

MS. ISAACS: I have three more paragraphs, your Honor. That's all, just three more paragraphs, please.

THE COURT: Okay. Three more paragraphs, great. I'm taking notes as fast as I can.

MS. ISAACS: Okay. I'm not trying to talk so quickly. I just don't want to take up your time.

THE COURT: It's your time, ma'am.

MS. ISAACS: These somatic experiences arise intergenerational, *in utero*, childhood, post and present traumatic stress disorder. Dr. Gabor Mate' and his colleagues understand the complexity of how to deal with these perceived illnesses.

The Sacklers have caused a huge financial burden on myself and have rendered me homeless. My life has been forever altered. My son's life is in ashes. Nearly all of my property

is gone, and my family members have no relationships with one another.

Then the lack of due process to myself and all of the American people have been negated by Judge Drain, all of which is a violation of the 14th Amendment of the Constitution unto myself, my deceased son, and the American people. Once again, all made up of antiquated opinions from Britain via the British Colonies, from people that couldn't spell in 1789.

The legal eagles back then tried to decipher all the made-up, misspelled opinions and created illogical laws that are used today, which are harming billions across the nation.

A Chapter 11 bankruptcy plan is to restructure the corporation, not dissolve it. That is a Chapter 7 bankruptcy. These entire proceedings are a scam designed by the Sacklers and played out by their puppet attorneys and government employees for greed. Much like Richard Sackler’s deception to all the people around the globe with the mislabeling of Oxycontin and his puppet sales force team. This egregious deception has been and still is all based on his and his family's addiction to money. It’s all fraud.

The Court has the opportunity to pull away from your colleagues, to stop shielding the Sacklers' continued manipulation of the DOJ, FDA, DEA, FBI and other federal agencies. The confirmation must be remanded back to the trial court, and Judge Drain fired.

Thank you, your Honor.

THE COURT: Ma'am, I very much appreciate your having been here today and making your argument, and I read your paperwork. And you have been to hell and back, and I'm grateful to you.

Is Mr. Bass on the phone?

MR. BASS: I'm here.

THE COURT: Mr. Bass is in the courtroom. Mr. Bass, would you mind -- actually, why don't you just use that microphone right there. Okay?

MR. BASS: Is it on?

THE COURT: It's on.

MR. BASS: Okay. Thank you.

THE COURT: It's on, but keep the mask up. Okay?

MR. BASS: Okay. Thank you, your Honor.

Originally, I filed my claim with the United States judicial panel of the multi-district litigation in Ohio.

THE COURT: Yes, before Judge Polster.

MR. BASS: Right. And they didn't see that it was appropriate to the second claim; so they say that I should handle it, or me and the parties should find another means of resolving the issue.

THE COURT: Okay.

MR. BASS: I filed the complaint in the United States District Court of New Jersey, before Judge Brian R. Martinotti.

Now, Judge Martinotti has 44 unethical violations with companies that he had investment in. So I wouldn't want my claims to go back to him.

So I was asking, can I pursue my civil action here against the defendants for the pharmaceutical issues?

THE COURT: Okay. I'm not -- short answer is, I don't know the answer to your question.

MR. BASS: What I'm trying to do is rather resolving the action, my civil action in New Jersey, I want to know if I can resolve it here, can I consolidate it here with the bankruptcy claims that I have?

THE COURT: I guess the short answer is, I would need some more information. I'd need to see your paperwork from New Jersey. I'd have to check it with the parties. They ordinarily weigh in on that sort of thing. That's what usually happens in the bankruptcy court. It's not directly relevant to this appeal, but we'll turn to that and figure it out.

MR. BASS: What would you need me to provide to you?

THE COURT: Why don't you send me a copy of your complaint that you filed in New Jersey.

MR. BASS: How about the complaint that I filed in Ohio as well?

THE COURT: They're probably pretty much the same. Send them up.

MR. BASS: They're basically the same. All righty.

THE COURT: All right. Thank you, sir.

Any representative of the Ecke family on the phone, or in the courtroom? Yes.

Do me a favor, step in there, and do you see that little microphone cover?

MS. ECKE: Yes.

THE COURT: Put that on the microphone and take your mask off. Ma'am, your name is?

MS. ECKE: Maria Ecke.

THE COURT: Maria Ecke, E-c-k-e.

MS. ECKE: Connecticut.

THE COURT: If it's all right, would you mind if the attorney just walked that up to me so I can take a close look at it?

MS. ECKE: Yes, please, and I also have something else.

THE COURT: Okay.

MS. ECKE: I'd like you to meet my beautiful, handsome 3.9 cum son that was rear-ended trying to get to college. His name is David Jonathan Ecke. He was rear-ended at a standstill and then murdered by the Sackler family.

The Sackler releases are unlawful for at least two legal reasons. No. 1, there is no authority under the bankruptcy code for them; and No. 2, the bankruptcy court lacked adjudicatory constitutional authority to enter a final

approval approving them. Either basis requires reversal.

Justice Clarence Thomas said in -- wrote in 2019: In my view, if the court encounters a decision that is demonstrably erroneous, one that is permissible interpretation of the text, the court should correct the error regardless of whether other factors support overruling the precedent.

A considerable portion of the Appellees' 400 pages of briefing is devoted to discussing the benefits of the plan over the hypothetical value-destroying alternatives. The issue on appeal, however, is the legality of the non-consensual Sackler releases. If those releases are held unlawful, the confirmation order must be reversed and the case remanded to the bankruptcy court, notwithstanding any sincere "belief that the creditors would be better off" under the plan. *Northwest Bank Worthington versus Ahlers*, 485 U.S. 197, 207 (1988).

THE COURT: I know it well.

MS. ECKE: *Accord, Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 987 (2017).

Regardless, it is far from clear whether the unfair negotiating leverage that non-consensual releases create for third parties results in better or more efficient settlements over the alternatives. Here, the specter of the bankruptcy court confirming a plan with sweeping non-consensual releases empowered the Sacklers to negotiate from a position of strength.

Unavailable in a true arm's length negotiation, implicit in the Appellees' discussions of the alternative is that global settlement could never be reached without -- absent -- I'm sorry, could never be reached without non-consensual third-party releases. This, too, is far from clear.

Wherein, no State shall make or enforce any law, which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without the due process of law, nor deny that any person within its jurisdiction, the equal protection of the laws.

Our family members are deceased and have been deprived of life, dying every day, or still struggling with their afflictions, as my other son does because he started using drugs because of his brother. He doesn't even have children after 12 years of marriage. Could it be that Purdue Pharma's drugs interfere or interfered with his reproductive system?

The families, through various organizations, have been demanding due process to no avail. The bankruptcy proceedings are prohibiting we, the people, the plaintiffs, our due process, which is guaranteed by the 14th Amendment of the Constitution. "Due process is the legal requirement the State must respect all legal rights that are owed to one person. Due process balances the power of the law of the land and protects

the individual person from it."

When a government harms a person without following the exact course of law, this constitutes a due process violation, which offends the law. "Due process has also been frequently interpreted as limiting laws and legal proceedings so that judges, instead of legislators, may define and guarantee fundamental, fearless justice and liberty."

Everything that goes on during this bankruptcy plan has been up to discretion. The word "discretion" is defined in the Webster Dictionary as: Freedom. Our family members are dead and not free, and those beloved ones, family members that are left behind, full of pain, anguish, grief, and so are not free of mental and physical disease due to trauma inflicted by Purdue and this plan.

Any agreement that would permit a bankruptcy that takes away the plaintiffs' rights of due process and permits a corporation, and people who run these corporations, to absolve themselves from criminal prosecution, while humans continue to die, is against the law of the Constitution.

"Just remember, mom" -- this is a quote from my son -- "Mom, my heart hurts. I think I'm gonna to die soon." I'll never forget this statement until I die.

The Sackler releases are illegal because they purport to override 11 U.S.C. 523(a)(7). Sackler releases are not permitted by the bankruptcy code because non-debtor Sackler

individuals cannot receive a broader discharge from a governmental penalties claims to Purdue's corporate bankruptcy filing that they could, if they filed personal bankruptcy.

Metromedia warned that "a non-debtor release is a device that lends itself to abuse. In form, this is a release, in effect, that it may operate a bankruptcy discharge arranged without filing, without safeguards of the code." 416. F.3d at 142 (emphasis added).

The Sackler releases are an abuse of bankruptcy code. They prefer to extinguish law, enforce claims of civil penalties against the Sacklers who would wow never have these claims extinguished, even if they filed bankruptcy themselves.

THE COURT: Ms. Ecke, you have three more minutes. Okay?

MS. ECKE: Okay.

THE COURT: Thank you.

MS. ECKE: In direct contravention of 11 U.S.C. 523(a)(7), the plan's release of third-party claims is preclusive to those claims and therefore constitutes a final judgment on them, implicating the constitutional limits of *Stern v. Marshall*. I respectfully disagree with this Court's holding and submits the Supreme Court's decision in *Travelers Indemnity Company v. Bailey*, 557 U.S. 157, 209 and Stoll vs. Gottlieb, 305 U.S. 165 (1938), urge a different result.

I am appealing for relief and stay from finding of

fact, conclusions of law and order, confirming the 12th amended joint Chapter 11 plan of reorganization of Purdue Pharma and its affiliated debtors. Defendants' conduct was reckless. Defendants regularly risked the lives of consumers and users of their product, OxyContin, with full knowledge of the dangers of its products.

Defendants made conscious decisions not to redesign, relabel, warn or inform the unsuspecting public. Defendants' reckless conduct, therefore, warrants an award of punitive damages as an appropriate result of the defendants' wrongful rights and omissions in placing defective pain pills into the stream of commerce without adequate warnings of the hazardous nature.

The plaintiffs have suffered, and continue to suffer, severe and permanent physical and emotional injuries. Plaintiffs endured pain and suffering and have suffered economic losses, including significant expenses for medical care and treatment, and will continue to incur these expenses in the future.

Wherefor, plaintiffs respectfully request that the Court enter a judgment in the plaintiffs' favor for compensatory and punitive damages, together with interest, costs herein incurred, my fees and all other and future relief as this Court deems proper.

After speaking with Ellen Isaacs and learning that the

brief -- rebrief deadline was extended until Sunday, November 28th, for her by the debtors, I would expect the same to be extended to me.

I stand with the U.S. Trustee and the non-consenting States, but I do want to show you, I hope you read this, this other article, where its Attorney General Blumenthal, who is now our Senator in Connecticut. He said that, basically, the money that they got from the tobacco industry all went into the general fund and this I am trying to avoid. It just went up in smoke, and I don't find this fair at all. I don't think the State should be getting the majority of the money. What about the injured victims? Thank you, your Honor.

THE COURT: Ms. Ecke, thank you so much. He's a beautiful boy, and I very much appreciate your ardor, and your having taken the time to learn the law, which worked very well.

MS. ECKE: Thank you.

THE COURT: Okay. That's it for the morning session. We need a 45-minute lunch break, after which we will hear from the appellees for whom, as you understand, I had a whole different set of questions. Okay?

I'll see you after lunch.

(Luncheon recess)

(Continued on next page)

Afternoon session

12:45 p.m.

THE COURT: Hi everybody. I hope you got some lunch. It is your grave misfortune that I got a break, because I wrote more questions.

MR. HUEBNER: First of all, for the record, your Honor, and everybody, good afternoon. It's Marshall Huebner of Davis Polk and Wardwell --

THE COURT: Mr. Huebner, you've got to speak up.

MR. HUEBNER: -- for the fiduciary debtors. I thought I was doing well.

Your Honor, we obviously, as you might imagine, haven't really gone home since we got your questions on Friday, and I've woven them into a presentation that, ironically, will actually, I believe, address, I hope, all of the questions that came up this morning, but I actually think they will be more sensible and hopefully more logically received as part of the flow.

THE COURT: It's your nickel. I reserved an hour at the end just, so that I could ask any questions that I hadn't gotten an answer to. So I want you to do what you think you need to do.

MR. HUEBNER: Thank you, your Honor. Hopefully, it will be helpful, so let me start rolling.

Third-party releases have no place in virtually any

Chapter 11 proceeding. And for that reason, courts have put in limiting principles and confine them to rare and unusual cases since 1988 when this circuit was the first one to confront them.

In rare cases, they're not only appropriate and lawful, they're actually indispensable to fairness, equality and the very possibility of reorganization. Indeed, in virtually every mass tort bankruptcy over the last 35 years, including asbestos, Dalkon shield, breast implants and airbags, just as here, the victims negotiated a settlement with alleged tort feasers and owners. The victims overwhelmingly voted to approve the plan. And in every one of those cases, courts approved the settlements and the third-party releases.

The fact that we're still hearing to this date that this was an abuse of the bankruptcy process by the Sacklers is very hard for those of us who have toiled for the victims for almost four years to stomach. Not that there are not others who did as well and have different views, which we respect, but the reality is that 97 percent, 96.87 percent, of all U.S. governmental creditors voted in favor of this plan, and the eight state appellants and federal appellants --

THE COURT: I know all of that. And your saying it again is only going to cause me to say what I said at the end of our meeting in October. If these releases are lawful, then I don't care -- not that I don't care personally -- but it's

not relevant to me that the Sacklers did terrible things, if indeed they did terrible things in the years leading up.

MR. HUEBNER: Understood, your Honor.

THE COURT: And if they are not lawful, then I don't care how much good this plan is going to do. I'm really -- my questions focus on aspects of the legality of the releases. I don't want to hear about the plan, okay, except when I have a question about the plan. I don't want to hear about all the wonderful things it's going do. I know that it was approved by a super majority. That's not helpful.

MR. HUEBNER: Got it, your Honor. Let me do this.

THE COURT: Not helpful.

MR. HUEBNER: Let me jump to the releases themselves because I think it is a great place to start.

It is because they have been misdescribed again and again that they actually raised many of what seemed to be questions. So, let's talk about Suzie Sackler because that's exactly what we did when we were drafting them, and we made sure that lots of claims like the ones your Honor worried about in *Karta* and actually cauterized and took away in *Karta*, which Judge Drain did here, is what happened.

For any party to be subject to a shareholder release, four different things have to happen:

One, they have to have a claim against the debtor. That alone answers one of your primary Suzie hypotheticals. If

there's only a claim against Suzie because she dealt Oxy from her dorm room, it is not released.

Number two, it has to be against a shareholder releasing party. We keep hearing that there are an endless number of releasing parties here. It's actually not true, your Honor. The reason Exhibit 10 has many entities on it is because the original formulation that in fact every attorney general in this room has used for most of their settlements, which is the following ten companies and every one of their respective officers, directors, affiliates, employees, subsidiaries, etc., people didn't trust here, and they wanted to actually see the list of the Sackler companies to know who was being released. Almost the only examples anyone actually uses for things that are categorical, as your Honor already called them on, are things like heirs and unborn children. Of course, there can't be tort claims against unborn children. The Sackler left Purdue in 2018.

Third, your Honor, is what is a released claim. So, not only do you have to have a claim against the debtor, which categorically deals with a huge swathe of things that have never been released, but your claim has to be based on or relating to the debtors and a claim as to which the conduct, omission or liability of any debtor or any estate is the legal cause or otherwise a legally relevant factor. That's language Judge Drain added in *Ten-Seven* (ph.), which is a lot like what

you added in *Karta*. And someone got it half right this morning. It came from *Quigley*, but it came from *Quigley* for a very good reason. Like you in *Karta* and the Second Circuit in *Quigley*, Judge Drain said these things must be tied closely to the estate. What language should I use? So he looked at *Quigley* and *Quigley* looked at the bankruptcy code, and it looked at 524(g)(4)(A)(iii), which uses language a lot like this because when Congress legislated when third parties should be bound to releases --

THE COURT: No, when Congress legislated when asbestos was --

MR. HUEBNER: Your Honor, I was about to say that -- in asbestos cases, this is the language they came up with to make sure that third-party releases were tied to the debtor's conduct.

So, your Honor, the next thing though, because we're not done yet, is that there are six categories of excluded claims because people wanted to make sure that all sorts of things like criminal conduct -- I guess if the Canadian Competition Act is criminal, it's just not released at all, period, end of story, which is a huge part of the police power discussion that we will be having hopefully in a few minutes, and there are lots of other exclusions, like income taxes, claims arising after the affected date. There's a whole separate carveout for Canada my partner will discuss, and then

there's the non-opioid excluded claims, which I think, frankly, was not understood well this morning, so let me make it easy.

Judge Drain said, This is only about opioids. If there is related conduct between the Sackler and the company that does not have to do with opioids, I am not releasing it. Judge Drain, I actually at one point after we got the audio, screamed at the Sackler counsel several times during the hearing and said, "If you don't change these releases the way I am demanding it, I will never confirm this plan. And if I did, I would be reversed on appeal." So what the judge did was he narrowed them again and again and again to bring them well within the heartland of third-party release jurisprudence both in this circuit and others.

Your Honor, as you noted this morning, it all starts with jurisdiction. If the bankruptcy court didn't have the ability to hear this stuff, then we shouldn't be here at all.

Well, your Honor, strangely enough, everyone forgot -- other than I guess the appellees -- to brief and discuss with you today arising in and arising under jurisdiction because you wrote the seminal decisions on some level. 15 months ago in *Dunaway* you talked about the statutory --

THE COURT: I'm sorry. 15 months ago in *Dunaway* I affirmed a preliminary injunction.

MR. HUEBNER: I'm getting there, your Honor.

THE COURT: That's what I did. I didn't write the

seminal decision on anything. I affirmed a preliminary injunction.

MR. HUEBNER: That's right. That's not the decision I'm about to quote. I'm going to get there in a second.

THE COURT: If you're going to quote *Kirwan*, you can forget that too.

MR. HUEBNER: Your Honor, I guess I'm a little bit confused by that in *Kirwan* you specifically ruled: "A confirm reorganization plan that includes" -- and you were referring to third-party releases -- "does not address the merits of the claims being released. Those, of course, are governed by non-bankruptcy law. Rather, it cancels those claims to permit the total reorganization of the debtors' affairs in a manner only available in bankruptcy." Then you went on to find that there was arising in jurisdiction of the debtors plan in *Kirwan* with third party --

THE COURT: Well, I may have been wrong. The Second Circuit affirmed that case on an entirely different ground.

MR. HUEBNER: That's true, your Honor.

THE COURT: And, therefore, everything else I said should be treated as dictum. I don't find it a particularly persuasive case in the context of this case.

MR. HUEBNER: But, your Honor, here is --

THE COURT: Even if I wrote it.

MR. HUEBNER: Here is what I would say: It's

certainly not governing. The Court can reverse itself. You ruled on two grounds. The Second Circuit chose to affirm on one of them, but it is a powerful and directly on point district court decision from this district upholding arising in jurisdiction for exactly this type of plan, which is one that has third-party releases, which, as I will show you in a few minutes, were found as a matter of fact about 15 different ways to be essential and indispensable to the possibility of restructuring these debtors.

Your Honor, let's move on to related to, because we spent a lot of time on that this morning, and I actually think it's hopefully going to be helpful there as well.

Your Honor, *Celotex* said that proceedings related to a bankruptcy include suits between third parties which have an effect on the bankruptcy estate. *SPV*, as your Honor noted, went on to say -- of course, it cited *Celotex* and approved *Celotex* and went on to say: In this circuit, a civil proceeding is related to a Title 11 case if the action's outcome might have any conceivable effect on the bankruptcy estate. The Court didn't say will have. And that's actually the critical issue.

In fact, a Third Circuit in *Pacor v. Higgins* did say will have. It said, I need to find that the debtors will be impacted whichever way the suit comes out. The Second Circuit said, we disagree. We put in place a lighter standard for

jurisdiction. As long as it might, that's good enough.

So now let's talk about applying that here because what the appellants also don't call to your attention at all is on page 342 of *SPV*. After they finish their discussion of contribution and indemnity, they then went on to say there's a separate way that third-party suits instantly trigger related to jurisdiction, and that's a high degree of interconnectedness with the lawsuits against the debtors.

Let's take a step back and think about why that must be so. The test is, would that other lawsuit have any possible effect on the debtors? Think of what the appellants are actually telling you, your Honor. We want thousands of lawsuits against the Sackler alleging that they controlled Purdue, and that Purdue did terrible things, and 500,000 people's lives were maybe snuffed out by Purdue's conduct, but don't worry, none of those lawsuits will affect the debtors in any conceivable way. That's actually what they're telling you.

And as you noted before, they chose not to challenge any of Judge Drain's factual findings, and there are eight of them, eight separate ones that end this discussion because, your Honor, there were 41 witnesses at this trial. 41. 40 were by the plan proponents. One, one was from the appellants, an expert about the Sacklers' projected future wealth. That was the only evidence they brought to trial.

So, what did the evidence actually show?

One: Are the claims against the Sacklers factually interconnected to the claims against Purdue, which under *SPV* is a separate trigger for related to jurisdiction. Right? As you said in *Dunaway*, your Honor: As the Court of Appeals made clear in *SPV*, when deciding whether potentially time-barred claims could have a conceivable effect on the debtor's estate, even unsuccessful claims are those raised in subsequent, untimely or frivolous lawsuits can result in the estate incurring costs, which directly impacts the *res* of the estate.

That's not even the one, because the quote from *SPV* about factual interconnectedness, it's literally this case, and I quote from the Second Circuit on this independent ground: "There's a high degree of interconnectedness between this action" -- the third-party action with UBS -- "and the Madoff bankruptcies. *SPV* can only proceed on these claims if it establishes that the Madoff fraud occurred. But for the automatic stay, it is difficult" -- I left out "... but for the automatic stay, it is difficult to imagine the scenario where *SPV* would not also sue Madoff and BMLIS. Given that *SPV* alleges that UBS aided and abetted the debtors' fraud. The existence of strong interconnections between the third-party action and the bankruptcy has been frequently cited by courts in concluding that the third-party litigation is related to the bankruptcy proceeding."

Your Honor, I'm not going to read you your own long

quote from *Dunaway*, but you literally said, this is what *SPV* teaches, and you said that it was related to jurisdiction over a single lawsuit by a single county against a single Sackler because even though the Sacklers -- even though the debtors were not named as a defendant, as you said, the trial on harms alleged to have been caused in whole or in part by the debtor is related to a bankruptcy, whether or not they're named as a defendant, because a judgment implicating the debtor's conduct could conceivably alter the debtor's rights, liability, options or freedom of action.

And Judge Drain at modified bench ruling at 103, 104, 96-97 and a ton of other places found that the actions against Sackler are inextricably interwoven and would have a massive impact.

But let me give you seven other impacts very quickly because we spent a long time in cul-de-sac on contributions and indemnities to insurance. I don't concede them at all, but I don't need them because there are five others.

The first one is interconnectedness. It wins by itself.

Two: The debtors would end up heavily involved in all of these lawsuits because it's their own conduct that's implicated. As you ruled in *Dunaway*, "There is no way for the appellants to pursue the allegations against Dr. Sackler without implicating Purdue and vice versa." Page 51. Judge

Drain almost Xeroxed it and found that the litigation against shareholder released parties would necessarily "implicate Nuco" -- and this would be terrible -- "could have an impact on the operations of Nuco and Nuco's ability to support abatement." Findings of fact, paragraph 2D3. That's a factual finding about effect on the estate. This company is not that big any more. And if it has to be dragged into hundreds or thousands of lawsuits, the notion that that has no conceivable effect on the company is untenable.

Three: Whether parties win or lose against the Sacklers, your Honor, the outcome is always material to Purdue. If the Sacklers win, and there's no liability, you don't think that's going to effect them paying on our settlement and a legal landscape? If they lose, and they have billions or tens of billions or trillions of judgments, how are they going to pay our settlement?

This is not a hypothetical. In two recent cases, the plaintiffs lost. Our ability to recover on our own claims against the Sacklers if they're litigated poorly elsewhere is another massive risk and effect on the States.

Which is four: A material effect on the debtors' pursuit of their estate claims, their most valuable assets. Your Honor, as you noted a few minutes ago, the debtors are worth one-six, one-eight. Our claims against the Sacklers are potentially worth billions.

THE COURT: Yeah.

MR. HUEBNER: But as Judge Drain found, modified bench ruling at 111, litigation against the Sacklers would "directly affect ... the debtors' ability to pursue the estate's own closely related, indeed, fundamentally overlapping claims against the Sacklers."

SPV shuts the door. It says, "A potential alteration in the liabilities of the estate and a change in the amount available for distribution to other creditors is sufficient to find that litigation among non-debtors is related to the bankruptcy proceeding." 882 F.3d 341. I mean, how anybody could claim that all of these suits proceeding wouldn't possibly affect the debtors is beyond me.

Five: Continued litigation against the Sacklers destroys all of the interlocking intercreditor settlements enshrined in the plan. There are pages of findings on this as well. We spent three years working out the intercreditor deals, which the creditors, including every one of the appellant states, demanded could only go forward if there was a Sacklers settlement. The mediator's report that we cite in our brief, not our report, the mediator's report makes that perfectly clear. And the judge found these settlements would fall away if the Sacklers' settlement did not stand. Bench ruling at 72.

So, your Honor, those are five separate massive

effects on the estate before we get to insurance contribution and indemnity. I'm going to hit those very quickly because actually I think they can be hit quickly.

Insurance: Some states have wrought some laws that say maybe once they win, insurance has to be returned. Okay. And what about the hundreds or thousands or tens of thousands of counts that are not under that exact provision of that exact state's law? And what happens if the states don't win? Or what happens if the claims are partially within coverage and partially not within coverage?

THE COURT: And that's where your -- you're relying on Judge Pooler's, I'm sure, very careful use of the word "might."

MR. HUEBNER: Your Honor, I'm actually not because, in fact, if the Sacklers lose big, and they're only found liable under statutes where they can't get the insurance money permanently, we're never getting it back because now there's a hundred billion dollars of judgments against them or a trillion competing with our $58 million you-need-to-insure-the-insurance proceeds. There's no world in which the insurance is not implicated.

Your Honor, on the insurance point, with all due respect to the appellants, the record is absolutely clear. The debtors have all the relevant policies, and they are in fact claims-made policies, and they're in the record and even prepared a packet of the documents if you need them. We said

this in our footnote in our brief which was unfortunately half quoted to you this morning, which is the reason we didn't implicate the 2005 to 2015 policies is because no claims against DNOs were asserted during that period for opioids, so those are not the policies. *Delconti* paragraph 43, DNO policies of a hundred million dollars, including the relevant periods like 2017 when the claims were made and those policies got triggered. But everyone also keeps leaving out *Delconti* 36 to 40, over a billion dollars of general liability policies that we believe are also relevant. And if you look at JX-0599 and A-4705 of the appendix, you'll see policy language that creates the risk that all Sackler-owned entities could assert claims under those policies. The record evidence is enormously clear and totally uncontroverted.

With respect to indemnity and contribution, your Honor, I will just say this: It's just like insurance: There might be claims; there might not. There might be claims for some things; there might not be claims for other things. The states might win; the states might lose. But that's why the test in the Second Circuit, unlike the Third Circuit, is not that you have to prove that the estate will be impacted but that it might be impacted.

Your Honor, just for the record, people kept filing lawsuits because they just didn't know about the preliminary injunction, and there are, I think, over 860 lawsuits now

already pending that name the Sacklers and related persons. The notion that in not one of the counts in one of those lawsuits brought under the laws of 35 states there's anything reimbursable or insurable is completely untenable.

Your Honor, let's turn to *Metromedia* now. So, we already talked about *Metromedia*, and I'm only going to defend it, I think, in part because what has to be kept in mind is the *Metromedia* is the latest in a long line of unbroken Second Circuit precedents that actually lead the way, in fact, for nation and for Congress on the rare circumstances in which third-party releases are in fact appropriate.

Manville I, of course, was the first case ever before the statute was passed, and on which the statute was based to say we know of no better way to resolve this terrible mass tort than with this creative structure.

So, your Honor, what were the factual findings with respect to the *Metromedia* tests, as it were?

One, these cases present unique, unusual circumstances including because of the inexorable connections between the claims against the debtors and their shareholders.

THE COURT: As I told you this morning, I don't find anything unique about that at all.

MR. HUEBNER: I know. And I have five answers, your Honor, that I hope will encourage you to change your mind.

Number one: We had eleven organized groups and four

rounds of mediation in which the mediators priced the claims, both direct and derivative, against the Sacklers and worked full time for a year guiding us to a fair and value maximizing resolution.

Two: There are thousands of suits against the debtors and almost a thousand against the Sacklers.

THE COURT: That's true in every mass tort case.

MR. HUEBNER: It is, your Honor. And mass tort bankruptcies are very, very rare, and in every one of them ever third-party releases have been the solution, both within and without the mass tort -- within and without the asbestos context.

Your Honor, I think it is universally recognized that if these are not the most complex Chapter 11 cases in history, they're awfully close. I think here, where the lawsuits to this day against the lawsuits against the Sacklers rest on Purdue's conduct, that interconnectivity, it doesn't mean they may not be directly liable, believe you me, but the allegations are not that Suzie sold Oxy out of her dorm room. It's that the Sacklers puppeteered, domineered and controlled Purdue's conduct and is therefore liable for it. That's why this is also interwoven, and why the debtors own reorganization, as I'll talk about in a few minutes, could never succeed. The debtors Judge Drain found will liquidate, and $5 billion going to save lives of the American people will be lost. That's not

contested. We'll get to that in a few minutes in best interest. It is uncontroverted that $5 billion plus plus, that mediation and the participation of almost every AG in the land and the DOJ, and the PI victims and the NAS, and the tribes, and the schools, and the hospitals and the ratepayers all came together to say it was the best available outcome.

With all due respect, your Honor, this is all I've been doing since I graduated law school after clerking. I don't think anyone has ever seen a case anything like this, and, respectfully, it is not typical, and I will just leave it at that.

Two: Your Honor, modified bench ruling at 136, Judge Drain as *Metromedia* listed as one of its considerations found the payment substantial. As you noted, the payment far exceed the debtors' entire net worth and are in the billions.

Three: The creditors themselves will not agree to proceed with a plan that does not contain these releases. You know, people who oppose the plan like to focus on the fact that the Sacklers would not pay unless they were getting releases. I mean, that's just how releases work. What they like to not remind the court is that the lead witnesses under oath for the creditor groups testified in the record that they could not and would not support a plan because they won't get paid. Nobody can allow dissenting states who have $400 billion under penalty of perjury claims asserted against the debtors that under the

they theories they briefed so well for you this morning, they believe the Sacklers are also liable for. They told the Court they're owed $400 billion. Of course no one else is going to proceed if they have the right to do that because the rest of us will never ever get paid.

The UCC's financial advisor testified that this plan is the only viable conclusion for these cases. Your Honor, the factual findings matter. In your four cases, you found that there was reasons why it was helpful, the reorganization debtors couldn't get funding. They needed a secured lenders' lien released. Here you have AGs, creditors committees, victims, debtors telling you, as Judge Drain found as a matter of fact, and I quote: "Without these settlement payments, I find that the plan would unravel, including complex interrelated settlements that depend upon the payments being supplied under the settlement in addition to the non-monetary consideration under it."

That's another important point, your Honor. For the last set of 15 AGs we brought in, money was only part of it. The document repositories --

THE COURT: Can somebody explain why that's such a big deal? I mean, I order documents disclosed in other litigations all the time because it's no big deal. Judges do that. Why is this such an important thing?

MR. HUEBNER: It's a very big deal, your Honor,

because our repository will have 38 million documents.

THE COURT: So what?

MR. HUEBNER: If you'd give me just a second --

THE COURT: And in it weren't for this settlement, it would have what, 37 million documents?

MR. HUEBNER: No, your Honor.

THE COURT: And what's in the documents that makes them so important, and what are they going to be used for?

MR. HUEBNER: What many commentators believe, your Honor, is that in the aftermath of mass tort crises, shining a light on sort of how the company got away with it and what their techniques and approaches were is critical to making sure it doesn't happen.

THE COURT: It's a called Empire of Pain. You can buy it in the Barnes & Noble right now. Quote six. Play it on TV. I've been trying to not look at this stuff. It's all over the place.

MR. HUEBNER: Your Honor, with infinite respect, the facts that will come out when the company and Sackler documents become public -- and please let me finish this because it's a very important differentiation -- many categories of attorney-client privileged documents that have never been in any known repository before ever, except possibly for *Hinsys* (ph), which is a very small, idiosyncratic case where the company was basically seized, all I can say is 15 attorneys

general of major, major states were willing to not do a deal without it, and there was testimony at trial under oath from experts that this was possibly the most important element of the settlement, maybe even more so than the money. That is what the testimony was and what the court found.

Your Honor, number four, as you already noted, we would not be able to satisfy the DOJ's $2 billion forfeiture claim without the settlement.

Five: The States would have to litigate their own claims against the Sacklers competing with all the other claims against the Sacklers. And as the judge found in ruling pages 90-91, on severely reduced budget, with no assurance of administrative insolvency.

Which leads you to six, your Honor. The trial court found as a matter of fact, and I quote: "Under the most realistic scenarios described in the liquidation analysis, there would literally be no recovery by unsecured creditors from the estates in a Chapter 7 liquidation" -- bench ruling at 90 -- which he found would be "the most likely result if the settlements for the shareholder release parties were not approved."

Your Honor, 24 this is again --

THE COURT: Okay. And accepting all of that as true, how does that confer statutory authority on the bankruptcy court to enter those releases?

MR. HUEBNER: That is up next.

Your Honor, the appellants tell you that there is no authority for third-party releases, even though you told them in October *Metromedia* is the governing law in this circuit. Don't tell me that third-party releases are not lawful

THE COURT: I've changed my mind. *Metromedia*, which I've read very, very closely is not. *Manville III* is.

MR. HUEBNER: I'm sorry, I didn't hear.

THE COURT: *Manville III* is the governing -- *Manville III IV* is the governing law in this circuit.

MR. HUEBNER: I'm delighted to talk about both of those cases, and let's just do it right now.

Manville IV is actually very helpful to us. What it shows is that where there is a claim that could not have possibly been conceived of 20 years earlier, of which there was no possible way to give notice because the Chubb in that case would have had to known that the bankruptcy court would have exceeded its subject matter jurisdiction and enter an unlawful injunction and file a claim for that. And 20 years earlier, *Travelers* finds a stipulation that claims like Chubb were not bound. In Chubb, in *Manville IV*, your Honor, the notice was put 20 years earlier into regular first class mail and in newspapers, and the court found that given the nature of the claim, it was sort of like a triple futures claim. I think they used the words it was unfathomable at the time, and no one

ever could have expected the claim would have existed.

Manville III I like even more. I actually turn you to pages 64 to 66 pages of *Manville III* where the court repeated three times, three times: The reason there's no jurisdiction is because the claims against Travelers have no possible effect on the estate and do not involve the conduct of the debtors. They said it again and again, and it's exactly right.

If Suzie Sackler was being sued, she should go jail and be found liable in damages, and it doesn't affect the debtors at all. Those are not the claims that are released. We fit within *Manville III* and *Manville IV* extraordinarily comfortably.

Your Honor, a better way to even hit the source of the authority, because underlying a lot of the appellants' arguments really when you stop for a second is this sort of unspoken notion like that it's because they're illegal. A lot of what they say if you sort of stop for a minute, is really the USD was very clear. Two of her first three points were third-party releases are unlawful. That's just not the law anywhere in this country except for two and a third circuits, and that's because those circuits -- and I'm going to be a little bit cheeky here -- I believe actually violated law in reaching that conclusion, as I will now explain.

Let's talk about whether there is a police power exception and 523 and the source of statutory authority because

in fact there is a lot of law on this, and people seem to have not read either the Bankruptcy Code or the bankruptcy rules of the pages which they probably should have.

Number one, for over 30 years, dozens of courts have approved third-party releases, and no court has ever, ever said that there is a police power or 523 carveout. Not *Manville*, no *Drexel*, not *Exide*, not *Aerodyne*. By the way, your Honor, in *Drexel*, just for the avoidance of doubt, the third-party releases were for securities fraud claims against individual officers --

THE COURT: Yes, I know. I worked on the case.

MR. HUEBNER: And, your Honor, those are non-dischargeable claims under 523. It's an actual natural person and an actual securities fraud claim. The Second Circuit on page 520 -- sorry it's page 93 of the thing I have, but it's numbered different in the actual opinion. Their ruling first was on Rule 23. Then they stopped and said, now we'll turn to their last appeal, which is, were these releases of the officers and directors improper? And, by the way, as we'll talk about a little bit later, because the trusts were unbelievably misdescribed to you, but just as a matter of law, in *Metromedia*, the court noted that the recoveries coming in from the third parties don't need to go to the parties bound by the releases and noted that in *Drexel*, none of the money coming in from the parties getting released went to the parties giving

the releases. So, we are going to talk about the facts in a few minutes, but the notion that as a matter of law, every party giving a release has to get money from the releasing parties is contrary to directly governing Second Circuit precedent.

Number two: When Congress enacted 524(g) and (h) in the asbestos provisions, there was something called public law 111, which was passed by Congress and signed by the President of the United States of America. While it does not appear in 524, it is not codified in Title 11, it is law of the land no less than if it were. Here is what is says: "Nothing in 11 U.S.C. 524(g) and (h) shall be construed to modify, impair or supersede any other authority the court has to issue junctions in connection with an order confirming a plan of reorganization."

THE COURT: Mr. Huebner, I know that it says that. The problem is it doesn't say "and such authority can be found there or somewhere else."

MR. HUEBNER: I know. I'm going to get into that.

THE COURT: That sentence does not -- people were saying there was authority to do this. There was so much authority to do this, I'm not quite sure why they bothered to pass the statute. But what Congress said, if there happens to be any authority out there, don't construe this as impairing it. That's all that sentence says. That's all it says. Judge

Drain made particular findings that particular sections of the Bankruptcy Code conferred on him something that called residual authority which allowed him to do this.

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

THE COURT: And that's what I'm reviewing.

MR. HUEBNER: And in about 90 seconds I'm going to be quoting that phrase from the Supreme Court of the United States of America to show you exactly where it is found.

Your Honor, the 524 public law matters because the Manville injunction was one of several that was ripe before Congress at the time, and Manville injunction before 524 enjoined governmental entities. And 524, which actually could have, if Congress wanted to, carve out police power claims, governmental claims, non-dischargeable claims. They chose not to.

THE COURT: I am sort of less interested in the police power and more interested in the -- at the same time that the *Manville* statute was passed, the *Dalkon* shield case had been going on, which was another mass tort. The *Drexel* case had been going on, which was a very strange case, but it was a securities fraud case.

There were other cases in areas other than asbestos that were out there. And Congress did not choose to -- this is why I'm really struggling with this, Mr. Huebner. You've got to help me. Congress did not choose to do a mass tort

carveout.

MR. HUEBNER: Your Honor, that's exactly right, and they said, don't read our affirmative decision not to do this. You're not allowed to draw an inference because we want to let the law continue to develop.

THE COURT: It didn't say that. It said, if there's any other authority out there, that this isn't meant to abrogate it. They didn't say a thing about letting the law develop in the future. There is not one word about the development of the law. It's a simple, straightforward statement that says nothing shall be construed to modify, impair, or supersede an existing power, an existing power, in case this stupid statute is not necessary, we want to make it really clear that we're not trying to take away anything -- any power the bankruptcy courts have under the Code. I've read it. That's what it says. It doesn't say anything about development.

MR. HUEBNER: Your Honor, the legislative history actually --

THE COURT: I'm not a great believer in legislative history. I'm a great believer in the words used by Congress.

MR. HUEBNER: The, your Honor, let me do this: I don't know how I can do better than the legislative history and the statute.

THE COURT: There's another 524.

MR. HUEBNER: I have four other points that I think will hopefully help the Court.

THE COURT: I am looking for help.

(Continued on next page)

MR. HUEBNER: Here we go. No. 3, your Honor, is the text of 524(g) itself. When Congress did legislate in the area of third-party releases, it did not carve out governmental claims, police power claims or non-dischargeable claims. It was right in front of them, and if they wanted to narrow the Manville and Dalkon Shield injunctions they knew about, because they liked the public policy that the Appellants are trying to suggest to you should be right, they would have signed it into the law and they chose not to.

Four. The *United States v. Energy Resources*, your Honor, the Supreme Court confirmed that 1123(b)(6), when combined with 105(a), provides broad "residual authority consistent with traditional notions of bankruptcy courts as courts of equity for provisions and plans that facilitate the restructuring of the debtor-creditor relationship."

What the Supreme Court approved in *Energy Resources*, your Honor, was actually pretty radical. The debtor owed a whole bunch of tax claims, and the plan said the bankruptcy judge plan/order gets to dictate which ones the IRS marks as paid, and the IRS said: No way. Show me a specific code provision that allows you to direct me to mark as paid claims that have 6672 responsible persons and not ones that don't. And the Supreme Court said: You lose.

If it's necessary for the reorganization, then the residual authority in the bankruptcy system, consistent with

the long-standing notions of equities is enough, because 1123 says that a court can include any provision not inconsistent with applicable law in the plan. And 1123(a)(5) says that a plan must provide adequate means for its implementation.

And, your Honor, respectfully, you ruled this already at 592 B.R. 489, at page 511, where, in Tier 1, you held that authority for third-party releases and plans is, quote, derived from bankruptcy law, quote, flows from a federal statutory scheme and is, as used in that case, accused the Appellants of ignoring, quote, subject to 11 U.S.C. 1129(a)(1), 1123(b)(5) and (6), 105, and 524(e).

And your Honor, a ton of circuit courts have ruled this also. Airadigm said the exact same thing as *United States v. Energy Resources*, but the necessary or appropriate power, coupled with 1123(b)(6), leads to the following ruling by a circuit court: "We hold that this residual authority permits the bankruptcy court to release third-party claims from liability to participating creditors if the release is appropriate and not inconsistent with any provision of the code," 519 F.3d at 657. Which is why it's time to zero in on whether these releases are inconsistent with any provision of the code, which is the actual test.

THE COURT: Okay. Can you explain something else to me, which is, you refer -- I'm going back to PL 111 and the legislative history. Not only did Congress, in section G --

and I'm going to limit this to Dalkon Shield and asbestos because those were the two hot bankruptcy cases of the '80s that --

MR. HUEBNER: Yup.

THE COURT: -- that did a lot to shape modern bankruptcy law. Okay? And asbestos ended up with its own special section in the code, and the contraceptive device for women did not. Okay?

And in addition to subsection (g), there is subsection (h) of 524, which applies to existing injunctions. Okay? So here's something in the statute. It's not in the legislative history. In the statute, it says this applies to existing injunctions, and it's quite clear from its terms, that it only applies to existing injunctions in asbestos cases. It doesn't apply to existing injunctions in any other kind of case.

MR. HUEBNER: Your Honor, I'm embarrassed I forgot to mention it, because you're right, it's so helpful. The fact of 524(h) --

THE COURT: I love talking to you, Mr. Huebner. It's so much fun.

MR. HUEBNER: Talk to my family.

Your Honor, the reason it's so awesome is because you're exactly right, 524(h) is the provision that says, because these rules may be a little different than the existing asbestos injunctions, nothing in (g) invalidates any existing

asbestos injunction.

Public Law 111 is the exact same rule of law for non-asbestos injunctions. So they did it both ways to make sure that no one should say 524(g) casts any doubt.

Your Honor, something else you heard this morning that when I think you read the cases, you'll see is just wrong. Is that --

THE COURT: Not when I read the cases. I've been reading them for the last two months.

MR. HUEBNER: -- the Second Circuit has required a second source of authority in the statute. It's not just right. In Manville I, the Appellants told you they relied on 363(f). Not true. 837 F.3d at 93 to 94, the Court ruled that the injunction fell "within the bankruptcy court's equitable powers at" under section 105(a) "should be construed liberally."

THE COURT: But the injunction in Manville I involved property that was incontrovertibly part of the debtor's estate. The injunction applied to the insurance policies that covered Manville's conduct, and the release went to the insurers in exchange for their giving Manville all of its property.

MR. HUEBNER: Your Honor --

THE COURT: There is nothing similar going on here. Nothing similar.

MR. HUEBNER: There are -- I would say two things to

you. No. 1, the whole issue in Manville I was that lots of other people said that they had property rights and access rights in the insurance policies also. They wanted to go after the insurers, just like in our case people want to go after the Sacklers, and the court said, no. I will allow --

THE COURT: No, because the property belongs to Manville. The Sackler's property, unless you choose to pursue your fraudulent conveyance claims, doesn't belong to Purdue.

MR. HUEBNER: Your Honor, I just -- I just -- that's just not --

THE COURT: I mean, I think there's a big difference between the nature of the injunction that was entered in Manville I, I appreciate the principle, but the nature of what the court was being asked to do was just radically different than what the Court is being asked to do here.

MR. HUEBNER: I would say it like this, because I also am aware that I have limited time. I think we could have a very fascinating conversation about that topic, but I'm going to just move on from it, because all I have to say is this. Every third-party release case has different facts, and in most of them, like Drexel, which was purely about wanting to sue officers and directors for non-dischargeable securities law fraud claims, or Karta or Care One, the facts are always different.

But the test is always the same, which is, is it

essential, important, indispensable to restructuring? If all it does is bring money into the estate, you lose because that's never enough, and that's one of the many limiting principles. There is no bootstrapping because it's not just that we wanted to pay creditors X cents on the dollar and not Y cents, and we, like, sued someone and got some money, it's as I went through a half an hour before, these estates cannot reorganize and there is no bankruptcy solution that is viable, as per the sworn, uncontroverted testimony and factual findings of the trial court without this settlement for the eight reasons that I laid out.

Five, your Honor, moving on from *United States v. Energy Resources* and *Airadigm*, I know it because the DOJ told me it is so. Earlier this year, in Exide, they told the court, on a brief that had the Deputy Assistant Attorney General of the United States right there, third-party releases enjoining state claims for hazardous waste to protect their citizens, are lawful and appropriate. In fact, they're so good, you should deny them the stay and moot their appeal and not even let them have their appeal, unlike what we're doing, which is being here on appeal.

And guess what else, your Honor? Every single one of the eight Appellant States was a creditor on the docket in Exide. So I guess they're limiting principal is that when they like the business deal, involuntary third-party releases

against States are lawful and okay, but when, as you said before, you wished the business deal were different, suddenly they're unconstitutional and there's no source of authority? The DOJ's briefs in that case are really pretty good.

No. 6, your Honor. Let's keep going with the statute.

THE COURT: I have do have questions about why the U.S. Trustee is pursuing this so vigorously in this particular case; though, U.S. Trustee insists that it's taken this position in the past.

MR. HUEBNER: And they've taken inconsistent positions in this case as well. We'll just leave it at that.

Your Honor, 362(b)(4) is my next proof test. I can't believe they cited it. 362(b)(4) says that the automatic stay doesn't apply to police power.

THE COURT: I know that. It's a weak argument.

MR. HUEBNER: But, no, it's actually a great argument for us.

THE COURT: That's right. Their weak arguments are great arguments for you.

MR. HUEBNER: Because 105 is beyond black letter. It's just that the injunction is not automatic, but is there for the asking and the legislative history is the bankruptcy court has ample powers to enjoin these actions not covered by the automatic stay. HR Rep. 95595 at 342 (1977). Congress told us --

THE COURT: I know that. I affirmed one.

MR. HUEBNER: It's just automatic.

Now, let's go to 523, because why don't we start at the beginning of 523, which all the Appellants skipped over and is a complete answer. "A discharge under 727, 1141, 1192, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from the following:"

Congress said exactly where 523 limitations apply. It listed them, one, two, three, four, five, six. Guess what's not there, 524, 105, 1123(a)(5), 1123(b)(6). Congress said when the exceptions to discharge apply and when they don't, and this is a "when they don't" situation, which is why --

THE COURT: Wait. For example, 1123 is not a provision that grants a discharge. 1123, if I recall correctly, is a provision that says in order to be confirmable, a plan must have these qualities and may have those qualities. And it doesn't say a word about discharge.

MR. HUEBNER: Your Honor --

THE COURT: I'll bet, and you know the bankruptcy code and I don't, but I'll bet if I went to 727 to 1141, to 1228(a) or to 1328, that they would all be provisions pursuant to which discharges are granted.

MR. HUEBNER: And, your Honor, that's what I was exactly about to say, which is, there are other ways, and 524(g) is the most perfect example, where parties get enjoined

from suing other parties for very specific, tailored things.

Congress, if they were right, absolutely could have said, should have said, and needed to have said: And 105 injunctions and 524 injunctions and residual power injunctions.

They're asking you to completely rewrite 523 to then say that their hypothetical new 523, that includes three new cross-references, is being violated. What case do they have for that? None. What anything did they have?

No court in the history of this country has ever even suggested that a 523 discharge regime has any conceivable relevance to third-party releases under a plan. And let me explain to you why, because there are two reasons. I don't need reasons, because I have a code, but I have two reasons. I think they're really pretty good.

No. 1, in Manville I -- one of the other sort of "through the looking glass" things about this appeal, is that again and again and again I'm up here arguing things that were argued to the Second Circuit and expressly rejected and, yet, here we are again.

In Manville I, the Appellants said: Dear Second Circuit, this is a discharge of people who didn't go through bankruptcy. This is illegal. They literally called it a *de facto* discharge of non-debtor parties, not entitled to the protection of Chapter 11, 837 F.2d 91. They lost. The Second Circuit's response, and I quote: "Before MacArthur's reasoning

is that the injunctive orders do not offer the umbrella protection of a discharge in bankruptcy, 837 F.2d at 91."

And Airadigm and a ton of other cases say that also. 523 is limited to discharges because there's nothing broader than a discharge. And Judge Drain ruled on this at length.

And then there's the other reason, your Honor, if you want just pure public policy from an actual bankruptcy lawyer. 523 has 19 exceptions to discharge, not just these. They're all over the place for lots of different things, and it's a massive shift in policy to say that somehow they're all incorporated, which Congress certainly never hinted at, and no court has ever hinted at before. This is all kind of made up, frankly, out of whole cloth.

But let me tell you what would happen in this case, your Honor, to show you why this would be terrible public policy, as well as outrageously outside of the ambit of the statute. What it would mean in this case is the following:

One. Natural persons Sacklers have 19 exceptions to their third-party releases. Corporate Sacklers maybe have two exceptions to discharge, maybe no exceptions to discharge -- sorry, excuse me. I terribly misspoke. Natural person Sacklers have 19 separate carve-outs from the third-party releases under the plan. Corporate entities have maybe one or two or maybe zero carve-outs from their third-party releases.

And what about the Sackler trusts, your Honor, where

the evidence at trial showed most of the money was and are not bankruptcy eligible? So they could never get a discharge because they actually get resolved under the law of their home jurisdictions. What do I do there?

So against the same pool of defendants, for the same conduct, getting the same releases, I now have three completely different structures, all because the States are telling you, with no support, that 523 requires that plan releases of third parties be limited, with no authority. It makes no sense, and it is entirely extra-statutory.

Finally, your Honor, is 1452. In other words, they try to show you things that they think are helpful to them and none of them are.

THE COURT: Of course they do.

MR. HUEBNER: Well, I know, but the punchline is that I respectfully don't think they're right. Every one of these things helps us. 1452 is only about removal and adjudication, and here, too, you ruled directly on point, 592 B.R. 489 at 509. Restructured debtor/creditor relations "must be distinguished from adjudication" particularly in the third-party release context.

And as you held in Dunaway, more recently, it is not a ruling on the merits and runs on entirely different jurisdictional footing. There is the power to give third-party releases for actions that courts could not hear. 524(g) is the

best evidence on the planet for that.

There's no limitation in 524(g) for any of these things. They're just trying to legislate in front of you and ask you to completely rewrite the bankruptcy code to add a ton of things that are just not there at all.

Your Honor, let me hit best interests quickly because I just -- I find this objection also quite flummoxing. Let's just run the tape back for a minute. Best interest is a factual question about whether a creditor is going to get more under X or Y.

The appellants brought no facts, no witnesses, no testimony. Believe it or not, your Honor, they didn't even claim in their legal pleadings that they would actually do better in the liquidation. They didn't even assert it without support. They merely said: Did the debtor meet its burden? So let's rip through that pretty quickly.

There are three reasons they lose on 1129(a)(7): No. 1 is the pure legal question. Judge Drain interpreted the statute, going word by word and applying statutory construction, canons that I think are correct, that third-party release claims don't get counted at all in a side-by-side of liquidation versus not. If you agree with this interpretation of the statute, it's over.

Two. Even if you think you got the statute wrong, and you do count potential recoveries by third parties against

third parties, the -- it's not governing -- the relevant case law quickly, in Ditech that they love so much, tells you that they only get to count as value in liquidation actual recoveries that are estimable and not speculative.

For very good reason, because people have integrity, no Appellant has ever even alleged in a pleading: I know what I would actually recover from the Sacklers, and it's more than I would get under this plan, because that would be ridiculous.

There are going to be hundreds of trillions of dollars asserted against the Sacklers if this all melts down, and the estates, obviously, have all the estate claims, which are potentially the best claims of all. The mere fact that there are potential recoveries against the Sacklers are speculative and inestimable means they lose.

And then there's three. With all due respect to the State of Connecticut, which I love and is where I met my wife, Judge Drain made like seven factual findings detailed about why they lose, even if every way they would like to read the statute is correct. 38 pages, in fact, of factual findings. To say that there was none and no evidence boggles the mind.

One, it is uncontested that in a liquidation scenario, creditors recover billions of dollars left from the estates under the plan, over $5 billion disappears. Bench ruling at 18, and "Under the most realistic scenario described in the liquidation analysis, there would literally be no recovery by

unsecured creditors from the estates in Chapter 7." That's just --

THE COURT: I know. I know what he found. I'm aware of what he found. You're right, he made a lot of factual findings on this subject.

MR. HUEBNER: Okay.

THE COURT: So let's --

MR. HUEBNER: So, your Honor, I'm going to basically wrap up, then, because I think I'm mostly going to get peppered by your questions later, and there are, obviously, a lot of appellees and actual victims who are the 99.8 percent, not the .2 percent that are the Appellants.

But, you know, again, if it's relevant later, I have a slew of other factual findings all based on evidence.

THE COURT: I don't need them.

MR. HUEBNER: Okay, your Honor. Let me just say two very quick things about due process because I think this will be helpful. The United States of America, apparently, didn't check the Federal Rules of Bankruptcy Procedure because, in fact, there are two rules that are directly on point to what process is due when you are seeking plan releases, and we followed it to the T.

Rule 7001(7) states that an adversary proceeding is needed when an injunction is sought, other than an injunction under a plan which, under the rules affirmed by the Supreme

Court, do not, obviously, implicate.

No. 2 is 3001(7)(f), which says that if a plan provides for an injunction, even if it is going to enjoin a non-creditor, a total stranger to the bankruptcy, the court shall consider providing 28 days' notice and, to the extent feasible, a copy of the plan and disclosure statement.

The notion that we had to serve a summons and complaint on everyone in America when we provided the most extraordinary notice in the history of Chapter 11, with 87 percent of Americans getting five separate notices in the whole country, hundreds of millions of people, as well as obviously the million other factual findings I don't have time for, that are all in the record, no one contested this.

And the U.S. Trustee, by the way, read their own opening brief at page 10. They never contested the adequacy of notice at the right time, which was the disclosure statement, where the Court heard facts and arguments from people and decided whether the notice that was being given was due and appropriate, and no one said boo.

To show up now, for the first time, on appeal with a bevy of due process arguments, which again are really just arguments that third parties should never be -- third-party releases should never be lawful, right, because if I have to serve a summons and complaint on everyone in the whole country, and they each get to litigate the underlying merits of their

claim, no one misses what they're really saying. Third-party releases are unlawful because you always get to litigate the merits of your claim, and you can never be bound to a third-party release. That's just another way of saying, we think seven circuits are wrong, and we're right. That's not a due process challenge at all.

So, your Honor, let me --

THE COURT: I know these are like little knits in the great overall scheme of your amazing argument, but can you explain to me what Newco is going to do, and who is going to do it, and for how long it's going to do it and --

MR. HUEBNER: Yes. I would love to, in fact, because if someone can just remind me what question that is. Here it is. I found it.

Okay. Your Honor, you asked two related questions, and I have answers to both. One question was: Where's the money going? Can someone just tell me --

THE COURT: Where is the money going? First of all, how much money is there?

MR. HUEBNER: All right. So, your Honor, we have a chart, which we finished at around 4:00 in the morning, that is like 99, 98 percent, something like that, filled with record cites that where every single number is from. There are a couple of numbers in the later years that are the debtor's projections. They're very, very minor.

All the real money, probably well over 95 percent of it, all has record citations. It walks through how much each group is getting each year. I'm assuming that is what you said, can someone tell me --

THE COURT: Well, I wanted to start with, what's in the pot? Purdue has a billion six. The Sacklers are putting in 4.35. The government is putting in 1.75, except I think that's part of the 4.37.

MR. HUEBNER: Yes, so let me --

THE COURT: I'd like to know how big the pot is. Okay?

MR. HUEBNER: Let me build up from the bottom because it's probably easier. So right now, the debtors have about $1.1 billion of cash on hand. They also have an entire business that, as I will describe in a few minutes --

THE COURT: I'm trying to find out what the business is.

MR. HUEBNER: So why don't I do that first?

THE COURT: I do not consider -- Johns Manville has a business. It had a business before it went bankrupt. It has a business after it went bankrupt. The same business. It makes building supplies. It used to make them with asbestos. Now it doesn't make them with asbestos. But Johns Manville is still a building supply company.

Purdue, is it going to be, in a country that

desperately needs pharmaceutical manufacturing, a viable manufacturing company going forward? Is it going to be a public benefit company that's doing abatement programs?

MR. HUEBNER: Your Honor, let me --

THE COURT: Is it a social service agency, or is it a business?

MR. HUEBNER: I got it. I got it. I'm going to do it first. So the good news is, it's a lot of those things, and I think they're all quite positive. And that is what the creditors, including Frank Levy AGs, on the whole, and other groups, insisted on.

So here's what's happening. Purdue itself, if the plan goes through, will plead guilty to felonies and will never emerge from Chapter 11.

THE COURT: It already pleaded guilty.

MR. HUEBNER: Well, we'll have the sentencing accepted by the New Jersey District Court and adjudicated in whatever way that works.

All of Purdue's assets, which include not only its pharmaceutical businesses that are the subject of these proceedings, but Purdue's other subsidiaries, for example, your Honor, make things like Betadine and Senokot and Colace and magnesium products, lots of things you would see in your drug store or in the hospital that are, to my knowledge, not remotely controversial and have no things tied to them.

So all of Purdue's assets, which is about 22 companies, will be transferred to a newly created pharmaceutical company called KNOA, K-N-O-A, Pharma. KNOA will largely operate as a public benefit company, but let me explain what that means because that's where the details are.

They will continue to be a pharmaceutical company, and it will sell its products with extraordinary care and extraordinary oversight. There are extremely detailed operating injunctions agreed to by the DOJ and the States and the UCC and the debtors, that will bind the new company.

There will be the monitor that has been in place since almost the beginning of these cases, will continue to ensure that this is, hopefully, the cleanest, safest, model of a pharmaceutical company and manufacturer in the country.

It will continue to sell all of its medical products. It also has a robust pipeline of developing therapies in both oncology and non-opioid matters.

It's going to use its money to do several different things, your Honor. No. 1, it's going to run the business.

THE COURT: All of those things are going to continue to happen. It's not going to layoff anybody. It's not going to close down any plants. It's not going to stop developing pharmaceuticals, and we are still going to be able to have Betadine when we get surgery.

MR. HUEBNER: Absolutely, your Honor. And to be

clear, this is important as a matter of public policy, the entire sales force, which was about three times bigger than the company is now, was laid off in 2018. Purdue has not promoted opioids for years. It is now a much smaller company than it was and one under extraordinary oversight and scrutiny.

It goes without saying that the Sacklers have had absolutely no involvement for almost three years now and will have absolutely no involvement of any kind. The directors of KNOA were selected essentially by a group of attorneys general as people of extraordinary quality and reputation and skills.

And the company is going to then do several things. One, it will fund itself and keep being a critical player, hopefully, in the U.S. supply chain for pharmaceuticals. And your Honor is quite right about the seriousness of manufacturing capacity and constraints and the chain of healthcare. FDA and HHS were actually very involved in various aspects of that, in part, to ensure continuity of care because, in fact, the debtors collectively make many products.

Second, it will continue to use its scientists and its know-how to work on, hopefully, ground-breaking opioid-abatement medications, things that go far beyond the medications currently available in the market and ultimately distribute those at or below cost to further, you know --

THE COURT: Distribute them to whom?

MR. HUEBNER: -- the best it can.

And the third thing, your Honor, is --

THE COURT: Distribute them to whom?

MR. HUEBNER: I'm sorry, your Honor. I can't hear you.

THE COURT: To whom will they distribute them?

MR. HUEBNER: So that's going to be decided by the post-emergence company. In other words, there will be a new slate of both fiduciaries up on top of the board of directors and the board of directors itself. Purdue itself will be transferred to KNOA. KNOA, ultimately, will be owned by the National Opioid Abatement Trust, and by tribal trusts, who I think has a slice of ownership as well.

And the third thing it will do is it will upstream money to those trusts. You know, I think we were all very profoundly affected by the pro se presentations, and I want to say something loud and clear so that it's not lost on anybody. I stood at the podium on the first day of these cases, and I said: We will not allow this case to be another tobacco. The debtors will never support a plan where money goes into the general treasuries, for whatever statutory purposes general treasuries may or may not be used.

This plan, which is extraordinary, another thing -- I'm always told you can't modify the word unique -- incredibly unprecedentedly unique, is that with the exception of the actual personal injury victims, adult and pediatric, every

creditor group in the entire case has agreed, and the plan provides, that one hundred percent of the net funds received goes exclusively to opioid abatement. And, your Honor, that's such a critical point here, which is essentially the whole company -- no, I'm not on my time anymore.

THE COURT: You answered that question. Thank you.

MR. HUEBNER: Your Honor, that's what the reorganized debtors are going to do, and the hope is that it will save many, many lives and improve many, many more, and all of that will be lost if the plan fails.

THE COURT: Understood. Now, can we --

MR. HUEBNER: Now, your Honor, now is the time, if you're still interested, in where is the actual near-term money going?

THE COURT: Yes, where is the money coming from?

MR. HUEBNER: Okay. So I have both where its coming from and where its going to, your Honor. Where it's coming from is as follows. There's a billion-one of cash currently on the balance sheet. On the effective date of the plan, a bunch of that goes out to the various creditor trusts immediately to start filling them and paying claims.

The Sacklers actually have to make a material payment on the effective date, which is part of the cash that goes into the creditor trusts. So as somebody represents to you before, I don't know where they got that notion from, you know, all of

these trusts essentially get filled partially with the company's excess liquidity, but very largely, frankly, from the incoming funds from the Sacklers that are paid on the schedule that are exactly lined up to the payment obligations owed to creditors and negotiated for under the plan.

And so each year there is money coming in from the Sacklers that ranges from 300 million in one year, at the low end, to a billion dollars in one year at the high end. And the money goes out to NOAT, to the tribal trust, to the hospital trust, the third-party payer trust, the Truth Initiative, the NAS monitoring trust, the PI trust and the PI's future trust.

On the effective date, your Honor, we also have to pay the $225 million DOJ forfeiture payment because, as your Honor noted before, another thing about this case that is extraordinary, leaving aside this appeal which is very deeply painful to many of us, is that the DOJ settlement agreement is an extraordinary example of project do the right thing.

What the DOJ did in that settlement agreement was they said, we could sweep billions of dollars off the top and just leave with it, but we believe in the mission of abatement, and we believe that the State and local governments are best able to help the American people. So as long as two conditions are met, we'll take only 225.

What are the two conditions? One, State and local governments get $1.775 billion for abatement. It has to be

used for abatement or there's no credit; and, two, that the reorganized debtor operate as a public benefit company or entity with a similar mission.

What the DOJ required, which is what the States wanted and the other creditors all agreed to, is that the overwhelming majority of the money and the value and the assets and the know-how has to go out to abatement to save lives except for --

THE COURT: Okay.

MR. HUEBNER: -- the personal injury amounts that were negotiated by the mediators with no involvement by the debtors. That was done in Phase I, where the creditors went alone into a room and figured out how to split up who got what, and that lead to approximately $1.4 billion going to non-governmental creditors and the rest to governmental creditors.

THE COURT: Okay.

MR. HUEBNER: Your Honor, if the chart would be helpful, we certainly could hand it up because it does show you year by year what's coming up --

THE COURT: I would actually like to see it.

MR. HUEBNER: If it's not, we don't have to. I think that we have a whole bunch of copies of this. Just to be clear, almost everything has cites in the record.

THE COURT: Okay.

MR. HUEBNER: It's a huge, huge, huge percentage of the funds listed.

THE COURT: Okay.

MR. HUEBNER: It's being brought in now, your Honor.

Your Honor, are there any other questions for me, or do you want to save the rest for later this afternoon?

THE COURT: Yes, you've more than done your share of proceeding here. Thank you very much.

MR. HUEBNER: I've never heard that before.

THE COURT: It really is fun to joust with you.

MR. HUEBNER: Thank you, your Honor.

THE COURT: I enjoy it.

MR. HUEBNER: Your Honor, I don't know if I should disclose this or not, but I was once in your house.

THE COURT: You were?

MR. HUEBNER: Just for the record, in 1992, my wife, Dina Gerber Huebner, was an associate down the hall from you at Paul, Weiss, and you very graciously invited her --

THE COURT: She came to the Christmas party?

MR. HUEBNER: -- to the Christmas party, and it was very fun.

THE COURT: It was a nice house.

Okay. I'm sorry I took so long with him, but it was helpful. Who's up next?

MR. HURLEY: Good afternoon, your Honor. Mitch Hurley from Akin Gump for the unsecured creditors committee. Can you hear me?

THE COURT: Yes, but you want to stick that microphone up a little higher. You are tall.

MR. HURLEY: Is that better?

THE COURT: Much better.

MR. HURLEY: Thank you, your Honor. I have limited time, and I'm going to keep my presentation very limited. What I want to focus on is, from a creditor perspective, why it is we believe that the standards articulated under Metromedia and other cases have been satisfied for entry of the injunction in this case.

And I want to note, as a preliminary matter, your Honor, the Appellants pointed out correctly that the Second Circuit observed that third-party releases of these kind had the potential for abuse. But as your Honor quickly pointed out in response, that doesn't mean they're not permitted. It's a warning, and it's a direction to courts that are considering third-party releases, to ensure that they make adequate findings that their releases are justified under the circumstances.

THE COURT: And suppose, just suppose -- I mean, you're not suggesting that Metromedia said if you check off these five factors but you think the release is abusive, it should be approved? I don't think Judge Jacobs was saying an abusive release should be approved.

MR. HURLEY: No. I think what it was saying is that

in order ensure that abusive releases aren't approved, the court considering a release needs to make specific findings that, quote, truly unusual circumstances exist that render the releases important to the plan of reorganization.

THE COURT: What if truly unusual circumstances exist that render them abusive?

MR. HURLEY: That's exactly what I want to address now, your Honor, from a creditor perspective. I would note, though, before I get to that is that, at least from our point of view, that inquiry and the factual findings that we believe Metromedia clearly requires, is exactly what Judge Drain sought to do in the eight-day trial with 41 witnesses and page after page of factual findings.

Unusual circumstances, we think, abound here, your Honor. First and foremost, the cases arise out of the opioid crisis, the worst man-made health epidemic in American history. Unusually for a case of this size, there was no funded debt. There was no bank debt. There were no bonds.

The overwhelming majority in number and value of claims in this case were made by plaintiffs and potential plaintiffs with claims arising out of the opioid crisis, and that created really unique opportunities and challenges for everybody involved in the cases.

The opportunity was that Purdue had and has real value, including as a going concern, including the cash on its

balance sheet, and including its most valuable asset, which are the claims against the Sacklers. And the opportunity was to gather that value together and maximize it and distribute it equitably among those different groups of plaintiff creditors through the course of the bankruptcy.

The enormous challenge and risk that I think we all recognized from the beginning of these cases, is that instead this would turn into a litigation free-for-all, where large groups of creditors that had very different views of their respective entitlements to the value of Purdue, would wind up fighting each other in estimation or liquidation proceedings in the bankruptcy court for years.

The cost of these cases, as your Honor is well aware, are staggering, and there was a real risk that if that happened, if the creditors could not come together to solve these problems themselves, that the value of Purdue was going to be wasted and go to lawyers instead of where it needs to go, into communities and to help victims.

This is also an unusual case in that creditors knew from the outset that if these problems were going to be solved, they had to do it. This was not, and we said in our papers, your Honor, this was a true creditors' plans. And the reason we said that, or one of the reasons we said that, this isn't a case where the debtors come up with a plan with maybe one ally and try to push it through with all of their other creditor

body.

From the very beginning of these cases, the creditors were involved in driving the cases, driving the negotiation and crafting the plan. Judge Drain made a specific finding at page 23 of his decision to that effect. He said that these cases -- and he was, of course, there, you know, front row seat for two years -- were driven as much, if not more, by the unsecured creditors committee and the other creditor groups than by the debtors.

One of the first things that the creditors determined to do, your Honor, was to try to mediate allocation, to try to determine how to arrange so that these warring groups of creditors could reach agreement on how to split up the value of Purdue, instead of going to war over it for, as I said, years and blow through hundreds of millions of dollars.

They wound up getting two of the most well-known and skilled mediators in the country, your Honor, as you know. Just as a flavor, even though those were the candidates, it still took weeks and weeks of negotiating just to agree on who the mediators were going to be. You can't really exaggerate the level of disagreement there was among the different groups of creditors at the beginning of these cases.

I'm going to give you just a flavor. I only have a few minutes; so I can't give you anything close to all of it, but I want to give you a flavor.

So you had the DOJ. You had the States, and there were two groups of States, consenting States and non-consenting States. You had political subdivisions of the States. You had Native American tribes. You had an, on a private side, personal injury victims, tens of thousands of them, both NAS and non-NAS. You had hospitals. You had insurance companies and other third-party payers. You had premium payers, emergency room physicians, as well, just to name some of the major groups of creditors that were involved on a day-to-day basis in the case.

They disagreed with each other about virtually everything. Let me start with, for example, the public side, mostly the States and the other government entities, believed that because in some cases they were sovereigns, in all cases they were governments of one kind or another, that it made sense that they should just get all of the value of Purdue, and it should be up to them how to distribute that money to their communities and to their citizens.

The privates, on the other hand, could point to studies that indicated that the overwhelming majority of harm caused by the opioid crisis actually fell on the shoulders of private personal injury victims and other private plaintiffs, and argued that they should be entitled to in excess of at least 65 percent of the value or more.

The DOJ, this has already been flagged before,

believed that it had super-priority claims that should come off the top. And there were enormous disputes within the public side and within the private side, but again, I have limited time; so I will stop there.

The mediation, ultimately, was hard fought, and we got to a solution, but it was not a foregone conclusion. All of the parties made compromises in that mediation, your Honor, that I can guarantee you at the start of these cases, they did not believe they would have made.

For example, and Mr. Huebner just touched on this, the States agreed, I think for the first time in history, that every penny that they get from Purdue is going to be used for abatement. It's not going to buy any golf courses. It's not going to be us used for public purposes, all of the things that happened with tobacco, that is not going to happen here because the States agreed to it. That was a big part of the fight.

The privates, with exception of the personal injury victims, made the same agreement, all the money that's coming in is going to abatement. A big compromise that the private side made was, ultimately, it's going to take a much smaller share of the Purdue pie than it believes it's entitled to. Instead of 65 or 70 percent, it's going to get something like 20 or 25 percent of the value. That value is -- they agreed to that, in part, because they are getting relative certainty, fixed payments on a fixed schedule.

Now, the agreements that came together, and there were many other agreements that were related to the ones that I've identified so far that are interrelated, interlocking with one another. The agreements all could not have happened without the Sackler settlement and the Sackler contribution.

So first of all, the private side of things, the public, of course, have express provisions that says they're conditioned on the Sackler contribution. The States have said, and they didn't make any secret about it at all, they never would have reached those agreements if it weren't for the money coming in from the Sacklers.

And the evidence below, again, indicated, and it was unrebutted, that even if the States had been willing to take the deals without the Sackler money, that Purdue would be unlikely to have been able to shoulder the responsibilities that it had taken on to make the private payments on the schedule required and to make the disbursements to the States, the $1.75 billion in abatement disbursements, that were required to get the credit from the DOJ. And if you don't have that credit, then the DOJ gets $1.75 billion off the top of a company that, as we just talked about, is worth maybe $1.8 billion.

So the settlement was absolutely critical to the deals that were critical to ensuring that the company could reorganize, and there's no question that the release was

necessary to get to that settlement.

THE COURT: No doubt.

MR. HURLEY: So the Sacklers have said, and I think it's self-evident, that they weren't going to pay $4 million without a release that provided them a release from most Purdue-related civil liability. That was clear in the record. I'm not sure there's a real dispute about that.

It's also important to note, your Honor, it wasn't just the Sacklers that insisted on a broad release for all parties. Creditors also needed all that. If there was a carve-out where only a handful of parties could continue their litigation against the Sacklers, it would imperil the payments that were supposed to be made under the plan to everybody else. That also wouldn't be fair.

So there's no question that the releases were essential to the settlement, to getting that settlement, and that the settlement was essential to the allocation agreements, without which you could not have a reorganization of these cases. So in that sense, I do believe that within the meaning of Metromedia and the other cases construing it, you have the unusual circumstances that justify the third-party releases. If they're not present here, I don't know how they could be present anywhere.

And I just want to close with one remark, which is that the other reason that we refer to this as a creditors'

plan, in addition to the creditors having to be key in designing it, is that if it fails, if it blows up, it's going to be the creditors who uniquely suffer the consequences.

There are 200 people dying every day in this country as a result of the opioid crisis. Now, if this plan is confirmed and proceeds, on the first day, hundreds of millions of dollars could be made available to communities that need it and people that need it.

That's not going to end the opioid epidemic, your Honor, but it is going to save lives, and it is going to save lives beginning now, not two years from now, not five years from now, or maybe never, which is the risk the Appellants want to take. It will save lives now. That's the creditors' plan, and we urge your Honor to reject the appeal.

Do you have any questions, your Honor?

THE COURT: No. Thank you.

MR. ECKSTEIN: Your Honor, good afternoon. My name is Kenneth Eckstein, and I'm with Kramer Levin, and I'm appearing on behalf of the ad hoc committee of governmental and other contingent litigation claimants.

I believe, as your Honor is aware, the ad hoc committee consists of ten states, the plaintiffs' executive committee with the PEC appointed by the District Court, overseeing the Federal Multi-District Opioid Litigation in Ohio, six political subdivisions, and one federally recognized

American Indian tribe. We, together with the MSGE, are the groups that speak for the thousands of States, territories, tribes and local governments that support the debtors' plan.

Your Honor, I also have a limited amount of time, and I'm going to try to focus on some very discrete issues. And I will try not to repeat items that have already been discussed.

THE COURT: Thank you, Mr. Eckstein.

MR. ECKSTEIN: I know your Honor is aware, but I think it just is helpful to begin my presentation to reiterate the fact that this plan is, as you've heard, the product of extensive negotiations among multiple parties over many years. It included negotiations with the appealing States, who contributed actively to the creation of many of the uniquely beneficial features, such as the abatement-related provisions, the document repository and the structure and governance of Newco.

Your Honor, I'm going to try to speak to four topics. One, the importance of the shareholder releases to the governmental entities; two, the planned embodiment of the police power objective and how, in fact, the police powers are ideally satisfied and recognized by this plan; the ways in which the plans serve the public interest; and the plan's consistency with recent Supreme Court precedent.

Also, in the course of my remarks, I will touch on some of your Honor's questions; although, I think some of them

have already been addressed.

Your Honor, to begin with, I'll touch briefly on the topic that others have covered in some detail, which is Metromedia and the importance of the shareholder releases to the plan.

The Appellants have repeatedly attempted to color the Court's view of the integrity of the release by stating, as if it were a fact, that the shareholder releases were included in the plan only because the Sackler family insisted upon them. This, they say, undermines Metromedia's requirement that a release be important to the plan.

Your Honor, the evidence completely refutes the Appellants' arguments. As set forth on pages 21 through 23 of our brief, abundant evidence established that there were multiple reasons why the shareholder releases were important to and, indeed, essential to both the current plan and any plan of reorganization, including the critical fact that, all but ignored by the Appellants, that the shareholder releases were important to the settling creditors, not simply to Sacklers.

The evidence could not be more clear that the release was required by the States and local governments, who are agreeing to a payment stream over nine years and are agreeing to accelerated payments to the individual and other private creditors, as you just heard described.

Without a broad release, there would simply be no way

the governments could accept the nine-year payment stream and the plan, while certain States were free to pursue judgments against the precise parties who are agreeing to fund the plan payments. It seems obvious and self-evident that without this certainty, this type of agreement could not have been agreed to by the States.

The appealing States have also argued that no consideration is provided to the States on account of their claims against the Sacklers. This also simply is not correct. I would note, as an initial matter, that Metromedia does not require any particular level of consideration be paid on the enjoined claims, noting "such consideration as weight in equity but is not required." Metromedia at page 143.

More importantly, the settlements by the States and local governments certainly took account of both the estate claims and the third-party claims against the Sacklers, and both were factored into the financial and non-financial components of the settlement. I refer your Honor to the Guard declaration at paragraph 71, where we said: I also believe it represents a reasonable resolution in the current context of the case of claims against the Sacklers, especially when a litigation considers the risks of collection and litigation and the need for funds to go to programs and projects that will abate the opioid epidemic.

Your Honor, let me now return to the police power

issue, which has occupied a great deal of the Appellants' case. The Appellants go to great lengths to argue that the third-party release improperly undermines the State's police powers, but they do not provide a single concrete example of how this plan actually does so.

The only real complaint is that the financial settlement should be higher, a complaint we hear from dissenting creditors in every bankruptcy case, but certainly not a complaint that implicates unique State sovereign interests. Thus, in the circumstances of this case, where key features of the plan were designed by the States themselves and where the plan actually operates to facilitate the States' police powers, the police power argument is misplaced and should be rejected.

In thinking about this issue, it's helpful to consider some examples of how the appealing States themselves have articulated the interests they seek to vindicate. Washington, for example, asserts that through its police power action, it "sought to protect its residents by enjoining further violations of State law, abating a public nuisance that Purdue caused, and deterring future wrongdoers." That's Washington's brief at page 7.

Maryland asserts that the appealing States want to "secure the public interest in justice, deterrence, retribution and compensation, and to secure the public health." Maryland's

brief at page 13. And to "prevent the recurrence of conduct that has recurred once already."

The briefs also reference "public accountability" and, relatedly, a desire to "advance public knowledge." All of these goals, monetary relief, injunctive relief, abatement, deterrence, public accountability and knowledge, are facilitated by the plan under provisions that were developed by the States themselves, including the appealing States.

First, the plan delivers more than $4 billion to public creditor trusts for abatement purposes. The funds distributed to the National Opioid Abatement Trust can be used, as your Honor has heard, solely for abatement purposes. That is different from tobacco or any other bankruptcy case that I've encountered or that anybody has referred to. The within-state allocations and uses of funds will be determined by the States and the local governments.

The abatement-related provisions of the plan, including the States' agreement to devote their recoveries to abatement, the interstate allocation of funds and the provisions governing the interstate development of those funds were developed by the States and the local governments, not by the debtors or the Sacklers.

The negotiation and development of these provisions is discussed at length on pages 7 to 10 of the ad hoc committee's brief and in the testimony of the ad hoc committee's witnesses

John Guard and Gary Gotto's declaration. Your Honor, if you need the citations, I'm happy to provide them.

THE COURT: No, I'm fine.

MR. ECKSTEIN: Second. The plan creates a public document repository, which your Honor has heard about, that will contain over 100 million pages of documents of the debtor and the Sacklers families, providing key information and insights to the public concerning the origins of the national opioid crisis and roles of Purdue and the Sacklers.

The ad hoc committee's witness, Jayne Conroy, testified that "it could be that the document repository is actually the most valuable piece of this settlement."

THE COURT: Yes, well, from the perspective of a lawyer, that's probably the case. I doubt that the individual victims feel that way.

MR. ECKSTEIN: Your Honor, I believe that the victims have been very, very focused on this, and I can assure your Honor that the States and local governments view this as one of the most essential items to ensuring the enforcement of their police powers.

The non-consenting States, including the appealing States, were actually involved in negotiating the terms of the document repository, as reflected in Judge Chapman's mediator's report, and that was an essential ingredient to the last improvement to the plan that was achieved under the auspices of

Judge Chapman.

Third. The plan reforms the debtors' ongoing opioid business, requiring Newco to operate in a responsible and sustainable manner that focuses on public health interests rather than the enrichment of shareholders.

To address an issue your Honor raised in your questions, the post-government structure and role of Newco is discussed at length in the disclosure statement. And I believe your Honor heard Mr. Huebner describe Newco at some length, and I will not repeat it unless your Honor has any further questions.

THE COURT: No, that was great. That was exactly what I needed to hear.

MR. ECKSTEIN: Fourth. The plan requires the Sackler families to divest their equity interests in the debtors and their affiliates and to withdraw from the opioid business worldwide. That is in the shareholder settlement agreement at section 8.09.

It was because of a foregoing provision, and others, that the ad hoc committee, whose constituents share the appealing States' goals of accountability, deterrence, abatement came to support the plan, as did 15 of the States that were originally aligned with the appealing States.

The appealing States want more money, to be sure, but it is hard to see how their efforts to overturn the plan could

possibly lead to a more effective exercise of their police powers. We respectfully submit that this plan is not in any way impairing police powers. It is facilitating the goals that the States have expressed from the beginning of this litigation in a manner that is hard to measure.

Your Honor, let me turn to a final point I want to address, the Appellants' contentions that the releases here are somehow inconsistent with the Supreme Court's decision in Jevic, which postdated Metromedia.

In some respects, I know your Honor has been asking for the authority to grant the third-party release. I know Mr. Huebner labored mightily to respond to the issue, but in some respects, we also should ask whether or not the Second Circuit's decisions in Metromedia and others are, in fact, aligned with the Supreme Court's recent expression in a significant bankruptcy case in 2017.

THE COURT: That question had occurred to me.

MR. ECKSTEIN: It's actually quite surprising that Appellants have cited your Honor to Jevic because that case does not detract from Metromedia but actually serves to confirm the Second Circuit's general approach to releases.

In Jevic, the Supreme Court rejected a structured settlement because it violated the code's priority scheme, a scheme that was "a basic underpinning of business bankruptcy law." But the court went on to acknowledge that there are many

instances in which courts have approved various forms of relief that are not expressly authorized by the code, such as so-called first-day orders that authorize things like the payment of pre-petition wages, critical vendors and other forms of relief that --

THE COURT: I thought it was interesting that Justice Breyer, in Jevic -- so sorry to interrupt you, but Justice Breyer in Jevic talked about, you know, first-day orders as a procedural mechanism that allows a debtor-in-possession to be a debtor-in-possession and did not mention third-party releases, for example, a much more controversial -- I don't know that has anybody ever suggested that --

MR. ECKSTEIN: Correct, your Honor.

THE COURT: -- that a DIP order is a violation of the bankruptcy code.

MR. ECKSTEIN: He did not mention third-party releases, but he mentioned first-day orders and other orders that facilitate a successful reorganization, and that was the big distinction between the types of examples that were described when the court went through the iridium case, as compared to what was being accomplished or sought to be accomplished in the structured dismissal that was being reviewed in Jevic.

In distinguishing these scenarios from the structured settlement before it, the Supreme Court wrote that in those

other cases, the relief at issue "would enable a successful reorganization and make even the disfavored creditors better off." A crucial distinction, that the disfavored creditors would be better off. That is exactly what the third-party releases do here.

They serve to use Jevic's words "significant code-related objectives," or to use Metromedia's words, they are "important to the success of the plan."

And unlike in Jevic, where the Warren claimants were being passed over and were getting nothing under that case, the Appellant States in our case are full beneficiaries of the plan and the settlement and, in fact, were participants in the creation of the key provisions of the plan.

I would submit, your Honor, that the distinctions between the scenario in Jevic, where the Warren creditors, who were individual employees, were being excluded by the more powerful and influential secured creditors, contrasts materially with this case, where every single creditor constituency has a seat at the table, participated and voted overwhelmingly to support this plan. This is the case where the release is facilitating the goals of reorganization.

While Appellants claim that Jevic broadly rejected a rare-case exception to the --

THE COURT: That is what he said.

MR. ECKSTEIN: Let me -- your Honor, I understand,

which is why I bring it up.

THE COURT: I read it.

MR. ECKSTEIN: While they rejected the rare-case exception, this distorts the holding of the case and inaccurately assumes that Appellees are seeking any sort of "exception to the normal rules of bankruptcy."

Jevic may have said that there is no rare-case exception to a rule as fundamental as the code's priority scheme, but it went no further than that. The plan here does not seek an exception to any otherwise-applicable bankruptcy law. Unlike in Jevic, the code is silent as to the question at issue, whether third-party releases are permissible.

But there is no doubt that the release in this case is facilitating the goals of the bankruptcy code, which is successful reorganization and equal treatment of creditors. We would urge your Honor to follow the guidance in both Metromedia and the guidance in Jevic, as I submit, and to confirm the plan.

Your Honor, thank you. I'll be happy to answer questions.

THE COURT: Thank you, Mr. Eckstein, very much.

MR. LIESEMER: Good afternoon, your Honor. Can you hear me all right?

THE COURT: I can.

MR. LIESEMER: Jeffrey Liesemer of the firm Caplin and Drysdale, and I represent the multi-state governmental entities group. The group, as your Honor probably knows, is composed of 1,300 counties, cities, independent school districts, hospital districts, other types of localities and municipalities. While we are not the largest creditor group in this case, we are certainly one of the largest.

(Continued on next page)

MR. LIESEMER: (Continued) I've been allotted ten minutes in front of your Honor, and I will be very brief and try not to repeat what others have said so we can make up some time. I just want to touch on where Mr. Eckstein left off, which was the *Jevic* case. Now *Jevic* case obviously had a statutory command. We had WARN Act claimants that had a priority under 507(a)(4). And in Chapter 7 cases under Section 726 of the Code, 507(a) priority claims have to be paid before general and secured claims.

In Chapter 11, under Section 1129(a)(9) of the Code, 507(a) claims have to be paid in full on the effective date of the plan unless the class of priority claimants agrees to stretch out the payments.

So this was a statutory command, and although there was some acknowledgment about, you know, some flexibility to ignore the priority scheme, that is an important difference from our situation here. The other case that's similar is *Law v. Siegel*, and *Law v. Siegel* also had a statutory command. In *Law v. Siegel*, there was an attempt to "surcharge" a debtor's homestead exemption. And Section 522(k) of the Bankruptcy Code provides that an exemption is not subject to administrative claims, including attorney's fees. You have to look at 503 to get to the attorney's fees part. So, again, an express statutory command that there was an attempt to circumvent, and the Court said you cannot use your equitable powers in that

fashion.

Now, we've had a lot of discussion this afternoon about where third-party releases can be sourced. And, of course, one of the first sections or provisions of the Bankruptcy Code are 105(a), 1123(b)(6), but I would suggest that there is another provision where it can be sourced, and that's 1123(b)(3), B as in boy, which provides that plan may provide for the settlement and compromise of estate-held claims. And that's what we have here. We have a settlement and compromise with the shareholder releasees of the estate claims.

It was interesting, your Honor --

THE COURT: Yeah, but we also have the resolution of -- claims that are manifestly not the estate claims. I'm having a hard time with that one.

MR. LIESEMER: I'm sorry, I couldn't hear.

THE COURT: The objectors' claims, the appellants' claims are not estate claims; they're just not. Even Judge Drain found that.

MR. LIESEMER: I understand that.

THE COURT: So a provision of the Bankruptcy Code that authorizes the settlement of estate claims does not seem to me to have any pertinence to the appeal.

MR. LIESEMER: Let me address your point, but in order to do, so I need to pivot over to *Manville I* and a point that

you made earlier because you're right, your Honor, in *Manville I*, there was a risk of depletion of shared insurance. They didn't want those holding vendor endorsements to be able to deplete and diminish that fund that was supposed to be going to the Asbestos Compensation Trust. I would suggest that the shareholder releases in this case are important to prevent the erosion and depression of settlement value of the estate-held claims. Because it's logical -- and I'll get to the evidence in a moment, but it's logical that if I am plaintiff A trying to settle with the defendant, the defendant isn't going to give me as much money as I want for my claim if the defendant is faced with plaintiff B, plaintiff C, plaintiff D.

So this is a device to help maximize value for the benefit of creditors, and we have the evidence for that at the confirmation hearing which was the testimony of Jane Conroy, who is an attorney, who, for several years, pursued Purdue and the Sacklers and other opioid defendants. And what she talked about during the testimony or one thing she talked about was the peace premium, and that was the same point that I brought out: You're more likely to maximize what the settlement value that you're going to receive if you can give complete peace to the other side.

THE COURT: But that was not one of the sections that Judge Drain said that he relied on in approving @Friend.

MR. LIESEMER: That's correct, your Honor, but Judge

Drain did at another point in his modified bench ruling, he did recognize and credit Ms. Conroy's testimony, and although he didn't necessarily point to it with respect to the *Metromedia* factors and elsewhere, I think the evidence is there to be able to rule in the alternative or in addition to what Judge Drain found to be able to be able to rely on Ms. Conroy's testimony as well.

THE COURT: I get your point.

MR. LIESEMER: So, for those reasons, we believe that the confirmation order should be affirmed. And unless your Honor has any questions for me, I'll stand down.

THE COURT: Thank you.

MR. LIESEMER: Thank you.

MR. SHORE: Good afternoon, your Honor. Chris Shore from White & Case on behalf of the Ad Hoc Group of personal injury victims.

I want to focus today on one question; it was actually the first question that you asked any of us, which is this question of what are the direct claims and what are the estate claims that we're talking about?

And to answer that, I want to focus on the direct and derivative claim jurisprudence, one, to make sure we're all on the same page about what constitutes a direct claim and what constitutes a derivative claim. And then, two, to explain, at least with respect to the personal injury victims, whether you

view the claims as direct or all derivative, they're all handled appropriately under the plan, the confirmation order and the plan supplements.

Let me start first with direct or what are sometimes called non-derivative claims. *Tronox* is our latest definition on it. Second Circuit stated: Non-derivative claims are personal to the individual creditors and of no interest to the others.

Two comments on that definition. The question of personality to the creditor is not determined as of or prior to the petition date. In every case in which a court has held that the claims are derivative, there was a preexisting creditor cause of action prior to the petition date. The creditor had the right to bring a fraudulent conveyance claim. The creditor had the right to bring an alterego claim. The creditor had the right to bring a conspiracy claim against a co-conspirator of the debtor, going all the way back to *St. Paul Fire and Marine*. In that case, *Pepsi* had an alterego claim against *Banner Industries* pre-petition. That claim, however, was deemed by the Second Circuit to be derivative because of the intervention of the bankruptcy of the subsidiary.

So, when you look at the DOJ's papers, for example, where they tell you, well, the courts have adjudicated that these creditors have direct claims against the Sacklers, that's

not the right analysis. The right analysis is, even if they do have direct claims that they could assert outside the bankruptcy court, do those claims remain direct in light of the bankruptcy of Purdue.

Let me focus on the second part of that definition which has gotten no air here, which is the second part, which says that direct claims are of no interest to other creditors. You've heard from a number of people, and I'll deal with in a bit, the notion that personal injury victims or states or anybody else has no interest in the litigation --

THE COURT: There is no -- God bless the Second Circuit, for you are dealing, as you always are, in a bankruptcy within limited pot of money. There is no claim that the other creditors don't have an interest in because every claim reduces the pot. So if *Tronox* is telling us that as long as creditor A has some kind of interest in creditor B's claim because it might reduce the value of creditor A's claim, that it's not a direct claim, I don't think that's what's being said.

MR. SHORE: No, I would say that in this case based upon this record with the statements that you've heard from everybody with respect to the creditors' willingness to go forward in this deal without the Sackler third-party release, and the risks to the deal if those claims are litigated, I think on that record it is the central issue for everybody. If

a direct claimant, quote "direct claimant" were to litigate against the Sacklers, the issue which is core to all of these claims, were they involved in a mismarketing conspiracy, and were to lose, we are all in harm's way in a snapback scenario.

On the other hand, if they were to win and get a giant judgment against the Sacklers, we're at harm waiting for our payments to come.

So I think in this case, given the centrality of it, and the impact the litigations would have on these claims, I think at least that fits within the definition of interest.

THE COURT: I'm going to have to think about that because I certainly did not read *Tronox* in that -- in the way that you're reading *Tronox* because I just fail to see how if you read it that way, it's not true of every single creditor's claim against the bankruptcy.

MR. SHORE: Again, we got into the issue with what arising out of and conceivable effect has on it. They do write these phrases that get addressed in jurisprudence and everybody does put limitations on them. I'm just saying in the context of this case, the notion that a third party could go out and litigate a direct claim to judgment is of singular importance to the entire creditor body.

Now, let's focus though on the claim that there are direct claims. Let's just assume there are collect claims. The criticism at the U.S. trustee level is that this is being

done for no consideration. Nobody's getting paid for their Sackler direct claims. One -- and I went back through the whole record. But for one reference in one line of the transcript of the confirmation hearing, that was not the subject of the U.S. trustee's objection; that there is no compensation being paid for direct claims that personal injury victims have.

Two --

THE COURT: But they put in one sentence, right? So they did raise it below. They barely mentioned it.

MR. SHORE: Yes, I did not. I did not say that you should disregard the argument. I'm just saying it was not the focus of the objection. Let me explain why that matters.

To answer your question regarding consideration, Mr. Eckstein just read to you the section of *Metromedia* that says: Consideration has weight in equity but is not required, I want to come back to that equity point and how it is equitable what's going on here.

And, three, personal injury victims who are holders of hypothetical direct claims are being compensated in the TDPs for their injuries. I'm sure the Court has seen sentence statements that the U.S. Trustee has cited in the TDPs regarding the claims, the termination of the claims and our counter-citing of the deemed satisfaction language in there.

But the disconnect here is what I need to explain to

you. The TDPs are injury-based compensation systems. They are not claims-based compensation systems. Nobody objected to that below. What the TDPs do is pay injuries, not pay for claims. To start, you need an opioid prescription. Let me pause, turning to your Suzie Sackler -- in this case there are wrinkles to everything. Suzie Sackler's roommate doesn't have a claim because she never had a Purdue opioid prescription. But to be clear, that was a requirement of the government's. They did not want illicit drug use being paid out of the TDP, so obviously they're not pressing that objection to the TDP here.

As an aside, and I think it is, I want to address another question your Honor asked that nobody seems to have addressed, there is obviously looseness in the language legally relevant. I think in context the judge was struggling for language, but your Honor has the ability to provide more context of that, what you believe legally relevant should mean in this context with more precision because it's going to be interpreted if this confirmation order is entered. There is always going to be a gatekeeping function, and it happens in every case. That's why the confirmation orders start and end with the court retains jurisdiction to deal with this order.

THE COURT: But the Court retains jurisdiction to deal with this order is not the same thing as the Court retains jurisdiction to decide whether somebody can bring a lawsuit

five years from now.

MR. SHORE: Right. But if your Honor were to agree that legally relevant, that you want to somehow carve out the sues Sackler and you come up with different language and say to Judge Drain: When you are faced with an actual claim and someone comes forward, this is what I understand legally relevant to mean, which means when he enforces that order, then he has the ability to take into consideration this lack of precision.

Look, in fairness to all of this, this whole process would work a lot better if we had an actual claimant with a direct claim personal injury claim standing up to answer questions from your Honor, and then we would be in the footing we're in in *Tronox* where you have someone coming forward post confirmation saying, "I've got a claim I want to bring, and the court is able to, among other things, ask questions to the counsel as to what is your claim and why are you pursuing it.

Now, going back to the TDPs. If you have a script and have filed a claim against the bankruptcy, the TDP is agnostic to the cause of your injury or the legal merits of your claim. That's another feature of the TDP that nobody has objected to. It just sets points for levels of injury related to opioid use for qualifying creditors. The injury will be paid whether or not the claim is paid, and to effect that payment and ultimately to be able to clean up the claims register, the TDP

language is that all claims related to that injury are satisfied.

Again, one injury, one claim, whether it was the Sacklers that caused your injury at the end of the day or they were the proximate cause or it was the debtors or it was 50/50 or whatnot, the injury gets paid. What in effect the U.S. trustee is arguing here is that for claimants with direct Sacklers claims, the TDPs should add a function of additional points for people who have direct Sackler claims. That is, if you come in and prove you have direct Sackler claims, you will get more points and more recovery that won't be available to people who can't prove up direct Sackler claims.

Now, the U.S.D. didn't even conceptually ask for that below, and that's why I'm saying, had this issue been raised, we could have had this out on the record below. But that change in the plumbing is in our view inequitable getting back to what *Metromedia* is saying about lack of consideration goes to equity.

Assume we task the trust administrator with a derivative direct analysis. 165,000 claims are going to come in. If someone checks the I've-got-a-direct-claim-against-the-Sackler box, the administrator has to then go through this whole analysis that the Second Circuit does. How does it fit? Where does it fit in? How does it fit here, right? All of that adds

administrative burden. If we're going to have administrative burden, there has to be an identified claim that we're trying to preserve. We've all, we've had conference calls -- I've had conference calls with my partners and associates on with. Let's come up with a Sackler direct claim, a claim that somebody has against the Sacklers that isn't also a claim against the debtors with one injury. We've had the hand out the bottles with the private statement from Mortimer Sacker, car wrecks -- all these different -- boardroom fights. All these things that have come out trying to figure out, what is a claim that a personal injury victim has against the Sacklers that isn't also a claim against the debtors that will been compensated? We had to come up with one, and so trying to say we should add administrative burden to have 165,000 claims addressed for whether they also contain Sackler direct claims seemed like a waste of money and inequitable ultimately to paying out the first claim.

In addition, we're in a limited fund situation. Nobody is going to get paid in full for that one injury. It is equitable in that case in our view that everybody get paid on their injury ones before somebody else gets paid twice. So when the U.S. Trustee says holders of *direct* claims are getting no consideration, no, that's not right. They're just not getting double consideration. They are getting paid for their injury; they're just not getting paid twice.

Let me deal with point two which is, are there any direct claims, at least with respect to the personal injury victims. Again, it does not matter that the Supreme Court of the United States found that the creditor could assert a claim against the Sacklers, pre-petition. The analysis still requires the court to look to whether or not that claim, an alterego claim, a fraudulent conveyance claim, a conspiracy claim may now be prosecuted by the individual or must be prosecuted or settled by the debtor.

You've asked the parties now three times to identify the claims. What we got with respect to personal injuries is sample complaints, citations by the DOJ, the decisions of pre-petition lawsuits, and a list of pending actions that list your plaintiffs and defendants; not submitted by claimants but submitted by the government. One obvious problem with all of that, if your Honor has gone through those, if the complaints are not necessarily precise, especially with respect to some pro se litigants as to the facts or applicable law.

And while they all might conjecture, the fundamental problem, as I said, is we don't have anybody here to answer the question, and, quite frankly, give the concession that sunk the claim of @Tronox. I guess everybody -- every other creditor could bring this claim as well. But my reading sorts these claims into two buckets. One claims that the Sacklers looted Purdue by taking out billions. That's a fraudulent conveyance

claim that's classically derivative, and I don't think anybody is even arguing that the direct claimants are allowed to sue the Sacklers for fraudulent conveyance now.

Two: Claims that the Sackler and various members of the Sackler family, sometimes identified, some just referred to as the Sacklers or the Sackler family engaged in an eyes-wide-open scheme to deceive the American public about the dangers of opioids. There is, having reviewed all of that, not one allegation in the record that any released party was in privity with a claimant; that Richard Sackler handed a bottle of OxyContin to somebody, or made a private statement that wasn't made to the creditor body at large. It's all this one big conspiracy claim.

There is also no -- well, I will just say it again. The deceptive marketing conspiracy is hardly of no interest to us, right? In fairness, those claims are what are getting people money. It was the assertion of those claims against the Sacklers that brought the Sacklers to the table and had then give $4.9 billion. They don't want to litigate the issue of whether they engaged in a deceptive marketing conspiracy

THE COURT: I thought it $4.35 billion.

UNIDENTIFIED: Your Honor, it's 4.325.

THE COURT: Thank you.

MR. SHORE: Your Honor, in thinking about this question of what is a derivative claim and what is a

non-derivative claim, the two -- well, two of the three Madoff cases are relevant. In *Picower*, the issue is whether the trustee, *Picower*, is permitted to sue JPM on behalf of JPM's customers. They are the third-party releasee. JPM was in direct privity with the customers. That was the Mortimer Sackler talked directly to victim A or handed a bottle of pills to victim A. The Second Circuit said there because of the privity, those claims have to be brought by the individual victims and can't be brought by the trustee.

In *Marshall*, and this is -- right, this is an issue right after bankruptcy is done, it was the creditors of BLMIS, the debtor could sue Jeffrey Picower, the third-party releasee, who paid money to the state, or whether Mr. Picard, the trustee had the sole authority on that. There the Second Circuit noted that Mr. Picower was not in privity with the creditors. He hadn't made any directness representations to them. He had not engaged in business with them. And ultimately the Court concluded all creditors could make that. So on that record, the Court found that the claims were derivative. Okay? Here, the claimants, the personal injury claimants are all alleging the same conspiracy.

THE COURT: Right. Understood.

MR. SHORE: So, let me end with this, and the importance of this question that you asked, and, in fairness, hasn't been answered.

One: If the claims are direct, you still need to know what they are to assess their claim that the distribution scheme of the money is inequitable.

Two: If the claims are derivative, right, we still need to figure out what they are to figure out how to whack this all up. And this is where I'll end.

There are many benefits to the settlement that you heard about today. One of the most important ones to the victims is closure. What the U.S. Trustee is saying here is: Victim community, there are claims out there, which we won't identify, that are being taken away from you for no compensation. Fight. That's not a responsible act if they don't have a claim. What claim? Who can assert it? What money are you going to get for it, because at the end of the day we're just making the problem worse without an identification of why we're fighting.

So unless your Honor has any questions, that's all I have

THE COURT: Thank you very much.

MR. BICKFORD: Good afternoon, your Honor. I'm Scott Bickford from Martzell Bickford in New Orleans. I'm representing the Ad Hoc NAS Committee, as well as personally some 3,500 NAS children. So I guess that makes me probably the only plaintiff's attorney in the room rather than a bankruptcy attorney.

I do want to speak to one thing that Mr. Shore elegantly stated, is that, in examination of the NAS claims that are filed now all consolidated from across the country in the MDL in Cleveland, all of them have the same boilerplate complaint against the Sacklers. They're all intertwined with the Sacklers' actions and inactions relative to Purdue, their duties as board of directors of officers as agents of Purdue. And I agree with him wholeheartedly that to fashion a separate action against the Sacklers and make it a viable claim that would go forward really hasn't been done in the history of the very sparse personal injury cases that have been filed in the history of the opiate litigation.

THE COURT: I think what we're really dealing with are the state claims, although I guess some people can sue under the various state unfair trade practice statutes, but I think what we're really talking about here are the statutory claims or what we're principally talking about is the statutory claims.

MR. BICKFORD: Understood.

The only other issue that I wanted to address that is very important that your Honor raised earlier is in fact this repository. And just so that your Honor understands the context of the issue, number one, is we passed on November 17 100,000 opiate-related deaths in this country, the most ever. And after 20 years of opiate-related testimonies and

indictments, etc., there is still no standard of care, national standard of care for NAS children, for their treatment when they are born opiate dependent in the hospitals, for their followthrough when they have learning disabilities, when foster parents undertake their care. This standard of care doesn't exist.

What the NAS committee has done, and much to Mr. Huebner's probably irritation, is that we pushed Purdue to produce more documents and documents that had never seen the light of day, both from Europe and from the United States, that entail Purdue and @multipharma studies of the relationship of the children and opiate exposure, of opiate exposure in adults; and immediate access to these documents by medical professionals we hope will allow a standard of care to be adopted in this country for NAS children and for those who are opiate dependent.

This is what's important about the repository. It's just not 38 million or 37 million documents. It's documents hard fought by people within the bankruptcy with Judge Drain's assistance to get documents that would never have seen the light of day that the FDA hasn't seen that are important to go forward.

Now, there may be some page 6 revelations of emails between the Sacklers, etc. We're worried about the medical documentation and studies that have been done over the years

that haven't seen the light of day, and that those get into this repository. It was a very, very hard fought issue on behalf of the NAS children in this case, as well as the personal injury victims in this case that this repository get done and funded. And you know without this settlement going forward --

THE COURT: You want to have it. I don't see that it's consideration from the shareholder release parties. They're Purdue's documents. Purdue's privilege to waive.

MR. BICKFORD: They're also Multipharma documents, which are outside the bankruptcy scope to some point, and there are other documents in there that are coming into this repository. So it has been a give-and-take and a fight to get documents, and it is a valuable consideration from the NAS children's standpoint that medical personnel have these available to go forward.

THE COURT: I guess I'm confused as to how it's consideration from the Sacklers. They are not the Sacklers' documents.

No sit down, Mr. Huebner.

MR. HUEBNER: Okay.

MR. BICKFORD: There are some sampler documents under control, as I appreciate what is being produced into this repository. This repository is not just the sum total of Purdue's documents. Its documents are expansive beyond that.

THE COURT: Okay. All right. I mean, if I come to appreciate over the course of the afternoon, it's what is really important to you guys. I appreciate that. Mostly because I was sparring with Mr. Huebner so long, I will allow you guys to go over time. And I don't know, the elephant in the room is I haven't heard from anyone heard from Sackler yet.

MR. KAMINETSKY: Good afternoon, your Honor. Benjamin Kaminetsky of Davis Polk for the debtors. I'm playing the role of deer. I'm just here to respond very briefly to the argument of the Canadian appellants. It's going to be very, very short. Just a few minutes.

I think you have the issues from the briefs. I'm just going to respond to what Mr. Cecere said today in court. Mr. Cecere started by saying there is indeed, he did acknowledge that there was a Canadian carveout from the release but said in his words that it's illusory because everything then is recaptured, and that is obviously not true. How do we know it's not true, your Honor? It's because the actual Canadian plaintiffs, the governments of the ten Canadian provinces negotiated this language to protect their Canadian claims.

Who is before you today, the Canadian appellants, just to be clear, it's merely four cities in Canada and two first nations. We've negotiated at length with the Canadian provinces and that was the nature of the Canadian stipulation

that could be found on document number 3520, and was the genesis of the Canadian carveout.

From what you see here today, who you don't see here today is the Canadian governments. That is because they are satisfied that the Canadian carveout protects them fully for the losses they want to bring in Canada against Purdue Canada and the Sacklers related to the conduct related to Purdue Canada.

All this stuff you heard today about Competition Act claims were just completely made up for the first time for this appeal. The first time we heard about Competition Act claims were in connection with this appeal. The only claims in the record are those attached to the proofs of claim, and Judge Drain reviewed them carefully and specifically found at page 33 and then again on page 39 of his modified bench ruling, -- I'm now quoting a very small piece -- "It is far from clear that the claims really are against the debtors. To the extent they are against Purdue Canada or other non-debtors, those claims are fully preserved under the plan, nor are claims base on the shareholder of these party's conduct related to non-debtors released or enjoined under the plan."

So, what these Canadian cities and first nations -- again, four cities and two first nations, they are trying to thread a needle that can't possibly be threaded. I'm not sure that was a great metaphor. These are literally quotes from

that brief that are uniquely far removed from the debtor -- from the bankruptcy estate. This is from their brief. Again, uniquely far removed from the bankruptcy estate but are inextricably intertwined with the debtors and their conduct.

They say those both in the same breath. The bottom line is, your Honor, they bring a claim that the debtors conduct is legally relevant, is that the debtors' conduct is a legally relevant factor, it's released. If not, it's not released in the first place. And if they're Canadian claims, they even have the additional carveout to give them comfort. There is nothing special about these Canadian claims. If they involve the debtor, if they're legally relevant to the debtor, they're released, like every other claim is released. If they're not, they're not. They completely preserve the Canadian claims related to non-debtor conduct.

That's what Judge Drain found. And to give your Honor more comfort, that's what gave comfort to the actual provinces of Canada to walk away once they got the language they wanted added to the releases.

Mr. Cecere also discussed the indemnity contribution and insurance questions that your Honor raised, and then he made representations regarding Canadian law. I'm not going to repeat anything that Mr. Huebner said about the relevance of all of that, but I just want to mention two things: One, what was missing was any discussion of why Canadian law could

possibly be relevant, particularly to contractual indemnification and insurance. I'm not an expert on choice of law, your Honor, but as other briefs from the other states suggest, these questions are governed not by British Colombian law, but by the law of the relevant contracts, which is certainly not the law of Canada.

To take it further, even if that is not the case, Ms. Cecere just simply misrepresented Canadian law to the Court. I wrote down his words, and he said it in the brief he filed yesterday or today. He said, the Competition Act claims is not subject to the contribution and indemnity. And he quotes a case. Now I'm reading from the case, and what it actually says, and I quote: "The law in Canada is uncertain as to whether there is a right to contribution and indemnity between intentional tort feasers." It goes on to say, "This has not been considered by any court in Canada." I am quoting from the *Maine v. Cadbury Schweppes PLC* case, 2010 BCSC 816 at paragraphs 6, 19.

So, the representation that Canada's law is clear on these issues is simply false. Again, I'm not an expert on Canadian law. I just read the case that was cited.

Finally, let me end with this. We heard this morning that because the Canadian appellants were classified in Class 11(c) for the general unsecured claim creditors, again we "get nothing from the Sacklers." Judge Drain specifically found to

the contrary at page 39 of his modified bench ruling. It is only because of the Sackler contribution that there is any recovery for Class 11(c). Absent that, Judge Drain found a Class 11(c) would get nothing. And, of course, all you need do to classify the Canadian municipalities in a first nation separate from the domestic governments it's tried is under the rule of the Second Circuit, if there's any reasonable basis to categorize claimants differently, then it passes muster. I'm citing from 89 F.3d 942, 949-950 (2d Cir. 1996.) That's a *Chateaugay Corporation* case. Of course, there's more than a rationale basis to classify domestic governments and foreign governments in different classes.

I also just want to note for the record, he didn't discuss it this morning, but the Canadian appellant's argument that we saw -- I think your Honor may have seen in the briefs, arguing that first nations and sovereign immunity and all that. That wasn't raised down below. That's completely new for this appeal. We have very good answers as in our briefs, but they waive that argument by not raising it down below.

Unless you have any more questions for the deer, your Honor, I will sit down.

THE COURT: No. Would anyone -- are we done with the appellees who are going to speak?

MR. HUEBNER: For the record, Marshall Huebner. The appellees split up their time and did not allocate time to the

Sacklers. Obviously, your questions, some of them may be for them, and so they don't have an allocated slot. They're, of course, here and I assume ready to speak or answer questions if the Court desires it.

THE COURT: Well, before I ask their lawyers if they want to say anything, does anybody else want to say anything about the conduct of the Sacklers with respect to the assets of Purdue in the ten years leading up to their withdrawal from the company? Judge Drain obviously made a number of findings in that regard.

Hearing nothing, let me -- Ms. Monaghan, do you have anything that you would like to raise with me?

MS. MONAGHAN: Just briefly, your Honor, one thing that we would like to address is your Suzie Sackler hypothetical and how Judge Drain's legally relevant qualifier intersects with that.

So, on that front, I would say that the Sackler release parties agree that Suzie Sackler would not be released for the claim that you have in mind. The reason we think that's clear is because if Suzie Sackler did the exact same thing with a non-Purdue opioid, if Suzie Sackler gave her roommate Vicodin, she would have the same legal problems that she has for giving her roommate OxyContin and, therefore, Purdue's conduct is not a legally relevant fact to the case against Suzie Sackler in that instance, and we think that --

THE COURT: Very good, Ms. Monaghan. Bravo. Love it.

MS. MONAGHAN: We think that's what makes the difference. I'll stop while I'm ahead then, your Honor. I just want it to be clear we're not -- and to also be clear, I don't think there is any such case. So it's a little bit of a brain teaser.

THE COURT: We have, and obviously you all have sat around and tried to imagine this because I keep asking you the questions, but I have no reason to believe that there is any such case. Now, the issue for your client and for Mr. Lee's clients are other than the ones who, you know, the nine, the ten, the eight, the insiders. It's like, why? As Judge -- for the people who were not involved in running the corporation, none of the state statutes that have been pointed out to me would make them liable. It's not clear to me who's giving money to this settlement, which members of the Sackler family, and no one seems to be taking great pains to enlighten me. And Judge Wiles had this great statement in *Aegean* where he said we don't give out releases to make people feel better. And if there is no viable claim against Suzie Sackler, and no claim has been asserted against Suzie Sackler, and none of the direct claims, as opposed to derivative claims, were -- that the states -- are of a nature that the states are asserting and apparently some individuals are asserting against Richard Sackler are being asserted against Suzie Sackler, why should we

give Suzie Sackler a release? What does she have to be released from?

MS. MONAGHAN: Your Honor, the reason Suzie Sackler or any Sackler who didn't serve on the board of directors needs a release, I think I can shed some light on.

There are basically five categories of shareholders release parties. All of them are implicated in the payment structure underlying the settlement.

So, in my case, my side of the family, the side A it is so-called, payments are coming largely from trusts. Those trusts have beneficiaries. The beneficiaries are not limited to the family members who served on Purdue's board. Any time a trust makes a payment, the beneficiaries are losing money that they would otherwise get and are indirectly contributing to that payment. And so the releases go to five categories of releasees: The Mortimer Sackler family members, and as to that we put in evidence that was uncontested from the lead director of the trusts and from the protector of the trust who testified that they could not in the exercise of their fiduciary duties make these payments unless it was in the best interest of all the beneficiaries. And it's only in the best interest of all the beneficiaries if all of the beneficiaries and all of the trustees and protectors, as well as the trusts, receive those releases. Otherwise, the trustees would have no choice but to have to conserve resources to fund the defense and to benefit

the other beneficiaries.

THE COURT: To fund the defense against the non-existent claims that can't be asserted by anyone and haven't been asserted by anyone.

MR. STPHAO: Your Honor, from our perspective, many, if not all of these claims, would ultimately not succeed, but that doesn't mean they're not going to be made, and there are allegations in the complaint that are much broader than just the directors.

The Oregon complaint, for example, asserts that all of the Sacklers were implicated in something they call the Sackler Pharmaceutical Family Enterprise. The California complaint has John Does numbers 9 through 100. I also should note that the trustees' position on that was further confirmed by orders from the court of the bailiwick of Jersey where these trusts are located. They are authorized to enter into the settlement, and those orders are part of the record, only if they get these releases. Otherwise, they're acting outside the scope of their authority as trustees. So that's covered three of the five buckets. That's the family members who are all beneficiaries because the trusts are for the benefits of all descendants of Dr. Mortimer Sackler, the patriarch. That covers the trustees' protectors because when you sue a trust, the way you get to it is by suing the trustees.

THE COURT: Correct.

MS. MONAGHAN: That also covers the transferees, right, because the transferees received distributions from Purdue but they are released only in their capacity as transferees and only to the extent of the amount of the transfer.

Then there are what are called the IACs, the independent associated companies. The independent associated companies under the express terms of the settlement have to be sold, and the net proceeds go into the estate. So there's clearly a conceivable effect on the estate there.

And the protector, a woman named Alexa Saunders, testified without demur that she couldn't authorize the sales of the IACs without getting releases for the IACs. And, in fact, she doubted they would be saleable without those releases.

The last category is advisors and employees of the foregoing, but they are released only in that capacity. the definition of the release makes it clear that capacity limitation, and that's really to avoid opening a back door because if you could sue -- if you couldn't sue, you know, the trust company but you could sue the employee, the release wouldn't really be effective, but it's only if you are suing the employee in their capacity as an employee of that trust company.

So I think that those five categories are clearly

justified and are clearly necessary to give effect to the release, both to provide peace that is necessary because of the intertwining of Purdue and the Sacklers and to ensure that payments are made.

In addition to the obligors under the settlement, there is a very complex web of credit support agreements that pull in all of these parties one way or another. And then The creditors also wanted something called a further assurances agreement pursuant to which they would all agree that they wouldn't make any transfers that would defeat their ability to fund these payments, and so they are all one way or another involved in ensuring that these payments are made. And it really required a huge effort to bring all of these individuals, all of these trusts all together because this is an enormous commit.

The assets of the four former defendants are less than 20 years of side A's commitment to the settlement, and one of my clients testified at the hearing it's the finality provided by the settlement that enables them to make this commitment, but they really had to come together as a group to commit to a settlement of this enormity.

THE COURT: And none of that would have been necessary if they had in the ten years preceding the Sacklers withdrawal from active involvement in Purdue, followed their historic practice of paying the taxes, taking out ten percent in

dividends, and leaving the rest of the money that was earned by Purdue with the debtors, which, if I calculate it correctly, would have funded this plan and a little more.

(Continued on next page)

MS. MONAGHAN: I'm not quite sure what you're asking there, your Honor, but if your --

THE COURT: Your client took $11 billion out of the company in the ten years immediately preceding the bankruptcy. Did they not?

MS. MONAGHAN: Not exactly. So with respect to the tax distribution --

THE COURT: They paid 4.6 billion in taxes.

MS. MONAGHAN: Right, and because my client, the ultimate owner is a foreign trust, those payments were made directly to the government as withholding.

THE COURT: That's just fine. I have no quarrel with the payment of taxes duly assessed and justly owed.

I asked maybe a week or ten days ago whether there was anything in the record about the Sackler's historic pattern of taking money out of the company. And I was told, I believe, that in the 12 years prior to the 2007 settlement, the Sacklers took a billion three or a billion four out of the company, 90 percent of which was used to pay taxes, which is what happens with a closely held corporation. And so ten percent was not used to pay taxes. It's a nice dividend, but shareholders are entitled to a dividend. And the rest of the money that Purdue had in its kitty stayed in the kitty to fund the business.

MS. MONAGHAN: I think, actually, that's not accurate,

your Honor.

THE COURT: Well, I'd like to know what is accurate about this.

MS. MONAGHAN: There is --

THE COURT: This turns out to be very, very, very important to me.

MS. MONAGHAN: Okay. So let me try to explain. There was much less money that came out before 2008 than after 2008, but the reason for that was that Purdue was actually generating less money. And the reason for that was that Purdue had lost patent protection on OxyContin, its signature product.

And it wasn't until that patent protection was restored, which was in, I believe, either late 2007 or early 2008, that the company started generating free cash in the amounts that funded the amounts that you are talking about from 2008 to 2018.

THE COURT: And where is that in the record?

MS. MONAGHAN: I can't recall off the top of my head where it is in the record, but it is definitely something that we briefed below and referenced. So we can find those citations for you and submit them right after this hearing, your Honor. We can show you the dates of the patent decision. It's really not in dispute, I don't believe.

THE COURT: I have a long interest in knowing how much money Purdue was making in those years. What percentage of

that money was getting taken out? Because I have a corporation that, at a time when at least some of the people who were running it were attuned to the fact that the family finances might be jeopardized, took a lot of money out of the corporation, an amount of money that even after the payment of taxes and a 10 percent dividend, which would be a billion dollars, an amount of money that if left in the corporation, would have fully funded this plan with a half a billion dollars left over, if my math is correct.

MS. MONAGHAN: Only if they didn't pay taxes, your Honor.

THE COURT: No, no, no. You paid the taxes. You take out the 4.6. You pay the taxes. You take out 10 percent, a whole billion dollars, for a dividend, and what's left stays in the company. It's more than $4.325 billion. So it more than funds this plan. This plan, the plan you all negotiated.

So I have an issue with the fact that over that ten-year period, all that money, when Purdue suddenly had patent protection again and was actively marketing its drug and its other products, and Betadine was being used when I had surgery and Colace was being used on my sister when she had problems, all of a sudden there's no more money in the corporation. Interestingly, there's about a billion and a half dollars in the corporation, the Sacklers are no longer directors, people start talking about a bankruptcy resolution.

I'm not interested in whether a fraudulent conveyance claim can be proved. I'm looking for whether there was abuse, and abuse is at least one interpretation, it's one gloss that can be put on the facts of the ten years prior to the bankruptcy.

MS. MONAGHAN: Well, your Honor --

THE COURT: So I need to know more.

MS. MONAGHAN: We would be happy to submit a supplemental brief on these points and cite you to the information in the record.

One other point that's in the record that I think might have been overlooked in this analysis is that from the years from 2008 to 2018, this board included outside directors, who had no financial interest in the company and who voted for every distribution that was made. Every distribution that was made --

THE COURT: Forgive me for being unimpressed with that fact. I mean, I can't believe that with five minutes to go, I finally -- you know, nobody mentioned what, to me, has always been the elephant in the room. Nobody mentioned it, not even when invited.

So I have to lay my cards on the table, folks. I have to lay my cards on the table. Putting to one side the very difficult statutory issue, and it is a difficult issue -- subject matter jurisdiction, not such a difficult visual in

light of SPV Osus. I think Mr. Huebner has everybody there.

But there's a difficult statutory issue, and there's an extremely difficult issue about whether there has been abuse. And if there's been abuse of the bankruptcy process, then I don't see how this relief gets approved no matter how much good it does.

MS. MONAGHAN: I don't think there is a shred of evidence that there was --

THE COURT: There's not a shred of evidence they took $10.4 billion out of the company. There's more than a shred of evidence. There's evidence that the people were aware of the fact that claims were going to be asserted. Their advisors told them to take steps to protect the family.

So, you know, there's evidence in the record from which very negative conclusions can be drawn. Judge Drain focused exclusively -- not that he made a finding or didn't make a finding. He made no finding on abuse. The word didn't matter to him. He made a finding that it would be difficult to prove a fraudulent conveyance claim, at least for much of the ten-year period prior to the bankruptcy, and I don't disagree with him because fraudulent conveyance is something very technical.

But doing something to position a company so that it needs your contribution in order to come out of a bankruptcy is entirely different from fraudulent conveyance.

MS. MONAGHAN: Your Honor, there is not a shred of evidence in the record, and my clients were all deposed, two of them testified at the hearing, that they made any decisions thinking that they were headed for a bankruptcy.

And, in fact, Judge Drain appointed an examiner to be sure that the special committee of the debtor was entirely independent in its decision making from the family. So it was the estate that was charged with evaluating things like the fraudulent conveyance claims, like the unjust enrichment claims, frankly, like all of the claims connected to the distributions that came out of Purdue, which seems to be what's underlying your questions.

THE COURT: It is.

MS. MONAGHAN: And concluded that the debtor was acting independently. The debtor was not being directed by the family to do anything. The debtor -- the family was off the board before the debtor filed for Chapter 11.

THE COURT: Yes, I --

MS. MONAGHAN: The debtor's board at the time --

THE COURT: The family had taken out the money and gotten off the board.

MS. MONAGHAN: The family stopped receiving any distributions at all in 2016, at the end of 2016, except for tax distributions.

THE COURT: Right. And Judge Drain very clearly said

very few distributions were made at the end.

MS. MONAGHAN: And so by the time the company filed for bankruptcy, the family had been off the board entirely.

THE COURT: Ms. Monaghan.

MS. MONAGHAN: The board, at the time of the filing, had a fiduciary obligation to decide for itself whether the filing was appropriate.

THE COURT: That's not the issue. The issue is whether -- this is circumstantial evidence. I didn't expect admissions. The issue is whether the circumstantial evidence, of which there is quite a bit in this record, admits of the conclusion that beginning after the resolution of the first round of litigation, the Sacklers began to take steps against the possibility that things would go south again, as they did, and whether you can draw from that conclusion that they did what they did, managed to make their outside contribution, which I sometimes think of as a contribution because sometimes I'm thinking one way and sometimes I think of as a refund because sometimes I'm thinking another way, made it necessary. They made themselves necessary.

MS. MONAGHAN: Your Honor, at the time -- so the first of the cases that led to the filing of this bankruptcy, which was really precipitated by cases by municipalities and States, were filed in 2014, I believe, and there was less than half a dozen.

They stopped taking any distributions at all in 2016. And between that first filing and the filing of the Chapter 11 case, Purdue's cash cushion increased substantially. That is the exact reverse of the pattern that you would expect from people who had some multi-year, multi-decade secret plan to abuse the bankruptcy system. The timetable is not there. The facts are not there.

They did take distributions. Purdue was generating profits. It is a closely held corporation, and the shareholders receive distributions when there are profits. That doesn't have anything to do with abuse of the bankruptcy system, and particularly not when the last of those distributions is three years before the filing.

I just don't see how that's even circumstantial evidence, and it's certainly not evidence that was relied upon or came out in the confirmation hearing or ever, in any of the litigation.

THE COURT: Well, maybe that will require a remand.

MS. MONAGHAN: I don't really see that it does because the matter before the Court is whether Judge Drain had jurisdiction, had statutory authority, and then under a deferential standard of review, whether he made the required findings. On all three of those dimensions, Judge Drain put forward a confirmation determination that should be affirmed by this Court under the Second Circuit's standards.

The issue that you're raising about whether there was some overall abuse of the bankruptcy system would be based on nothing but speculation.

THE COURT: Well, I'm not basing it on speculation. I've got a list yea long in my chambers of all the record cites that we found that would, if I were making a closing argument, I could weave together a closing argument.

Look, I'm not saying I'm there, but I'm saying this is, to me, a serious issue. It's a very serious issue, and it's an issue that has come to concern me greatly. I'm trying to figure out -- I'm wrestling with it, and I'm trying to figure out whether I need to remand to the bankruptcy court for further findings, whether I'm supposed to make those findings in a case where I really do think the bankruptcy court had subject matter jurisdiction.

MS. MONAGHAN: I would also point out, your Honor, that this settlement comes with, as many of the Appellees who argued before me have already pointed out to you, numerous sort of safeguards. So you have the supervision of not one, not two, but three highly respected mediators; one, a sitting judge in the same bankruptcy district --

THE COURT: That all has nothing to do with what's troubling me.

MS. MONAGHAN: Well, I think it does, your Honor, because for this abusive plan to have come off, they would have

had to contribute something that was an unfairly small contribution, and that is something that has been thoroughly negotiated --

THE COURT: Poor Judge Drain. He's saying from the bench a *cri de coeur*. There should have been more money. I expected more money. That doesn't happen a lot in the bankruptcy court.

MS. MONAGHAN: Judge Drain was, obviously, subjected to incredible pressures by this case, as everybody has been. But I would also say that he made very clear findings, and those findings were that the contribution was substantial, that there were substantial litigation risks.

And on that front, I would point out that there was a single case that actually went through an evidentiary phase, and my client was dismissed out of it on an extraordinary writ from the Utah courts. And so in that case, the basis for the assumption that there should be a greater contribution has to be measured in terms of the legal risk. That's what settlements are about, right, balancing benefits against risks.

You're pointing to a reason that you think maybe the settlement could have been higher, but Judge Drain, in addition to the *cri de coeur* that you referred to, made specific findings that the settlement was warranted because there was substantial litigation risk on both sides, including on the plaintiff's side, and that was supported not only by our

victory in Utah but by subsequent decisions in California and Oklahoma.

THE COURT: Well, that's on one theory. That's on a public nuisance theory. Then there was a public nuisance verdict in favor of the plaintiff's and against CVS and Walgreen's last week in Cleveland; so that's, you know. Public nuisance, it's a very interesting theory.

MS. MONAGHAN: Well, I think the answer, though, is settlements are based on that balance of risk, on that balance of litigation risk, and there are items that can go in both columns on both sides.

And the court in this case found that this settlement was appropriate and should be confirmed, in light of all of those factors. And so to take a factor, which the Court was well aware of, about the amount of distribution, and say that's the sole factor or that that somehow overrides all other factors is not consistent with the Second Circuit's law, and it's not consistent with what Judge Drain did here. He was aware of the amounts of the distributions, everyone was.

THE COURT: I know. They're not contested. They weren't analyzed in the way that I would look at them, that I would want to look at them. I'm not even sure that the facts are in the record. I don't know. I haven't found them.

MS. MONAGHAN: I don't see how you can overturn a confirmation on the basis that there was abuse, if there is no

evidence that anyone was manipulating the bankruptcy process.

And I would ask for the opportunity, because this is a significant allegation to be thrown at my client, to submit something on that because it's not the case that that is supported in any way in the record.

THE COURT: Well, you're welcome to submit something. Anyone is welcome to submit something, but as I said, I have a list in my chambers of record cites that some folks from the U.S. Attorney's Office could weave into -- and any competent litigator, and everybody in here is more than a competent litigator, could weave into an argument that there was a longstanding plan by the Sacklers to get as much money out of the company as it could in the years before they withdrew from the lists and left Purdue with much less money than it had earned, to fend for itself until such time as they elected to give some money into the bankruptcy.

MS. MONAGHAN: Your Honor, I think all of the plaintiffs before and then after the creditors came into the bankruptcy, went after all of those issues. I think if you talked to counsel for the UCC or you talk to counsel for the consenting States or the MSGE group, you would hear that they've thoroughly reviewed all of those issues. They made presentations on those issues to the mediators. They were priced into the settlement, and that's what Judge Drain found.

THE COURT: Okay.

MS. MONAGHAN: Thank you, your Honor. I'll turn it over to my colleague.

THE COURT: Okay. Well, I've got about five minutes, and then I'm getting up off the bench because I told you I was getting up off the bench at 4:00.

MR. UZZI: Your Honor, Gerard Uzzi of Milbank on behalf of the Raymond Sackler family.

Just to address your last point, your Honor, I don't believe you can look at this issue of whether there's an abuse by this release by saying, well, did the Sacklers conspire to keep -- strip money out of the company. Because that's the issue, right? There's a fundamental issue of what's being settled here. That claim, as to the recovery of funds that the Sacklers have taken out of the company, belongs to the estate. It's not --

THE COURT: But that's a fraudulent conveyance claim. I'm not interested in the fraudulent conveyance claim. If Purdue wants to settle a fraudulent conveyance claim, it's welcome to do so, but it's possible to draw more than one inference from a set of facts.

I'm talking about something entirely separate from whether, as a technical, legal matter that money could be clawed back under a fraudulent conveyance claim.

MR. UZZI: Understood, your Honor, but I do think those issues are related, and the facts that you are pointing

to are just simply allegations and, we would submit, are facts that are taken out of context, but that ignores the rest of the record, your Honor.

And I know the time is short, so in our brief submitted in the bankruptcy case, I point you to page 19 of 57 that goes through the counter-factual record in detail, in detail, as to what the board was thinking at the time that the distributions were made, and why all of those distributions were proper at the time that they were made.

And you just can't look -- you know, I submit, your Honor, you can't look out of context at some allegations that were made, snippets taken out of context, and say, is there an abuse of the release here, when there is a counter-factual record, your Honor.

And the fundamental issue that you're asking is really going to what's being released in the first place and, you know, because it assumes -- your Honor's abuse analysis --

THE COURT: Everybody can sit down. Nobody else is going to talk after he's done. Everybody else, sit down.

MR. UZZI: Your Honor's abuse analysis kind of almost assumes the correctness of what's otherwise being settled here, where Judge Drain did find that there were substantial defenses to all the allegations that were made, and that includes this allegation, your Honor, that the Sacklers engaged in some sort of conspiracy to strip assets out of the company.

That's the reason why we have settlements, your Honor, because that issue was in dispute, and we can't assume the correctness of the issue in dispute to bootstrap what is an abusive -- an argument of an abusive of the release.

We have the creditors here, who have analyzed that issue in detail, and your Honor, the reason why we did not stand up during the primary argument is because this is, in fact, the creditors' plan. And we were reserving time if you had specific questions for us, and I'm glad you raised this, your Honor, so we can address it.

But the creditors here have determined that issue, your Honor, the issue of whether there was a -- again, I'll use the term conspiracy to strip assets out of the company. They've looked at that issue. They've analyzed it, and in the context of looking at the actual merits of that, have decided that this settlement is appropriate.

So I don't believe you can, on the one hand, say, well, there's a merits argument there and the merits argument is properly settled because the record shows that and says that's fair, but say just in case they were wrong, it's an abuse of the release? I can't reconcile that tension, your Honor.

I think those have to be looked at together. And, yes, there are allegations on one hand, but there are allegations on the other side, your Honor, too, that we

submit -- again, I invite you your Honor to look specifically at pages 19 and 57 of our brief that goes through this in detail and not just an out-of-context snippet of, you know, David Sackler saying, when he was not even on the board and barely out of college, you know, gee, will people come after us in the future? Which is what everybody wants to point to, and look to the fact that the company, through most of the time that these distributions were taken out, were under the supervision of a corporate -- operating under a corporate integrity agreement and under the supervision of a monitor.

They got outside counsel from blue chip firms telling them that they were in compliance with their responsibilities. That's all in the record, your Honor.

So the record is there. We can supplement the record. We're happy to do that, your Honor, but the record is there. The record is there on the underlying claim of whether there was a conspiracy to strip assets and the creditors decided to settle this.

So, your Honor, I don't know if you have other questions for me. I am, of course, more than happy to answer them. I've tried to answer the question, you know, posed to Ms. Monaghan.

THE COURT: I think I'm almost too tired at this point to think of a question. I am tired. I'm very tired. I'm sure you all are very tired. Look, I invite people to weigh in on

this in writing.

I see no benefit in pulling my punches. From the beginning, I've told you I want you to know what's on my mind, and I wasn't kidding. And this is the thing that's on my mind. To me, there are two issues in this case. That's one of them. The statutory authorization is the other one.

And by the way, one of my law clerks found another bit of legislative history on Public Law 111, which says that the committee that's proposing the law expresses no view on whether there is any such authority, and we're authorizing this in the case of asbestos so that Congress can decide whether to expand it later, after we see how this works. Not much about developing the law in the courts. I'm really, really hung up on this.

Okay. Look, you're all brilliant, and you're all wonderful, and I know how much you all have invested in this. It may not sound like it, but I actually have a tremendous appreciation for what this plan is intended to do, but if it's going to be affirmed, it's going to be affirmed because we got it right. I really want to get it right. I'm under no illusion that I'm the last word on the subject. Okay?

Thank you.

(Adjourned)