No. 21-07532 (CM) (Consolidated)
No. 21-08055 (CM) (California)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re PURDUE PHARMA L.P., et al., Debtors.

THE STATE OF CALIFORNIA AND
THE PEOPLE OF THE STATE OF CALIFORNIA, Appellants,

v.

PURDUE PHARMA L.P., et al., Appellees.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' PRINCIPAL BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal brought by the State of California and the People of the State of California (together, "California") because it is an appeal from a final order of the bankruptcy court, App. at A0923 [Bankr. Dkt. 3787], confirming the *Twelfth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors* ("Plan"), App. at. A0606 [Bankr. Dkt. 3726]. *See* 28 U.S.C § 158(a)(1).

STATEMENT OF ISSUES PRESENTED

California's appeal presents the following issues:

1. Does the bankruptcy court have authority, under the Constitution and the Bankruptcy Code, to extinguish without consent the claims or causes of action of a sovereign state to enforce its police and regulatory power against nondebtors?

2. Did the bankruptcy court err by entering an order confirming the Plan and approving the releases at sections 10.6(b) and 10.7(b) of the Sackler family and other nondebtors from claims belonging to opioid victims, states, and the other releasing parties ("nondebtor releases")?

3. Does the bankruptcy court have legal authority or inherent equitable power to impose nondebtor releases other than those that meet all of the requirements of § 524(g) under the Bankruptcy Code?

4. Did the bankruptcy judge exceed his constitutional authority as an Article I judge under *Stern v. Marshall*, 564 U.S. 462 (2011), by extinguishing the victims', the states', and the other releasing parties' claims against other nondebtors?

5. Did the bankruptcy court exceed its power under the Bankruptcy Clause of the Constitution, its jurisdiction, or 11 U.S.C. § 524(e) by imposing the nondebtor releases?

STANDARD OF REVIEW

California's appeal raises purely legal issues. Accordingly, this Court's review is de novo. *E.g.*, *Davidson v. AMR Corp.*, 566 B.R. 657, 663 (S.D.N.Y. 2017).

INTRODUCTION

The bankruptcy court erred by confirming a plan with sweeping, nonconsensual third-party "releases" that purport to resolve and extinguish the civil law-enforcement claims of sovereign states in favor of countless members of the billionaire Sackler family, covering unborn Sacklers and innumerable, unidentified Sackler-owned entities ("Sackler Releases"). These releases run afoul of at least two fundamental bankruptcy tenets. Bankruptcy court is not a haven for wrongdoers, and Congress did not intend for bankruptcy laws to abrogate the states' police and regulatory powers. *See In re Berry Estates, Inc.*, 812 F.2d 67, 71 (2d Cir. 1987).

The Sackler Releases ostensibly effectuate a final resolution of all claims that California may have against them related to their role in creating the opioid crisis, including civil law-enforcement actions under the state's police and regulatory power. None of the Sacklers have filed personal bankruptcy. Yet, the Sackler Releases are so broad, they would discharge claims against the Sacklers for fraud, willful misconduct, and civil penalties, even though individual Sackler debtors could not discharge these types of claims through a personal bankruptcy filing. 11 U.S.C. §§ 523(a)(2), 523(a)(7).

California advances purely legal arguments supporting reversal of the bankruptcy court's order confirming the Plan. First, there is no authority under the Bankruptcy Code for the Sackler Releases. Second, the bankruptcy court's Article I status means that it lacked the adjudicatory and constitutional authority to enter a final order approving the Sackler Releases. Either basis requires reversal.

STATEMENT OF THE CASE

At the outset, it is important to provide context for California's state-court civil law-enforcement action against certain of the Sacklers and to highlight the extraordinary scope of the Sackler Releases. Those releases operate as a "super" discharge purporting to provide the Sacklers with a broader sanctuary from the state's civil police and regulatory authority than the Sacklers could receive if they filed individual bankruptcies themselves. *Metromedia* and other cases predicted this "abusive" result:

> [A] nondebtor release is a device that lends itself to abuse. By it, a nondebtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code. The potential for abuse is heightened when releases afford blanket immunity.

In re Metromedia, 416 F.3d 136, 142 (2d Cir. 2005); *see also, e.g.*, *In re Aegean Marine*, 599 B.R. 717, 726 (Bankr. S.D.N.Y. 2019) ("[T]hird party releases often present the anomalous situation in which the beneficiary of a third-party release asks for broader protection than he or she could have obtained in his or her own bankruptcy case.").

I. CALIFORNIA'S ENFORCEMENT ACTION AGAINST MEMBERS OF THE SACKLER FAMILY IS BROUGHT UNDER THE STATE'S POLICE AND REGULATORY POWER

On October 2, 2019, California filed a civil law-enforcement action in state court against nine members of the Sackler family[1] for their *direct and independent* roles in contributing to the opioid crisis in California, among other grave misconduct.[2] California's enforcement action

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[1] The named Sacklers are (1) Dr. Richard S. Sackler, (2) Beverly Sackler, (3) Jonathan Sackler, (4) David Sackler, (5) Marianna Sackler, (6) Theresa Sackler, (7) Ilene Sackler Lefcourt, (8) Dr. Kathe Sackler, and (9) Mortimer D.A. Sackler.

[2] *See, e.g.*, App. at A0011 [JX-0947, ¶ 8] ("The Sacklers were not idle owners who quietly sat by, but were active participants who helped direct the actions of the company, including its marketing and sales force, and build it into a highly profitable pharmaceutical powerhouse."); *id.* [JX-0947, ¶ 9] (the Sacklers were "personally aware of reports of abuse and diversion of

seeks civil penalties and a permanent injunction against the named Sacklers under the state's False Advertising Law (FAL), Cal. Bus. & Prof. Code § 17500 *et seq.*, and Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq.*, as well as an order against them to abate and enjoin the public nuisance, Cal. Civ. Code §3494 *et seq.*, resulting, in part, from the Sacklers' deceptive marketing of OxyContin, which led to an epidemic of opioid addiction and substantial public injuries. App. at A0066-71 [JX-0947, ¶¶ 229-249, "Prayer for Relief"].

Critically, under California law, individuals may be held directly and independently liable for a company's malfeasance where the individual "was in a position of control and permitted the known unlawful practices to continue." *People v. Sarpas*, 225 Cal. App. 4th 1539, 1564 (2014); *accord, e.g.*, *People v. Toomey*, 157 Cal. App. 3d 1, 15 (1984) ("[I]t is settled that a managing officer of a corporation with control over the operation of the business is personally responsible for acts of subordinates done in the normal course of business."). Moreover, as to California's FAL and UCL claims, state law expressly bars any insurance coverage or indemnification for the payment of penalties or defense costs. Cal. Ins. Code § 533.5; *see also* *Adir Int'l, LLC v. Starr Indem. & Liab. Co.*, 994 F.3d 1032, 1045 (9th Cir. 2021).

II. THE SACKLER RELEASES PROVIDE INDIVIDUALS WITH BROADER REFUGE FROM CALIFORNIA'S POLICE AND REGULATORY AUTHORITY THAN THEY COULD GET IN A PERSONAL BANKRUPTCY

California's civil law-enforcement action against the named Sacklers is *unquestionably* an exercise of the state's police and regulatory power. *See, e.g.*, *People v. Pac. Land Rsch. Co.*, 20

OxyContin"); *id.* at A0057 [JX-0947, ¶ 191] ("Each of the Sacklers made decisions that misled California consumers and healthcare providers, and that resulted in and helped maintain the public health crisis California faces today."); *id.* [JX-0947, ¶ 192] ("The Sacklers made decisions that caused Purdue to downplay the addictive nature of their opioids even though they were well aware of the highly addictive nature of opioids, which some of the Sacklers knew as early as the 1990s."); *id.* [JX-0947, ¶ 193] ("Notwithstanding the greater chance of abuse with higher doses, the Sacklers pushed the company to sell higher doses [of OxyContin] for longer periods of time.").

Cal. 3d 10 (1977) ("An action filed by the People [of the State of California] seeking injunctive relief and civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties."); *In re Gen. Motors LLC Ignition Switch Litig.*, 69 F. Supp. 3d 404, 412 (S.D.N.Y. 2014) (civil penalties under "UCL and FAL" are "a well-established means of securing obedience to statutes validly enacted under the police power") (citation and quotations marks omitted).

Accordingly, California's enforcement action against the Sacklers could never be removed to bankruptcy court, even if it were "related to" a bankruptcy case. 28 U.S.C. § 1452(a). And Congress categorically excepted these types of actions from the bankruptcy automatic stay, expressing a clear preference that they proceed in state court, unscathed by a bankruptcy filing. 11 U.S.C. § 362(b)(4); *see also, e.g.*, *San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1124-26 (9th Cir. 2006).[3]

The Sackler Releases provide individual Sacklers with a broader haven from California's police and regulatory authority than they could get in a bankruptcy filing of their own. Had the named Sacklers themselves each filed personal bankruptcy, the automatic stay—by default—would not have impeded California's enforcement action from proceeding against them. *See, e.g.*, *In re Gen. Motors*, 69 F. Supp. 3d at 412. Moreover—and critically—any claims against the Sacklers for fraud, willful misconduct, and civil penalties could not be discharged in an individual bankruptcy. 11 U.S.C. §§ 523(a)(2), 523(a)(7); *see also In re Fusion Connect, Inc.*, No. 20-05798, 2021 WL 3932346, at *7 (S.D.N.Y. Sept. 2, 2021) (holding that civil penalties

[3] Legislative history makes this clear: "[W]here a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." H.R. Rep. No. 595, 95th Cong., 1st Sess. 343, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5963, 6299.

"arising from fraud on consumers" and payable to a governmental entity "fits within the § 523(a)(2)(A) exception to dischargeability").

This means that California's nondischarged claims could proceed without violating a debtor's post-discharge injunction under 11 U.S.C. § 524(a). *See, e.g.*, *In re Fucilo*, No. 00-36261, 2002 WL 1008935, at *12 (Bankr. S.D.N.Y. Jan. 24, 2002) (citing *In re Pincombe*, 256 B.R. 774, 782 (Bankr. N.D. Ill. 2000)). In contrast, the Sackler Releases purport to forever resolve and extinguish these police and regulatory claims.

III. California Did Not and Does Not Consent to the Sackler Releases

Although nondebtor releases may be "tolerated" if the affected creditors consent, *In re Metromedia*, 416 F.3d at 142, California has not consented. California objected to confirmation of the Plan, App. at A0603 [Bankr. Dkt 3274] and timely filed a notice of appeal, *id.* at A1410 [Bankr. Dkt. 3813].

ARGUMENT

Confirmation of the Plan should respectfully be reversed because (1) there is no authority under the Bankruptcy Code for the Sackler Releases (outside of the asbestos context), and (2) the bankruptcy court's Article I status means that it lacked the adjudicatory and constitutional authority to enter final orders approving the Sackler Releases. Either is sufficient for reversal.

California endeavors to follow the Court's guidance of "not telling the Court the obvious" [4] and to avoid burdening the Court with duplicative argument. To that end, California reserves the right to adopt by reference parts of other appellant's briefs. *See* Fed. R. Bankr. P. 8014(e) ("[A]ny party may adopt by reference a part of another's brief.").

[4] Individual Practices and Procedures, Chief Judge Colleen McMahon, § V(D) (May 21, 2021).

I. THE BANKRUPTCY CODE DOES NOT PERMIT THE SACKLER RELEASES

California respectfully submits that *Metromedia* is wrong: nonconsensual third-party releases are not authorized by the Bankruptcy Code, except in very narrow circumstances related to asbestos claims only. 11 U.S.C. § 524(g); *see also* 11 U.S.C. § 524(e) ("[D]ischarge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.").[5]

Metromedia improperly relied on the bankruptcy court's equitable powers under 11 U.S.C. § 105 to permit nonconsensual third-party releases, in "rare cases," outside the asbestos context. 416 F.3d at 141-42. However, even in "rare cases," § 105 "does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003) (citation and quotation marks omitted). The Bankruptcy Code expressly permits third-party releases in the context of asbestos-related claims only. 11 U.S.C. § 524(g). A bankruptcy court impermissibly employs § 105 when it creates new substantive rights for released nondebtors by giving those nondebtors benefits similar to a bankruptcy discharge, without subjecting them to the crucible of a bankruptcy filing. *See In re W. Real Estate Fund*, 922 F.2d at 600 ("Obviously, it is the debtor, who has invoked and submitted to the

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[5] Three circuits prohibit nonconsensual third-party releases on this basis. *See Bank of N.Y. Tr. v. Off. Unsecured Creditors' Comm.* (*In re Pac. Lumber Co.*), 584 F.3d 229, 252 (5th Cir. 2009); *Resorts Int'l v. Lowenschuss* (*In re Lowenschuss*), 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re W. Real Estate Fund*, 922 F.2d 592, 600 (10th Cir. 1990). Six others, plus the Second Circuit, have allowed third-party releases in certain, narrow circumstances. *See In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 140 (3d Cir. 2019); *Se. Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc.* (*In re Seaside Eng'g & Surveying, Inc.*), 780 F.3d 1070, 1077-79 (11th Cir. 2015); *Airadigm Commc'ns , Inc. v. FCC* (*In re Airadigm Commc'ns, Inc.*), 519 F.3d 640, 655-58 (7th Cir. 2008); *Class Five Nev. Claimants v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 280 F.3d 648, 656-58 (6th Cir. 2002); *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992); *Menard-Sanford v. Mabey* (*In re A.H. Robins Co.*), 880 F.2d 694, 700-02 (4th Cir. 1989).

bankruptcy process, that is entitled to its protections; Congress did not intend to extend such benefits to third-party bystanders.”).

The U.S. Supreme Court’s subsequent decision in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017), undermines *Metromedia*’s reasoning that nonconsensual third-party releases are appropriate in “rare cases.” 416 F.3d at 141. In *Jevic*, the Court held that bankruptcy courts lack authority to approve “structured dismissals” of bankruptcy cases that “make nonconsensual priority-violating distributions of estate value”—and notably often include “granting certain third-party releases”—despite the Bankruptcy Code’s silence as to the propriety of these dismissals. 137 S. Ct. at 979, 984 (citation omitted). In so holding, the Court explained that permitting such dismissals “would circumvent the Code’s procedural safeguards” and “depart from the protections Congress granted particular classes of creditors.” *Id.* at 986-87. The Court went on to expressly reject a “rare case” exception—like that employed by the Second Circuit in *Metromedia*—refusing to “alter the balance struck by the [Bankruptcy Code],” and noting that the exception would lead to “uncertainty” and “similar claims being made in many, not just a few, cases.” *Id.* “Once the floodgates are opened, debtors and favored creditors can be expected to make every case that ‘rare case’[.]” *Id*. at 986 (quoting Frederick F. Rudzik, *A Priority Is a Priority Is a Priority—Except When It Isn’t*, 34 Am. Bankr. Inst. J. 16, 79 (2015)) (alteration omitted).

This same reasoning undercuts *Metromedia*. The Bankruptcy Code provides no authority for nonconsensual third-party releases outside the narrow context of asbestos-related claims. To read into the Bankruptcy Code a “rare case” exception for third-party releases outside this narrow context threatens to “depart from the protections Congress granted particular classes of creditors,” 137 S. Ct. at 986-87, including, for example, by allowing for the discharge of a state’s

law-enforcement claims for fraud against a nondebtor individual that would otherwise be categorically nondischargeable under the Code if that same individual filed personal bankruptcy.

As *Jevic* predicted, the floodgates have opened to debtors proposing plans with third-party releases. According to at least one bankruptcy judge in the Southern District of New York, "Almost every proposed Chapter 11 Plan that I receive includes proposed [third-party] releases." *In re Aegean Marine*, 599 B.R. at 26 ("[T]hird-party releases are not a merit badge that somebody gets in return for making a positive contribution to a restructuring.") (Wiles, J.).

Moreover, it is unclear whether the unfair negotiating leverage that nonconsensual releases create for third parties results in better or more efficient settlements than the alternatives. California's experience here has been telling. The specter of nonconsensual releases for the Sacklers empowered them to negotiate with the confidence that any objecting state's concerns would be ignored and that the bankruptcy court would confirm a plan that discharges the states' law-enforcement claims against the Sacklers and their affiliates, providing them with protections from liability that far exceed what they would have obtained had they gone through bankruptcy themselves. *Cf. In re Purdue Pharma L.P.*, 2021 WL 4240974, at *33 ("This is a bitter result. B-I-T-T-E-R.") (App. at A0862); *id.* at *34 ("[F]rankly anyone with half a brain would know that when I directed a second mediation, . . . I expected a higher [Sackler] settlement, perhaps higher than the materially improved settlement that resulted from that mediation.") (App. at A0863). Even if plans containing these illegal releases did consistently provide an increased distribution to creditors in the aggregate, over the alternative, this still would not be a basis to circumvent the Bankruptcy Code. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207 (1988) (courts cannot deviate from the procedures "specified by the Code," even when they sincerely "believ[e] that . . . creditors would be better off").

California respectfully submits that *Metromedia* is wrong and that its reasoning is further called into question by the U.S. Supreme Court's subsequent decision in *Jevic*. There is no statutory authorization for a bankruptcy court to approve nonconsensual third-party releases, particularly releases that purport to forever resolve and extinguish a state's law-enforcement claims against individuals who could not have had such claims discharged through a personal bankruptcy filing.

II. THE BANKRUPTCY COURT CANNOT STATUTORILY OR CONSTITUTIONALLY ENTER FINAL JUDGMENT RELEASING CALIFORNIA'S CLAIMS AGAINST THE SACKLERS

A bankruptcy court lacks both the statutory and constitutional authority to enter a final judgment on California's civil law-enforcement claims against the Sacklers, which allege violations of state law only. First, California's claims against nondebtors are at most "related to" Purdue's bankruptcy, and therefore the bankruptcy court was statutorily barred from entering a final judgment on them (except with all parties' consent). 28 U.S.C. § 157(c)(1); *see also, e.g.*, *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995) ("Proceedings 'related to' the bankruptcy include . . . suits between third parties which have an effect on the bankruptcy estate."). Second, given the bankruptcy court's Article I status, it may constitutionally enter final judgment *only* on claims that either "stem[] from the bankruptcy itself or would necessarily be resolved in the claims allowance process," *Stern v. Marshall*, 564 U.S. 462, 499 (2011); California's law-enforcement claims against the Sacklers fall under neither category.[6] Indeed, as discussed, because these claims are an exercise of California's police and regulatory authority, they cannot even be removed to bankruptcy court. 28 U.S.C. § 1452(a). *See In re Union Golf of*

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[6] California's law-enforcement claims against the Sacklers do not fall within the "public rights" exception articulated in *Stern v. Marshall*. That exception is limited to claims deriving from a federal regulatory scheme or committed for resolution to a federal administrative agency. 564 U.S. at 490-91 (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011)).

Fla., Inc., 242 B.R. 51, 58 (Bankr. M.D. Fla. 1998) ("To permit a debtor to include in its plan an injunction against the enforcement of a government's police power is essentially a de facto removal of the action to the Bankruptcy Court, which removal is expressly prohibited by 28 U.S.C. § 1452(a).").

However, some courts have held—incorrectly, California respectfully submits—that despite these statutory and constitutional limits on a bankruptcy court's authority, a bankruptcy court may nonetheless involuntarily and forever resolve "related to" claims between nondebtors by "cancelling" them in a plan of reorganization because "confirmations of plans" are core proceedings. 28 U.S.C. § 157(b)(2)(L). This Court is one of them:

> A bankruptcy court acts pursuant to its core jurisdiction when it considers the involuntary release of claims against a third-party, non-debtor in connection with the confirmation of a proposed plan of reorganization . . . . A confirmed reorganization plan that includes such releases does not address the merits of the claims being released; those, of course, are governed by non-bankruptcy law. Rather, it effectively cancels those claims so as to permit a total reorganization of the debtor's affairs in a manner available only in bankruptcy.
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> . . .
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> At bottom, while an involuntary release may have the *effect* of a ruling on the merits, it is *not* a ruling on the merits—and thus operates on entirely different jurisdictional footing.

In re Kirwan Offs. S.a.r.l., 592 B.R. 489, 504-05 (S.D.N.Y. 2018), *aff'd on other grounds*, 792 Fed. App'x 99 (2d Cir. 2019) (McMahon, J.).[7] The bankruptcy court agreed. *In re Purdue*

[7] California is unaware of what authority would permit a court to outright "cancel" claims against nondebtors. This potentially raises Fifth Amendment takings concerns. *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 75 (1982) ("The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation."); *cf. Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 291 (1983) ("The State probably is correct . . . that Congress could not, without making provision for payment of compensation, pass a law depriving a State of land vested in it by the Constitution. Such a law would . . . constitute a taking of the State's property . . . in violation of the Fifth Amendment.").

Pharma L.P., No. 19-23649, 2021 WL 4240974, at *40 (Bankr. S.D.N.Y. Sept. 17, 2021) (App. at A0880 [Bankr. Dkt. 3786]).

California respectfully submits that this interpretation runs afoul of Congress's carefully crafted limits on a bankruptcy court's authority. This approach, in which an otherwise non-core proceeding may be transformed into a core proceeding merely by virtue of its inclusion in a Chapter 11 plan, turns the plan into a jurisdictional blank check. *In re Digital Impact, Inc.*, 223 B.R. 1, 11 (Bankr. N.D. Okla. 1998) ("If proceedings over which the Court has no independent jurisdiction could be metamorphisized into proceedings within the Court's jurisdiction by simply including their release in a proposed plan, this Court could acquire infinite jurisdiction."); *see also, e.g.*, *In re Cont'l Airlines*, 203 F.3d 203, 214 (3d Cir. 2000) ("[T]he Bankruptcy Court apparently never examined its jurisdiction to release and permanently enjoin Plaintiffs' claims against non-debtors. . . . We must remain mindful that bankruptcy jurisdiction is limited, as is the explicit grant of authority to bankruptcy court."); *In re Dreier LLP*, 429 B.R. 112, 131 (Bankr. S.D.N.Y. 2010) ("[T]he question is not whether the court has jurisdiction over the settlement, but whether it has jurisdiction over the attempts to enjoin the creditors' unasserted claims against the third party.") (citing *In re Johns-Manville Corp.*, 517 F.3d 52, 65 (2d Cir. 2008)).

California's claims against the Sacklers are statutorily and constitutionally outside the bankruptcy court's jurisdiction to enter final judgment, yet by forever resolving and extinguishing them through a confirmed bankruptcy plan—a final judgment—a bankruptcy court does exactly that. *In re Digital Impact*, 223 B.R. at 13 n.6 ("A release, or permanent injunction, contained in a confirmed plan . . . has the effect of a judgment—a judgment against the claimant and in favor of the non-debtor, accomplished without due process."); *cf. Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151-54 (2009) (affirming preclusive effect of nondebtor "release"

provision in bankruptcy plan); *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938) (same); *Corbett v. MacDonald Moving Servs.*, Inc., 124 F.3d 82, 92 (2d Cir. 1997) (same). If Article III prevents a bankruptcy court from entering a final order disposing of a non-bankruptcy claim against a nondebtor outside "the claims allowance process," *Stern*, 564 U.S. at 499, then it follows that this prohibition should be applied regardless of the proceeding (i.e., plan confirmation).

Courts recognizing this jurisdictional problem have employed the "claim by claim" approach by analyzing individual legal claims separately to determine if there is a basis for bankruptcy jurisdiction over each one. *See, e.g.*, *Pac. Dunlop Holdings v. Exide Techs.* (*In re Exide Techs*.), 544 F.3d 196, 220 (3d Cir. 2008) ("Each state court claim removed to bankruptcy court must be considered individually; non-core claims do not become core simply by virtue of being pursued in the same litigation as core claims."); *Halper v. Halper*, 164 F.3d 830, 838-39 (3d Cir. 1999) (where a case "presented the Bankruptcy Court with a mixture of core and non-core claims," adopting "a claim by claim analysis to determine the extent of [the court's] jurisdiction").

This approach better comports with the bankruptcy court's limited statutory and constitutional authority to enter final judgments, as succinctly explained by the U.S. Bankruptcy Court for the District of Colorado:

> [T]he Court cannot find it has [core] jurisdiction over the proceedings simply because the releases are included within a proposed Chapter 11 plan. It is true the Court has subject matter jurisdiction over these Chapter 11 Cases pursuant to 28 U.S.C. § 157(a) and "confirmations of plans" are expressly made core proceedings under 28 U.S.C. § 157(b)(2)(L) which the Court may hear and determine on a final basis. However, the Court cannot permit third-party non-debtors to bootstrap their disputes into a bankruptcy case in this fashion. There must be some independent statutory basis for the Court to exercise jurisdiction over the third-parties' disputes before the Court may adjudicate them. Even if the Court may be permitted under § 105(a) to approve third-party non-

> debtor releases in appropriate circumstances, § 105 does not provide an independent source of federal subject matter jurisdiction.

In re Midway Gold US, Inc., 575 B.R. 475, 519 (Bankr. D. Colo. 2017).

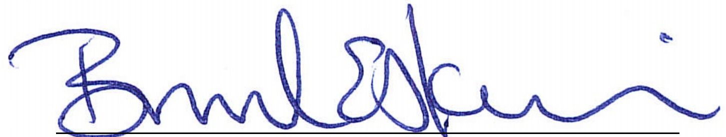
Finally, this Court's affirmance of the bankruptcy court's order approving the Sackler Releases would do nothing more than ratify the entry of a judgment extinguishing California's claims without an actual adjudication of them, on the merits, by an Article III judge. Accordingly, this Court's review of the confirmation order would not resolve the constitutional issues raised in *Stern v. Marshall*.

CONCLUSION

For these reasons and those in parts of other briefs that California adopts by reference, Fed. R. Bankr. P. 8014(e), California respectfully requests that the Court reverse the bankruptcy court's order confirming the Plan.

October 25, 2021

Respectfully submitted,



BERNARD A. ESKANDARI
Supervising Deputy Attorney General

CERTIFICATE OF COMPLIANCE

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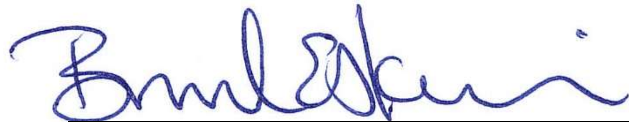

BERNARD A. ESKANDARI

CERTIFICATE OF SERVICE

I, Bernard A. Eskandari, hereby certify that, on October 25, 2021, I caused true and correct copies of the foregoing document to be served by the Court's CM/ECF System to all parties who are deemed to have consented to electronic service. I have also caused a courtesy copy of the foregoing document to be sent by overnight mail to the Chambers of Judge Colleen McMahon.

BERNARD A. ESKANDARI