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22-113-bk(CON), 22-115-bk(CON), 22-116-bk(CON), 22-117-bk(CON), 22-119-bk(CON), 22-121-bk(CON), 22-299-bk(CON), 22-203-bk(XAP)

United States Court of Appeals

for the

Second Circuit

IN RE: PURDUE PHARMA L.P., PURDUE PHARMA INC.,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN CASE NO. 21-CV-7532(L) (HONORABLE COLLEEN MCMAHON, JUDGE)

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF APPELLANTS

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February 18, 2022

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

Debtors.

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

Debtors-Appellants-Cross-Appellees,

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

Appellants-Cross-Appellees,

- v. -

THE CITY OF GRANDE PRAIRIE, as Representative Plaintiff for a Class Consisting of All Canadian Municipalities, THE CITIES OF BRANTFORD, GRAND PRAIRIE, LETHBRIDGE, AND WETASKIWIN, THE PETER BALLANTYNE CREE NATION, on behalf of All Canadian First Nations and Metis People, THE PETER BALLANTYNE CREE NATION on behalf itself, and THE LAC LA RONGE INDIAN BAND,

Appellees-Cross-Appellants,

THE STATE OF WASHINGTON, STATE OF MARYLAND, DISTRICT OF COLUMBIA, U.S. TRUSTEE WILLIAM K. HARRINGTON, STATE OF CONNECTICUT, RONALD BASS, STATE OF CALIFORNIA, PEOPLE OF THE STATE OF CALIFORNIA, by and through Attorney General Rob Bonta, STATE OF OREGON, STATE OF DELAWARE, by and through Attorney General Jennings, STATE OF RHODE ISLAND, STATE OF VERMONT, ELLEN ISAACS, on behalf of Patrick Ryan Wroblewski, MARIA ECKE, ANDREW ECKE, RICHARD ECKE,

Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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F.R.A.P. 29(a)(4) STATEMENT OF *AMICUS CURIAE*[1]

The Association of the Bar of the City of New York (the "Association") was founded in 1870 and has been dedicated ever since to maintaining the highest ethical standards of the profession, promoting reform of the law and providing service to the profession and the public. With its over 23,000 members, the Association is among the nation's oldest and largest bar associations.

Members of the Association's Committee on Bankruptcy and Corporate Reorganization (the "Committee")[2] represent both debtors and creditors (including employees) in business bankruptcy cases and have been involved in Chapter 11 cases of varying degrees of size and complexity across the country. The Committee's interest in this case is in the well-being and efficient functioning of the bankruptcy system as a whole.

Federal Rule of Appellate Procedure 29(a)(2) gives the Association authority to file this brief upon leave of court.

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[1] No counsel for any party helped author the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than the *amicus curiae*, its members or its counsel, contributed money that was intended to fund preparing or submitting the brief.

[2] The current members of the judiciary and employees of the U.S. Trustee Program who are on the Committee have abstained from participation in the preparation and review of this brief and do not express any views with respect to the subject matter of or positions taken in this brief.

INTRODUCTION

For decades, this Court has approved the use of non-consensual third-party releases in Chapter 11 plans, and this Court should now reaffirm that guidance. The Debtors already have explained why that reaffirmation is consistent with bankruptcy courts' statutory and constitutional authority; this brief (i) explains why that reaffirmation is consistent with bedrock principles of bankruptcy law and policy, and (ii) proposes a standard for this Court to adopt to guide bankruptcy courts (which standard is consistent with this Court's precedent).

Third-party releases have played an important role in promoting the principle of maximizing creditors' recoveries, particularly in mass-tort cases, by encouraging non-debtor parties who may have liabilities related to the debtor's conduct to fund plans of reorganization. Those releases have also been essential in enabling those plans to go forward, and so have facilitated the use of those plans as alternatives to (often uncertain) individual litigation for resolving creditors' claims. In those circumstances, releases have therefore promoted the bankruptcy principles of fairly distributing recoveries (because the distribution of recoveries in reorganization plans is governed by rules of fairness and equality) and efficiently resolving complex disputes (because reorganization plans provide unified, global, and equitable resolutions of disputes that the system of individual litigation, especially in mass-tort cases, cannot), to the benefit of debtors and claimholders alike.

While this Court has cautioned that non-consensual third-party releases may be abused, that concern calls for limiting principles—not a blanket ban on a tool that has so successfully served bankruptcy's goals. Those limiting principles are animated by a long history of precedent, which has shown that a bankruptcy judge should approve non-consensual third-party releases in a Chapter 11 plan only in appropriate cases. In particular, we propose that this Court hold that a bankruptcy judge should approve those releases only when they are fair to—and in the best interests of—the releasing parties (as a class), and necessary to the reorganization. Those fundamental requirements should be assessed through the prism of five factors drawn from precedent: (1) that the debtor's conduct was legally relevant to the third parties' liability; (2) that the amount that the released third parties contributed was essential to the reorganization and the released third parties would not have contributed that amount without the releases; (3) that the releasors (as a class) overwhelmingly voted to accept the plan; (4) that the claims against the released third parties were not eliminated, but rather converted to claims against a settlement fund; and (5) that the releasors had no reasonable expectation of a materially higher recovery absent the releases. The District Court's decision in this case illustrates the need for clarity about the circumstances in which third-party releases are appropriate, and this Court should provide that clarity by expressly

adopting these factors, both for this case and for the guidance of debtors, creditors, and courts in future cases.

The District Court below misapplied longstanding Second Circuit precedent in a manner that, if upheld by this Court, would have significant adverse consequences for debtors, creditors, and bankruptcy practitioners in this Circuit. Accordingly, this Court should reaffirm that bankruptcy law authorizes non-consensual third-party releases in appropriate cases and that appropriate limiting principles can ensure that those releases are not abused, but rather are used to further the principles of bankruptcy law.

ARGUMENT

I. NON-CONSENSUAL THIRD-PARTY RELEASES ARE AN IMPORTANT TOOL IN PROMOTING BEDROCK PRINCIPLES OF BANKRUPTCY LAW.

Non-consensual third-party releases[3] should be permitted in appropriate cases because they have been an important tool in promoting bankruptcy's bedrock principles. The first of these is the principle of maximizing creditors' recoveries: third-party releases have played an important role in serving that principle by encouraging third parties who may have liabilities related to the debtor's conduct to

[3] The third-party releases that are at issue in this appeal have not been consented to by all releasors on an individual basis. This is what is meant by "non-consensual," and these are the kinds of releases addressed by this brief's references to "third-party releases."

fund plans of reorganization, especially in mass-tort cases. The second principle is that recoveries should be fairly distributed among creditors: third-party releases have been essential in allowing plans of reorganization to go forward in certain cases, such as this one, and so have facilitated distribution of recoveries through the bankruptcy system, where distribution is bound by fairness rules. The third principle is that complex disputes should be efficiently resolved: in cases where third-party releases have been essential to reorganization plans, those plans provide a unified and global way of fairly resolving disputes, to the benefit of debtors and claimholders, that the alternative of individual litigation does not. This section will further explain how third-party releases promote each principle in turn.

First, third-party releases have been essential to the principle of maximizing creditors' recoveries, especially in mass-tort cases, by encouraging third parties who may have liabilities related to the debtor's conduct to fund plans of reorganization. *See Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999) (noting that one of the main policies underlying Chapter 11 is "maximizing property available to satisfy creditors"). When a corporation commits a mass tort, it is never alone in responsibility for recompense: it has officers, owners, and affiliates that may have made or influenced the tortious actions, or may bear or share legal responsibility for those actions, and insurers that may be obligated to pay for the consequences of those actions. And in a mass-tort bankruptcy, of course, the

corporation usually does not have the funds necessary to pay all victims the full amounts of their claims—often nowhere near the necessary funds. These circumstances create an important role for third-party releases, which give the responsible third parties an incentive to contribute funds that can significantly enhance the victims' recoveries through the corporate bankruptcy in exchange for protection against future tort-related litigation that *directly relates to the very issues that led to the corporate bankruptcy*.[4] The amount of the third parties' funding can be so significant[5] that it is the difference between the victims receiving a recovery or receiving none.[6] And it is not surprising that funding through a reorganization

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[4] Appellees may argue that third-party releases are unnecessary to achieve this benefit, on the ground that the third parties can themselves file for bankruptcy and obtain the releases as debtors. That argument incorrectly conflates the concept of a bankruptcy "discharge" (which requires the recipient to file for bankruptcy) and the release or settlement of a claim (which does not).

[5] This is true whether the amounts involved are in the billions of dollars, as in this case, or lesser amounts (but still significant to the victims), such as in The Weinstein Company bankruptcy, in which it would not have been possible to establish the multimillion-dollar victims' settlement fund without the use of non-consensual third-party releases. Transcript of Plan Confirmation Hearing at 115, *In re The Weinstein Co. Holdings*, No. 18-10601-MFW (Bankr. D. Del. Jan. 27, 2021), ECF No. 3207 (THE COURT: "[I]t is clear that without the contributions by the insurance company and the directors and officers who are being released, there could be no confirmation. The debtor has $3 million, which is not sufficient to pay administrative claims, let alone any recovery for other creditors. So, without the settlement, no plan is possible.").

[6] The uncontested finding of the bankruptcy court in this case is that, absent the third-party releases, the result would be a liquidation, in which the unsecured

plan can result in greater recoveries, given that individual litigation in Article III and state (or foreign) courts is uncertain and typically more costly and protracted than bankruptcy proceedings, draining the limited pool of available assets and leaving few, if any, funds available to compensate victims. That drain can happen even when the litigation is against non-debtor third parties. *See, e.g.*, *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 93-94 (2d Cir. 1988) (upholding an injunction of suits against non-debtor insurers where such suits "would adversely affect property of the estate and would interfere with reorganization").

Second, third-party releases promote the further bankruptcy principle of fairly distributing recoveries. In the cases where releases are appropriate, the releases are essential to reorganization, meaning that they enable plans to go forward, and so enable recoveries from both the third parties and the debtor to be distributed through the bankruptcy process rather than the process of uncertain and costly individual

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creditors (including the tort victims) would receive no recovery. *In re Purdue Pharma L.P.*, 633 B.R. 53, 90 (Bankr. S.D.N.Y. 2021) ("Under the most realistic scenarios . . . , there would literally be *no* recovery by unsecured creditors from the estates in a Chapter 7 liquidation, which is, I believe, the most likely result if the settlements with the shareholder released parties were not approved, given the likely unraveling of the heavily negotiated and intricately woven compromises in the plan and the ensuing litigation chaos." (emphasis in original)).

litigation.[7] *See SEC v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992) (explaining that third-party releases may be approved when they "play[] an important part in the debtor's reorganization plan"). The bankruptcy process is governed by provisions requiring that similarly situated creditors receive similar recoveries. *See* 11 U.S.C. § 1123(a)(4); *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006) ("[T]he Bankruptcy Code aims, in the main, to secure equal distribution among creditors."); *In re Energy Future Holdings Corp.*, 648 F. App'x 277, 283 (3d Cir. 2016) ("Section 1123(a)(4) embodies the principle that all similarly situated creditors in bankruptcy are entitled to equal treatment."). The individual civil tort litigation process is not. As a result, individual litigation in this context is beset by at least two obvious inequities: first, victims who sue (and obtain judgment) more quickly have greater access to the finite pool of resources (*i.e.*, the "race to the courthouse" issue); and second, victims who are able to pay more for litigation fare better. These factors arbitrarily shift recovery to the rapid and the rich, and not necessarily to the most severely injured. And the unfairness of this distributive system is particularly pronounced in the mass-tort setting, where the verdicts that

[7] By enabling a plan, the third-party releases can also avoid liquidation. Preserving going-concern businesses (and associated jobs and economic value) is a fundamental principle of U.S. bankruptcy law and policy.

particular victims obtain are known to vary quite widely for reasons unrelated to substantive differences in their cases. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 749 (E.D.N.Y. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *opinion modified on reh'g*, 993 F.2d 7 (2d Cir. 1993) (noting that "disparities are enormous" in verdicts and that "[t]rials are much like a lottery"); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J. L. & Pub. Pol'y 541, 559-60 (1992) (describing "a strong, persistent pattern of disparate outcomes in similar cases"). Lottery-like results—a pot of gold for some, and little or nothing for others—are not allowed in bankruptcy, and third-party releases thus allow a debtor to address tort liabilities in a way that is more fair to the claimholders *as a whole* than the tort system.[8]

[8] Class actions are usually not a solution in the mass-tort setting, including because questions of law and fact common to class members tend not to predominate over questions affecting individual members, given the differences in their injuries and the multiplicity of laws under which they are likely to sue. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624-25 (1997); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (holding in a mass-tort case that because the claims "must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable"). And multidistrict litigation is also not a solution to individual litigation's problem of unfair distribution, because it only consolidates pre-trial proceedings, meaning that the process of arriving at verdicts in multidistrict litigation is as susceptible to variation as in individual litigation. Moreover, the settlement process in MDL proceedings is not governed by fairness requirements—or even a requirement of court approval—such that MDL settlements need not be fair or fairly distributed like bankruptcy settlements. *See* Samir D. Parikh, *The New Mass Torts Bargain*, 91 Fordham L. Rev. (forthcoming 2022) (manuscript at 25-28) (https://ssrn.com/abstract=3649611).

Third, by enabling a global settlement of all related claims, third-party releases promote the bankruptcy principle of efficiently resolving complex disputes. This tool—which is not available outside of bankruptcy—benefits both debtors and claimholders as it allows for a fair and centralized process for resolving mass-tort cases that individual litigation cannot. *See In re W.R. Grace & Co.*, 475 B.R. 34, 77 (D. Del. 2012) ("Compromises are favored in bankruptcy proceedings because they minimize litigation and expedite the administration of the bankruptcy estate." (citing *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996))). Allowing a mass-tort dispute to go forward as thousands—or tens or hundreds of thousands—of individual lawsuits in a multitude of generalist courts is a significant and needless waste of public and private resources when that entire dispute can be resolved in a single bankruptcy court through the collective settlement procedure embedded in a creditor-approved and court-approved plan of reorganization. Bankruptcy judges are well equipped for that task: they are experienced and expert in fairly resolving massive conflicts with competing claims for relief, and the Bankruptcy Code's numerous open-ended provisions give them the flexible power that is required to do so.[9] *See, e.g.*, 11 U.S.C. § 105(a); *see also NLRB v. Bildisco & Bildisco*, 465 U.S.

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[9] The Debtors already have explained why bankruptcy courts have constitutional power to enter final orders containing non-consensual third-party releases as a matter of law. We note as a matter of policy that confirming that bankruptcy courts have that power will also promote the principle of efficient dispute resolution. If that

513, 525 (1984) (noting that "the policies of flexibility and equity [are] built into Chapter 11 of the Bankruptcy Code"); *Pepper v. Litton*, 308 U.S. 295, 304 (1939) ("[C]ourts of bankruptcy are essentially courts of equity, and their proceedings [are] inherently proceedings in equity." (quoting *Loc. Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934))). As a fully consensual settlement is impossible in a mass-tort case, the bankruptcy court, through the bankruptcy law rule of creditor democracy—whereby a plan may be confirmed (and bind *all* creditors) when two-thirds in dollar amount and a majority in number of each voting class vote to accept the plan, *see* 11 U.S.C. §§ 1126(c),[10] 1129(a)(8), 1141(a)—provides the *only* forum in the U.S. legal system where a unified and complete resolution of mass-tort cases can occur, in a manner that results in a fair distribution for all claimants. Furthermore, in cases where releases are essential to plan confirmation, the releases avoid liquidation, which is

power were denied, then district courts would need to review the factual findings and legal conclusions related to all third-party releases, and would need to review those factual findings *de novo* rather than deferentially. This, in turn, would increase legal uncertainty, which would undermine the parties' ability to rely on the bankruptcy court's determinations, impair the parties' ability to reach settlement, discourage possible sources of funding, and decrease overall recoveries for creditors. Accordingly, requiring a second *de novo* review would be a huge practical blow to third-party releases and seriously undermine their utility.

[10] Because tort claims are unliquidated, they are often estimated at $1 each solely for plan voting purposes (*i.e.*, one person, one vote).

one of the fundamental purposes—if not *the* fundamental purpose—of Chapter 11, to save companies and related jobs, and maximize creditor recoveries.

II. APPROPRIATE LIMITING PRINCIPLES CAN GUARD AGAINST ABUSE OF NON-CONSENSUAL THIRD-PARTY RELEASES.

This Court has approved third-party releases in the subset of bankruptcies where they "play[] an important part in the debtor's reorganization plan." *See Drexel*, 960 F.2d at 293. But in its *Metromedia* opinion, this Court warned that additional criteria should be used—such releases "should not be approved absent . . . truly unusual circumstances"—because "a nondebtor release is a device that lends itself to abuse." *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142-43 (2d Cir. 2005). That opinion did not, however, provide concrete guidance about when those "unusual circumstances" are present: it noted some circumstances in which courts have approved third-party releases, yet it disavowed a definitive list, stating that "this is not a matter of factors and prongs." *Id.* at 142. Now, in light of the District Court's opinion in this case and the importance of third-party releases to reorganization plans in mass-tort bankruptcies, this Court should provide a more definitive standard for assessing those releases to provide greater clarity to debtors, creditors, and lower courts.

In particular, we respectfully submit that this Court should adopt a standard that is modeled off of the analysis of the bankruptcy court in *In re Master Mortgage*

Investment Fund, Inc., 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994), but modified, as outlined below, to achieve consistency with this Court's prior decisions. In *Master Mortgage*, the bankruptcy court assessed a third-party release using a multifactor analysis whose five factors were distilled from a thorough survey of other federal court opinions assessing those releases. *Id.*[11] The *Master Mortgage* opinion is a logical starting place in determining how courts in this Circuit should assess third-party releases, not only because other courts have consulted it for guidance, but also because it was singled out by the American Bankruptcy Institute (a non-partisan commission of bankruptcy judges, professors and practitioners), which studied third-

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[11] The five factors listed in *Master Mortgage* are as follows:

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

168 B.R. at 935 (footnotes omitted).

party releases in 2014 and ultimately recommended that courts follow *Master Mortgage*. AMERICAN BANKRUPTCY INSTITUTE COMMISSION TO STUDY THE REFORM OF CHAPTER 11, 2012-2014 FINAL REPORT AND RECOMMENDATIONS 256 (2014).[12] While *Master Mortgage* is a useful template, however, it requires certain modifications to reflect this Court's prior opinions in order to provide appropriate guidance to courts in this Circuit.

Accordingly, this Court should hold that in order for a non-consensual third-party release to be approved, the bankruptcy court should assess a list of factors (discussed below) to determine whether the release satisfies two ultimate requirements: it must be (1) fair to—and in the best interests of—the releasing parties (as a class), and (2) necessary to the reorganization. These ultimate requirements provide clarity by giving courts a bottom-line target for their multifactor assessments. The first requirement manages the chief concern that third-party releases raise—namely, the risk that the releases will be unfair to or bad for releasors—by requiring that the bankruptcy court find that the release is fair to, and in the best interests of, the releasing classes. This is consistent with the aim of protecting releasors' interests that is implicit in *Master Mortgage*'s multifactor

[12] The Supreme Court and other Circuits have looked to the American Bankruptcy Institute Commission's report for guidance in bankruptcy cases. *See, e.g.*, *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 979 (2017); *Blixseth v. Brown (In re Yellowstone Mountain Club, LLC)*, 841 F.3d 1090, 1095 (9th Cir. 2016).

analysis. *See* 168 B.R. at 935. The court should assess whether the release is fair to and in the best interests of releasor *classes*, and not particular releasors, to be consistent with bankruptcy law's rule of creditor democracy, by which the interests of the creditor supermajority should not be scuttled to promote the interests of the few. *See* 11 U.S.C. §§ 1126(c), 1129(a)(8), 1141(a). The second ultimate requirement reflects this Court's repeated holding that a third-party release is only appropriate when it "plays an important part in the debtor's reorganization plan." *Metromedia*, 416 F.3d at 141 (quoting *Drexel*, 960 F.2d at 293). Finding that a release is necessary to reorganization is also an implicit aim of *Master Mortgage*'s multifactor analysis. *See* 168 B.R. at 935.

There are five factors that courts should consider to determine whether a non-consensual third-party release satisfies those two ultimate requirements. These factors should be treated as guidelines in assessing the ultimate requirements, and not as supplemental requirements.[13] The factors are as follows:

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[13] Taking the approach of a standard with flexible factors, rather than a rule with inflexible requirements, is consistent with the aim of this Court's prior statement that the assessment should not be "a matter of factors and prongs." *Metromedia*, 416 F.3d at 142.

1) **The "debtor's conduct" was "a legal cause of or a legally relevant factor to the third party's alleged liability."** *In re Quigley Co., Inc.*, 676 F.3d 45, 60 (2d Cir. 2012)**.**

In assessing whether a release of a third party could be approved as part of a debtor's reorganization plan, *Master Mortgage* considered whether there was "an identity of interest between the debtor and the third party." 168 B.R. at 935. That factor should be modified as formulated here to reflect this Court's opinion in *Quigley*, which provided guidance on the degree to which a claim against a third party must be related to the debtor to properly be the subject of a third-party release in that debtor's reorganization plan. 676 F.3d at 59-60. This factor makes sense because a third-party release will generally be fair to releasors only when it prevents releasors from bringing claims against third parties that are (closely) connected to the debtor's conduct. Without that connection, the released claims could have nothing to do with the bankruptcy at hand. And that would raise the concern that the release being assessed would not serve bankruptcy law's goal of globally resolving the disputes that are the subject of the reorganization plan, but rather would serve the released parties' unrelated interests in avoiding unrelated liabilities.

2) **The amount that the released third party contributed to the bankruptcy *res* was critical to the reorganization, and the released third party would not have agreed to provide that amount without the release.**

Master Mortgage considered whether the third party contributed "substantial assets" and whether the release was "essential to reorganization." 168 B.R. at 935.

These considerations should be modified as formulated in the factor here to provide additional clarity: the size of the third party's contribution is "substantial" when it is "critical to the reorganization," and the release is "essential" when the released third party would not have agreed to provide the critical amount without that release. This factor makes sense as a way of giving courts clear guidance about how to determine whether a release "plays an important part in the debtor's reorganization plan," which courts must assess under this Court's opinions. *Metromedia*, 416 F.3d at 141 (quoting *Drexel*, 960 F.2d at 293).

In analyzing this factor, courts could require in appropriate circumstances sworn financial disclosures from the proposed recipients of the third-party release to ensure that the court and creditors have adequate financial information upon which to evaluate the sufficiency of the contribution to the debtor's estate.

3) **Each class granting a release "overwhelmingly voted to accept the proposed plan treatment."** *Master Mortgage*, 168 B.R. at 935**.**

This factor is taken as-is from *Master Mortgage*, and it makes sense because there is no surer sign that a release is fair to and in the best interests of the releasors than the overwhelming approval of the releasors themselves. For this reason, *Master Mortgage* is persuasive in concluding that this may be "the single most important factor" in assessing a release. 168 B.R. at 938 ("The Court considers [creditor

approval] the single most important factor.”).[14] Section 524(g) of the Bankruptcy Code requires 75% approval for third-party releases in asbestos cases, 11 U.S.C. § 524(g), and that number could serve as a proxy for overwhelming creditor support under this factor.

4) **Claims against the released third party are “not extinguished,” but rather “redirected at the proceeds of the settlement.”** *Johns-Manville*, 837 F.2d at 91.

Master Mortgage considered whether the “plan provides a mechanism for the payment of all, or substantially all” of the releasors’ claims. 168 B.R. at 935. In *Johns-Manville*, this Court similarly looked at whether the plan at issue provided a mechanism for paying releasors’ claims, but phrased this as an inquiry into whether the claims were “not extinguished,” but rather “redirected at the proceeds of the settlement.” 837 F.2d at 91; *id.* at 94 (explaining that the releasor challenging the plan was “not left without a remedy,” as it was able to “proceed in the Bankruptcy Court against the $770 million settlement fund”). For the sake of consistency, we suggest that this Court keep its formulation from *Johns-Manville*. This factor is a logical part of assessing whether a release is in the best interests of releasors, because it assesses whether the release leaves releasors with no avenue by which to seek recovery, or rather leaves them with the avenue of seeking recovery under the

[14] The plan in this case received support from over 95% of voting creditors. *Purdue*, 633 B.R. at 61.

reorganization plan. Appropriate settlement trust distribution procedures (as per *Johns-Manville*), coupled with the creditor protections embodied in the third and fifth factors, should suffice to protect creditors' interests. *Id.* ("It has long been recognized that when a debtor's assets are disposed of free and clear of third-party interests, the third party is adequately protected if his interest is assertable against the proceeds of the disposition.").

5) Each class granting a release has no reasonable expectation of a materially higher recovery from a combination of available debtor resources (excluding the proposed third-party contribution) and the released third parties taken as a whole absent the release.

Together with the previous two factors, this factor asks the bankruptcy court to assess whether releasors' recoveries are adequately protected, consistent with the rule of creditor democracy, by reflecting on whether each releasing class overall would be better off with the releases (and an otherwise-confirmable plan) than without them. This factor can be assessed by considering the likelihood that litigation against the third parties would result in favorable judgments, and the time required for and likelihood of collection if claimants succeeded in obtaining those judgments. That assessment is manageable, because bankruptcy courts are already highly experienced in evaluating similar factors when determining whether to

approve settlements under Rule 9019, such as the factors delineated by this Court in *In re Iridium Operating LLC*.[15]

The standard articulated above would not be a departure from this Court's precedent; it would simply refine and clarify which "unusual circumstances" support approval of non-consensual third-party releases. *See Metromedia*, 416 F.3d at 143. By reaffirming that those releases may be approved in appropriate cases, this Court will stay consistent with the majority view of the Courts of Appeal, including the Third, Fourth, Sixth, Seventh, Eleventh, and D.C. Circuits, each of which has

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[15] The factors listed in *Iridium* are as follows:

> (1) the balance between the litigation's possibility of success and the settlement's future benefits; (2) the likelihood of complex and protracted litigation, with its attendant expense, inconvenience, and delay, including the difficulty in collecting on the judgment; (3) the paramount interests of the creditors, including each affected class's relative benefits and the degree to which creditors either do not object to or affirmatively support the proposed settlement; (4) whether other parties in interest support the settlement; (5) the competency and experience of counsel supporting, and the experience and knowledge of the bankruptcy court judge reviewing, the settlement; (6) the nature and breadth of releases to be obtained by officers and directors; and (7) the extent to which the settlement is the product of arm's length bargaining.

Motorola, Inc. v. Off. Comm. of Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452, 462 (2d Cir. 2007) (internal quotation marks omitted).

approved such releases.[16] And in fact, even those Courts of Appeal that have been thought of as having flatly rejected third-party releases have shown signs that they would not necessarily prohibit the use of third-party releases in reorganization plans in certain cases. For example, the Ninth Circuit (which has generally been thought of by bankruptcy practitioners as the Circuit most opposed to the concept of non-consensual third-party releases) cabined its holdings from prior cases, noting that those cases only prohibited releases that "affect[] the ability of creditors to make claims against third parties, including guarantors and co-debtors, for the debtor's discharged debt." *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1083-84 & n.6 (9th Cir. 2020) (noting that the "hallmarks of permissible non-consensual releases" are

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[16] *See, e.g.*, *In re Glob. Indus. Techs., Inc.*, 645 F.3d 201, 206 (3d Cir. 2011) (en banc) (noting that, for third-party releases to be approved, it must be shown that they are necessary to the reorganization and fair); *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 347 (4th Cir. 2014) ("[T]his circuit's longstanding rule [is] that non-debtor releases may be enforced in appropriate circumstances."); *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir. 2002) (holding that "the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor" when certain factors showing "unusual circumstances" are present); *Airadigm Commc'ns v. FCC (In re Airadigm Commc'ns, Inc.)*, 519 F.3d 640, 657 (7th Cir. 2008) (("In light of [Sections 105(a) and 1123(a)(6)], we hold that this 'residual authority' permits the bankruptcy court to release third parties from liability to participating creditors if the release is 'appropriate' and not inconsistent with any provision of the bankruptcy code."); *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070, 1079 (11th Cir. 2015) (holding that third-party releases should be approved "where essential, fair, and equitable"); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1153 (D.C. Cir. 1986) (allowing appropriately limited third-party releases).

"fairness, necessity to the reorganization, and specific factual findings to support these conclusions" (quoting *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 214 (3d Cir. 2000))). The Tenth Circuit's focus similarly has been on holding that bankruptcy courts cannot release third parties from liability on the debtor's discharged debts. *See Landsing Diversified Properties-II v. First Nat'l Bank & Tr. Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990) (citing 11 U.S.C. § 524(e)). Debts of those kinds are not the debts at issue in this case nor debts that commonly would be the subject of third-party releases satisfying the standard proposed by this brief. And the Fifth Circuit, another significant "minority rule" circuit, has noted that Section 524(g) of the Code "suggests non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets," signaling openness to third-party releases in precisely the mass-tort cases where those releases are most likely to be approved under the proposed standard. *Bank of N.Y. Tr. Co., NA v. Off. Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009).

In sum, the proposed standard should be adopted because it is faithful to what this and other federal courts have done in assessing third-party releases; it is consistent with bedrock bankruptcy principles; and adopting it will give debtors, claimants, and courts greater confidence in distinguishing third-party releases that are legally sound from those that are not.

CONCLUSION

Non-consensual third-party releases have facilitated reorganization plans and maximized recoveries, and in the cases where they do, they accomplish the overarching aim of bankruptcy law: the expeditious and fair resolution of complex disputes among disparate parties in a manner that promotes the collective interests of all. Though third-party releases may be abused, that danger simply calls for this Court to adopt the limiting principles that experience has taught the courts—not a blanket ban. Under those principles, a bankruptcy judge should approve those releases in a Chapter 11 plan only when they are fair to—and in the best interests of—the releasing parties (as a class), and necessary to the reorganization, assessing those fundamental requirements through the prism of five factors. Accordingly, this Court should affirm its thought leadership on non-consensual third-party releases by reversing the District Court and clarifying for bench and bar the circumstances in which the use of this critical bankruptcy tool is appropriate.[17]

[17] It is the hope of *amicus curiae* that, to the extent it addresses the topic of third-party releases legislatively, Congress would adopt the standard proposed herein. A uniform nationwide standard based on the one proposed to this Court would be a welcome development in this important area of bankruptcy law.

Dated New York, New York
February 18, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Paul H. Zumbro certifies as follows:

1. This brief complies with the type-volume limitation of Local Rule 29.1(c) because it contains 5,587 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: February 18, 2022

/s/ Paul H. Zumbro
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CERTIFICATE OF SERVICE

I hereby certify the following under the penalty of perjury:

I am an attorney at Cravath, Swaine & Moore LLP, counsel for the Association of the Bar of the City of New York.

On the 18th day of February, 2022, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Service to all parties will be accomplished by the appellate CM/ECF system, except for the following, who will be served via USPS first class mail:

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