No.

IN THE

Supreme Court of the United States

JOHN SWEENEY AND REGINA SWEENEY, HIS WIFE,
PETITIONERS,

v.

EASTMAN KODAK COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Is a products liability complaint subject to dismissal, pursuant to Rule 12(b)(6), Fed. R. Civ. P., consistent with the fifth amendment's Due Process Clause, and this Court's holding in *Jones v. Brock*, 549 U.S. 199 (2007), simply because it did not allege facts sufficient to overcome a potential defense of discharge in bankruptcy?

2. Can a claim for a latent injury from exposure to a Chapter 11 bankruptcy debtor's product be discharged in bankruptcy, consistent with the fifth amendment's Due Process clause, when at the time the debtor's claims bar date notices were published, and its bankruptcy plan confirmed, the claimant did not yet know the debtor's product caused his injury?

3. Can a claim for latent injury from exposure to a Chapter 11 bankruptcy debtor's product be discharged in bankruptcy, consistent with the fifth amendment's Due Process Clause, when the debtor's published claims bar date notices fail to mention either the product that caused claimant's injury, the debtor's role in the manufacture of that product, or the debtor's knowledge that the same product had caused numerous other individuals to suffer the same latent injury?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

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The unpublished Opinion of the United States District Court for the District of New Jersey in *Sweeney v. Lafayette Pharmaceuticals, Inc., et. al.*, (D.C. No. 2:16-cv-4860), decided April 30, 2020, and reported at 2020 U.S. Dist. LEXIS 75625 (D. N.J. 2020), dismissing petitioners' complaint against respondent, is set forth in the Appendix hereto. (App. 12a-25a).

The unpublished Opinion of the United States Court of Appeals for the Third Circuit in *Sweeney v. Alcon Laboratories, et al.*, decided on April 20, 2021, C.A. No. 20-2066, and reported at 2021 U.S. App. LEXIS 11383 (3d Cir. 2021), affirming the District Court's order of dismissal, is set forth in the Appendix hereto. (App. 1a-11a).

The unpublished Opinion of the United States Court of Appeals for the Third Circuit in *Sweeney v. Alcon Laboratories, et al.*, C.A. No. 20-2066, filed on May 20, 2021, denying petitioner's petition for rehearing and for rehearing *en banc*, is set forth in the Appendix hereto. (App. 26a-27a).

JURISDICTION

The unpublished Order by the United States Court of Appeals for the Third Circuit in *Sweeney v. Alcon Laboratories, et al.*, denying petitioner's petition for rehearing and rehearing *en banc*, was filed on May 20, 2021 (App. 26a-27a).

In addition, on March 19, 2020, in light of the ongoing public health emergency caused by

COVID-19, this Court issued an Order extending the deadline for the filing any petition for writ of certiorari due on or after March 19, 2020, for 150 days from the date of the court of appeals' order denying a timely filed petition for rehearing.

This petition for writ of certiorari is filed within the time allowed by this Court's rules, 28 U.S.C. § 2101(c), and by this Court's Order of March 19, 2020.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be … deprived of life, liberty, or property, without due process of law…

11 U.S.C. § 523(a)(3)(A) of the Bankruptcy Code:

> (a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title [11 USCS § 727, 1141, 1192, 1228(a), 1228(b), or 1328(b)] does not discharge an individual debtor from any debt—
>
> (3) neither listed nor scheduled under section 521(a)(1) of this title [11 USCS § 521(a)(1)], with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—
>
> (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection,

> timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing…

Rule 12(b)(6), Fed. R. Civ. P.:

> **DEFENSES AND OBJECTIONS: WHEN AND HOW PRESENTED; MOTION FOR JUDGMENT ON THE PLEADINGS; CONSOLIDATING MOTIONS; WAIVING DEFENSES; PRETRIAL HEARING**
>
> * * *
>
> (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> * * *
>
> (6) failure to state a claim upon which relief can be granted: …

STATEMENT

For approximately four decades respondent manufactured "iophendylate," the key ingredient in Pantopaque, a radiographic contrast dye. The developers and manufacturers of Pantopaque, including respondent, knew since at least the 1940's that there was a direct causal connection between the Pantopaque typically left in a patient's spine following administration of a Pantopaque myelogram, and a chronic, latent disease of the spine known as "chronic adhesive arachnoiditis."

Petitioner John Sweeney received a Pantopaque spinal myelogram in 1975. In their August 10, 2016 complaint in the United States District Court for the District of New Jersey petitioners alleged that, until at least the 1980's, respondent fraudulently concealed its knowledge of this direct causal connection between residual Pantopaque and the later emergence of chronic adhesive arachnoiditis in the spines of Pantopaque myelography recipients. The use of Pantopaque for spinal myelography was discontinued in the early1990's, when the causal connection between Pantopaque myelograms and chronic adhesive arachnoiditis was widely recognized by physicians.

Symptoms of chronic adhesive arachnoiditis (i.e., intractable pain, loss of bowel and bladder function, lower limb weakness, and even paralysis), do not emerge for years or even decades after Pantopaque is injected into the subarachnoid space of a patient's spine. Petitioner John Sweeney's symptoms did not emerge until 2009, almost thirty-five years after his Pantopaque myelogram, when he began to experience unexplained weakness in his lower limbs. These symptoms steadily worsened over the next several years, until Mr. Sweeney was ultimately confined to a wheelchair. But their cause was not discovered until 2014, when residual Pantopaque was accidentally discovered in his thoracic spine during an exploratory CT scan. Petitioner then searched the internet and discovered that respondent was the manufacturer of Pantopaque's key ingredient, iophendylate, for more than forty years. He also discovered a reference to a Pantopaque myelogram in his own medical records, administered to him in November of 1975.

Petitioners were unaware of respondent's Chapter 11 Bankruptcy proceedings when they filed their initial Complaint in this action on August 10, 2016, against respondent and the other manufacturers and distributors of Pantopaque. Also unknown to petitioners, approximately forty-eight different lawsuits involving approximately seventy-five different former Pantopaque myelography patients were brought against respondent, prior to its Chapter 11 bankruptcy filing, all claiming their chronic adhesive arachnoiditis was caused by injection of Pantopaque into the spinal canal.

Respondent Kodak was named as a defendant in each of these lawsuits. Yet respondent *never informed* the Bankruptcy Court of the Southern District of New York, where it began Chapter 11 Reorganization proceedings in 2012, of these prior Pantopaque lawsuits against it. In addition, the Claims Bar Date Notices which respondent circulated *never mentioned* respondent's role as the sole supplier of Pantopaque's key ingredient, iophendylate, for over four decades. Nor did Kodak's Claim Bar Date Notices advise potential claimants of the impact that respondent's bankruptcy proceedings would have on them or their claims.

Despite knowing that petitioners did not and could not know in 2012 that petitioner John Sweeney suffered from Pantopaque- induced chronic adhesive arachnoiditis – indeed, he never discovered this fact until 2014, more than a year *after* respondent's Claims Bar Date notices were circulated – respondent moved to dismiss petitioners' Complaint pursuant to 11 U.S.C. 1141(d) and 11 U.S.C. 524(a), contending that

their claims were discharged in its Chapter 11 bankruptcy proceeding by the Claims Bar Date notices published in 2012, and the Confirmation Plan adopted.

The District Court treated respondent's motion as a Rule 12(b)(6) Motion To Dismiss, even though respondent itself did not characterize it as such. (App. 12a; *cf.*, App. 30a-32a). The District Court granted dismissal, without providing petitioners any opportunity for discovery. (App. 24a – 25a). However, it based its decision not on any pleading deficiency, but on a full due process analysis, and concluded that "Plaintiffs, as unknown creditors with prepetition claims, were afforded due process through Eastman Kodak's notice by publication. A contrary result would interfere with the fundamental purpose of the Bankruptcy laws—to provide debtors with finality and a fresh start. *In re WR Grace & Co.*, 729 F.3d 332, 346." (App.22a)

Petitioners appealed, contending that their rights to due process were not satisfied by respondent's Claims Bar Date Notices. Petitioners contended that, because they "did not even discover the possible role of Pantopaque in producing Mr. Sweeney's chronic adhesive arachnoiditis until October 2014," two years after respondent's Claims Bar Date Notices were published (App. 29a), and "there was no mention of either Pantopaque or of the potential claims of Pantopaque victims in any Kodak Claims Bar Notice, the impact of Kodak's Bankruptcy Claims Bar notices upon the [petitioners'] potential claims against Kodak could not possibly have come to the attention of either Plaintiffs or anyone who knew them, in time for Plaintiffs to assert a claim in [respondent] Kodak's

Chapter 11 Bankruptcy Reorganization proceeding." (*Ibid*).

The reviewing Third Circuit Panel upheld the District Court's ruling. The Panel noted that petitioners' amended complaint contained "…no allegation that previous Pantopaque suits appeared in Kodak's books and records more than a decade after those actions were resolved…" The Panel concluded that, "[i]n the absence of allegations [in the amended complaint] tending to show that Kodak's records in 2012 disclosed outstanding Pantopaque claims, we must conclude that the notice provided here was constitutionally sufficient." (App. 8a – 9a).

The Panel also concluded that, because petitioners did not yet know Mr. Sweeney had been injured by Pantopaque, when respondent's bankruptcy Claims Bar Date notices were circulated, no notice provided to petitioners could have alerted them to the existence of their claim against Kodak, in time for them to represent their interests in respondent's Chapter 11 Bankruptcy Reorganization proceedings. (App. at 11a, n. 9). As a result, despite the fact that respondents Claims Bar Date notices made no mention whatsoever of Pantopaque, or its connection to respondent; and were published some two years *before* petitioners even knew that their claim against respondent even existed, the Panel ruled those notices were "constitutionally sufficient" to discharge petitioners' claim. (App. 8a-9a).

REASONS FOR GRANTING THE PETITION

1. The Panel's Decision To Effectively Condition Petitioners' Due Process Rights To Notice, And The Opportunity To Be Heard, Upon Compliance With A Non-Existent Pleading Requirement, By Itself Provides A Compelling Reason For Granting This Petition.

The decision of the Panel below is extraordinary. It is the *first* by a United States Circuit Court of Appeals to rule that, in order to survive a motion to dismiss, based upon "discharge in bankruptcy," a creditor asserting a claim against a debtor must allege *in its own complaint*, facts from which it can be determined that a genuine issue of material fact exists on *the debtor's* defense of discharge in bankruptcy. (App. 8a-9a).

In fact, however, the Panel's purported pleading "requirement" is not only unprecedented, it is without legal basis. It also directly *violates* this Court's ruling in *Jones v. Brock*, 549 U.S. 199, 212 (2007), by imposing a pleading requirement, pursuant to Rule 12(b)(6), Fed. R. Civ. P., not sanctioned by any Federal Rule and which, therefore, in fact *does not exist.*

In *Jones*, this Court considered the analogous question of whether the complaint of a prisoner asserting a claim under the Prisoner's Litigation Reform Act ("PLRA"), must affirmatively plead exhaustion of remedies, one of the well-recognized defenses to a PLRA claim. Answering in the negative, this Court emphasized that the Federal Rules, not the

case-by-case decisions of federal courts, establish the requirements for the pleading of claims:

> "Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts." [citations omitted]
>
> "A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief. If the allegations, for example, show that relief is barred by the applicable statute of limitations…that does not make the statute of limitations any less an affirmative defense, see Fed. Rule Civ. Proc. 8(c). …Determining that Congress meant to include failure to exhaust under the rubric of "failure to state a claim" in the screening provisions of the PLRA would thus not support treating exhaustion as a pleading requirement rather than an affirmative defense.)
>
> …that is not to say that failure to exhaust cannot be a basis for dismissal for failure to state a claim. It is to say that there is no basis for concluding that Congress implicitly meant to transform exhaustion from an affirmative defense to a pleading requirement."

Jones v. Brock, 549 U.S. 199, 214-216 (emphasis supplied).

The Panel below obviously ignored *Jones*, when it decided petitioners' appeal. (App. 1a-9a); (App. 26a-27a). In its decision below, the Panel did not even suggest that the allegations in petitioners' Complaint failed to state a valid products liability claim, nor did

the Panel suggest petitioners' allegations "suffice to establish" the defense of discharge in bankruptcy. (App. 1a-9a). On the contrary, the Panel ruled that petitioners' Fifth Amended Complaint was subject to dismissal because it *failed* to allege facts from which it could be concluded that respondent "should have ascertained the existence of Pantopaque claims against it." (App. 8a-9a). The absence of such allegations did not "establish" the defense of discharge in bankruptcy, it failed to even *address* its potential existence.

In short, *there is no requirement* in the Federal Rules for pleading facts in a complaint relevant to the potential existence of a discharge in bankruptcy defense, or any other potential defense. And clearly the Panel had no authority to *create* such a pleading requirement on its own volition. *Jones*, 549 U.S. 199, 214-215. In fact, Rule 12(b), Fed. R. Civ. P., entitled "How to Present Defenses," specifically instructs that "[e]very defense to a claim for relief in any pleading must be asserted *in the responsive pleading* if one is required." *Id.* (emphasis supplied). There is no requirement for the assertion of *any* defense *in the initial pleading*, or of the assertion of facts which would disprove the validity of any defense, and there was no basis for the Panel to impose that requirement upon petitioners. *Id.*

As a result of its erroneous conclusion to the contrary, the Panel failed to even reach petitioners' due process arguments. Instead, it *nullified* the protections afforded to petitioners by the Due Process Clause, by effectively conditioning those protections upon the allegations of petitioners' complaint (App. 8a-9a).

Most importantly, however, it is clear that at least three judges of the Third Circuit Court of Appeals (perhaps the entire Circuit, given its rejection of petitioners' application for Rehearing *en banc*), ignored the principles set forth in *Jones*. (App. 8a-9a); (App. 26a-27a). The Panel's wrongful requirement that petitioners plead facts sufficient to overcome a *potential defense* of "discharge in bankruptcy," is unauthorized by the Federal Rules, violates due process, and is at odds with this Court's decision in *Jones*. 549 U.S. 199, 214-215; see also, *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 515 (2002); *Hill v. McDonough*, 547 U.S. 573, 582 (2006).

This fundamental error justifiably invokes this Court's duty of superintendence of the federal judiciary, to insure compliance with the teaching of *Jones*, *Swierkiewicz*, *Hill*, and other rulings by this Court holding that pleading requirements *are not*, and *cannot* be established by federal courts on an *ad hoc*, case-by-case basis. *Jones*, 549 U.S. 199, 214-215.

Petitioners respectfully submit that their petition should be granted for this reason alone.

2. The Fifth Amendment's Protection Against Deprivation Of Property Without Due Process Of Law Is Routinely Denied To Latent Injury Claimants Like Petitioners, In Chapter 11 Bankruptcy Proceedings, And The Need To End This Ongoing Violation Of The Due Process Clause Provides Further Reason To Grant This Petition.

The guarantees of the Fifth Amendment Due Process Clause represent the most fundamental and important bulwark of our entire system of justice. That an American could be deprived of life, liberty, or property *without* first receiving "notice" and "the opportunity to be heard," is almost unthinkable. Yet that is precisely what happened to petitioners here, and what now is happening with increasing frequency in our federal courts to claimants, like petitioners, who hold latent injury claims against Chapter 11 Bankruptcy debtors. What is driving this trend is the mistaken perception that providing such debtors with a "fresh start" in bankruptcy is not just a laudable goal, but an absolute necessity.

Reorganization proceedings under Chapter 11 of our Bankruptcy Laws are intended to provide a "fresh start" to Chapter 11 Bankruptcy debtors. The importance of providing this "fresh start" to Chapter 11 Bankruptcy debtors has been repeatedly recognized by this Court. See e.g., *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 364 (2006); *FCC v. NextWave Pers. Communs. Inc.*, 537 U.S. 293, 305 (2003). Petitioners recognize completely the laudable objective of providing Chapter 11 Bankruptcy debtors, and indeed

all bankruptcy debtors, with a "fresh start" in bankruptcy.

However, a legal claim represents a "property interest," and petitioners' property rights under the Due Process Clause of the Fifth Amendment cannot be extinguished, without notice and the opportunity to be heard. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-431 (1982) (noting that a cause of action under the Illinois' Fair Employment Practices Act was a protected property interest, referring to other types of claims that the Court had previously recognized as deserving due process protection, and holding that "a cause of action is a species of property protected by the...Due Process Clause"); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485 (1988) ("Appellant's interest is an unsecured claim, a cause of action . . . Little doubt remains that such an intangible interest is property…deserving due process protections.") (citations omitted). Moreover, a Chapter 11 Bankruptcy Reorganization proceeding involves the "significant [governmental] action" this Court recognized in *Tulsa* was necessary to invoke the protections of the Fifth Amendment's Due Process clause. *Id.* at 487.

In keeping with this Court's rulings in *Logan* and *Tulsa,* numerous federal court decisions in the last ten years have recognized that a legal claim against a bankruptcy debtor is a property interest protected by the Fifth Amendment's Due process clause, and therefore *cannot* be discharged in a bankruptcy proceeding, regardless of whether the claim is held by a creditor whose claims are known or unknown to the debtor, unless the creditor's due process rights to

notice and the opportunity to be heard have been satisfied. *In re Grossman's, Inc.*, 607 F.3d 114, 125-127 (3d Cir. 2010); *DPWN Holdings (USA) Inc. v. United Airlines Inc.*, 871 F.Supp.2d 143, 157-158 (E.D.N.Y. 2012) (remanded on other grounds, 745 F.3d 145, 153 (2d Cir. 2014); see also, *In re Flynn*, 402 B.R. 437, 445 n.11 (B.A.P. 1st Cir. 2009) *("[R]egardless* of what the Bankruptcy Rules allow, they may not be used to circumvent constitutional due process requirements. Notification procedures set forth in rules 'neither trump nor displace the constitutional requirement that . . . [the] notice [be] sufficient to satisfy the demands of due process.' ") (alteration in original), quoting *United States v. One Star Class Sloop Sailboat*, 458 F.3d 16, 22 (1st Cir. 2006).

More recently, however, individuals who suffered latent injuries from exposure to products manufactured or distributed by debtors in Chapter 11 proceedings, have had their Fifth Amendment's due process guarantees effectively ignored. Federal courts concerned primarily with the "fresh start" in bankruptcy, and focusing *solely* upon the Chapter 11 Bankruptcy debtors' awareness of current and/or potential latent injury claims when issuing its Claims Bar Date notices, have ignored the issue of whether those notices could even have reached a latent injury claimant where, as in this case, the claimant *did not even know of the existence of his or her claim*, at the time of the debtor's bankruptcy proceedings. See e.g., *Dahlin v. Archer-Daniels-Midland Company*, 881 F. 3d 599, 607 (8th Cir. 2017); *In re Placid Oil Co.*, 753 F.3d 151, 157 (5th Cir., 2014); see also *In re Peabody Energy Corp.*, 579 B.R. 208, 213, 217 (E.D. Mo. Bankr. 2017); *In*

re Chemtura Corp., 2016 Bankr. LEXIS 4056, *12, 34, 44-45 (S.D.N.Y. Bankr. 2016).

These cases and the ruling of the Panel below make it clear that, even though neither the bankruptcy laws nor the "fresh start" objective of Chapter 11 are mentioned in the Constitution, the "fresh start" in bankruptcy has become the "golden calf" of due process, in the context of Chapter 11 Bankruptcy proceedings, superseding the guarantees of the Due Process Clause itself, for debtors seeking discharge of latent injury claims. In this case, as in *Dahlin*, *Placid Oil*, *In re Peabody*, *In re Chemtura*, and numerous other cases like them, Petitioners likewise *did not even know their claims existed* at the time respondent's bankruptcy Claims Bar Date notices were circulated, and those notices *failed to even mention their potential claims*. But, like those cases, the Panel below also concluded the respondent's notices were still "constitutionally sufficient" to discharge them. (App. 8a-9a).

Nevertheless, the Fifth Circuit's ruling in *Placid Oil*, the Eighth Circuit's decision in *Dahlin*, and the decisions of those numerous courts which have followed them, including the Panel in this case, all share the same fundamental flaw: while relying upon *Mullane*, they focus *only* upon the portion of *Mullane* which discusses the requirements of notice, based upon the *debtor's* awareness of existing or potential claims. But they overlook the critical importance of the *claimant's* knowledge, as noted by this Court's admonition in *Mullane* that, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated,

under all the circumstances, *to apprise interested parties* of the pendency of the action and *afford them an opportunity to present their objections*." *Id.*, 339 U.S. at 314 (citations omitted, emphasis supplied).

The ruling of the Eighth Circuit Court of Appeals in *Dahlin v. Archer-Daniels- Midland Company*, 881 F. 3d 599 (8th Cir. 2017), exemplifies this flawed approach. In *Dahlin*, the debtor circulated bankruptcy Claims Bar Date notices which made no mention of injuries from benzene, in spite of being sued numerous times prior to its bankruptcy filing for injuries from exposure to benzene. *Dahlin v. Archer-Daniels-Midland Company*, 2015 WL 11675667, *5-*10 (S.D. Iowa, Davenport Div. 2015). As here, where no provision was made for potential Pantopaque claims, the Defendants in *Dahlin* created no fund to compensate individuals for future benzene-related claims, nor did they appoint a future-claims representative for benzene claimants. And finally, there was also no indication the Bankruptcy Court was ever made aware of the debtor's potential future liability for benzene claims, just as the Bankruptcy Court here was never made aware of respondent Kodak's potential future liability for Pantopaque claims. Id., *11-*12.

Faced with these facts, reiterating the earlier decision of the Eighth Circuit Court of Appeals in *Sanchez v. N.W. Airlines, Inc.*, 659 F.3d 671 (8th Cir. 2011), and the due process concerns expressed in that decision, the District Court in *Dahlin* rejected the debtor's summary judgment motion, seeking to dismiss the wrongful death claim of the plaintiff, whose husband succumbed to cancer traced back to his exposure to benzene at one of the Defendants' plants.

Dahlin v. Archer-Daniels-Midland Company, 2015 WL 11675667, *12, citing *Sanchez*, 659 F. 3d at 675, 680. Despite its earlier holding in *Sanchez*, however, the Eighth Circuit Court of Appeals *reversed* the District Court's decision in *Dahlin*, and vacated the jury' verdict in favor of the claimant, tersely explaining that:

> …Under the circumstances, Lyondell's notice satisfied due process. See *Mullane*, 339 U.S. at 314; *Chemetron*, 72 F.3d at 348- 49; *Placid*, 753 F.3d at 158. A "[c]ritical feature[] of every bankruptcy proceeding [includes] . . . the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts." *Central Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363-64, 126 S.Ct. 990, 163 L. Ed. 2d 945 (2006). Dahlin's claim arose before the confirmation of Lyondell's bankruptcy plan. No proof of claim was filed. This lawsuit was discharged in bankruptcy. See *Sanchez*, 659 F.3d at 675; 11 U.S.C. §1141(d)(1)(A).

Dahlin, 881 F.3d 599, at 607 (emphasis supplied)

A simple comparison between the 8th Circuit's 2011 ruling in *Sanchez*, set forth above, and its 2017 ruling in *Dahlin*, immediately reveals the ongoing erosion of the rights of latent injury claimants' rights under the Due Process Clause, in Chapter 11 Bankruptcy Proceedings.

The ruling of the Fifth Circuit Court of Appeals in the case of *In re Placid Oil Co.*, 753 F.3d 151, is another example. In *Placid Oil*, the Fifth Circuit Court of Appeals held that the latent injury claim of an individual exposed to asbestos at a manufacturing facility owned by

the debtor was discharged in bankruptcy, despite the fact that the latent injury claimant, the wife of a former employee of the debtor's, did not even recognize that she was injured by that exposure *until some sixteen years after* the debtor's Bankruptcy Bar Date notices were circulated. Id. at 153. The debtor's claims Bar Date notices in *Placid Oil* made no reference whatsoever to the presence of asbestos on the debtor's premises even though, years *before* its bankruptcy filing, Placid Oil Co. was aware of asbestos hazards to its employees at that facility, and specifically, it was aware of the exposure of the claimant's husband to asbestos at that facility in the course of his employment. Id.

Importantly, however, in his compelling dissent in *Placid Oil*, citing *Mullane*, Circuit Judge James L. Dennis noted the "grave due process problems presented by the discharge of unknown—and unknowable—future claims," explaining that:

> The underlying legal issue in this case is whether a bankruptcy court may, consistent with the Constitution's guarantee of due process, hold that a state-law wrongful-death claim based on the death of a housewife, who fatally contracted mesothelioma from asbestos fibers on her husband's work clothes, was discharged in a bankruptcy filed by her husband's former employer fifteen years before she developed or was aware of any symptom of the disease. In my view, the bankruptcy court in this case erred in failing to recognize that such a result would violate the constitutional guarantee of due process of law…

Although "*Mullane* allows constructive notice to unknown claimants so long as no other method would be more effective in reaching them, the Court has not endorsed such an approach to claimants who are not only unknown but 'unselfconscious and amorphous,' as are future claimants in bankruptcy," [citation omitted] ("[N]either *Mullane* nor any case following it involved claimants who were not only unknown to the party sending the notice but who were in essence unknown to themselves and who therefore would not recognize themselves as the intended targets of the notice even were the notice actually received.") [citation omitted]. Not only has the Court never endorsed such an approach, but a majority of the Court has also strongly indicated that requiring only constructive notice to individuals exposed to asbestos but who do not know about either their exposure or the harm that may result would present grave problems…

Several courts and commentators have also recognized that constructive notice to such unknowing—future claimants fails to comport with the guarantee of due process....

> "[W]hen an individual cannot recognize that he or she has a claim in a bankruptcy case and, therefore, cannot make a decision about how to assert that claim, that person is functionally or constructively 'incompetent' for purpose of the bankruptcy case." [citation omitted] "These claimants…have no ability to represent their own interests in the bankruptcy case because they cannot be given the information necessary to enable them to make decisions about those

> interests." *Id.* at 370. Consequently, "[c]onstructive notice cannot reach [them because they] do not know of their claims." *Id.* …
>
> These and other authorities recognize the grave due process problems presented by the discharge of unknown—and unknowable—future claims…when constructive notice to individuals exposed to toxic substances but who lack knowledge of either their exposure or any as-yet unaccrued injury is effectively no notice at all. Therefore, neither *Lemelle* nor *Mullane* —which did not consider notice with respect to unknown and unperceivable future claims—should be read as holding that due process has been satisfied when all that is provided is constructive notice to exposure-only individuals who may be unaware of their exposure, unaware of the severe harm that may ultimately result, and unable to recognize that their rights may be affected in bankruptcy. Rather, careful thought and a context-specific approach is required before concluding that unknown, future claimants have been provided with notice and an opportunity to be heard such that their claims may, consistent with the guarantee of due process, be discharged…[citation omitted]

In re Placid Oil Co., 753 F.3d 151 at 159-164 (emphasis supplied, citations omitted).

The same glaring, fundamental flaw Judge Dennis's dissent exposes, is present in the Panel's decision in this case, as it was in the majority's ruling in *Placid Oil*, and in *Dahlin*: the "elementary and fundamental requirement of due process" necessary "in any

proceeding which is to be accorded finality," could *not possibly* have been satisfied by the debtors' published Bar Date notices. That is true because, as here, the plaintiffs in those cases *did not even know their latent injury claims existed*, when the debtors' Claims Bar Date notices were issued, and those notices *made no mention whatsoever* of the debtors' connection to the harmful products at issue.

Prior to the Panel's ruling herein, it appeared as though the Third Circuit stood as a staunch defender of the due process rights of latent injury claimants, in light of its decision in the case of *In re Grossman's Inc.*, 607 F.3d 114,. See, e.g., "A Tale of Two Circuits: The Third and Fifth Circuits Diverge in Balancing the Debtor's Interest in a Fresh Start with the Due Process Rights of Future Asbestos Claimants," by Paul M. Singer, Edwin J. Harron and Sara Beth A.R. Kohut, Feb. 18, 2015, Product Liability & Toxics Law. With its decision below, however, the Third Circuit has signaled that, while it continues to give lip service to its concerns for the due process rights of latent injury claimants, with respect to their claims against Chapter 11 Bankruptcy debtors, the level of that concern may have dramatically deteriorated between the time of its 2010 decision in the case of *In re Grossman's Inc.*, 607 F.3d 114, and its decision in this case, over a decade later.

The "fresh start" in bankruptcy for Chapter 11 Bankruptcy debtors is not and should not be the pretext for an exception to the Fifth Amendment's Due Process guarantees. Indeed, there are numerous latent injury claimants who, like petitioners, have sustained injuries from which they can *never* receive a "fresh start," at

any point in their entire lives, and which may be reflective of similar injuries affecting hundreds, or even thousands of other individuals exposed to the same harmful products of the same debtors.

By contrast, the danger posed by latent-injury claims brought even after the expiration of claims bar dates to the "fresh start" afforded by a Chapter 11 Bankruptcy Reorganization, can be met by every Chapter 11 debtor in several ways. A debtor can apply, in its filing, for establishment of a fund for latent injury claims arising from its prepetition manufacture of known dangerous product. A debtor may also maintain products liability insurance for claims which it knows, or should know have already given rise to numerous latent injury claims, and may give rise to such claims later.

Remarkably, despite these options, no federal jurist besides Judge Dennis in his dissent in *Placid Oil*, appears to have directly confronted the important due process issues presented here. Without this Court's intervention rulings like those of the majority in *Placid Oil*, in *Dahlin*, and of the Panel in this case, and those of the increasing number of federal courts which have adopted the same, fundamentally flawed approach to due process in connection with Chapter 11 Bankruptcy proceedings, can clearly be expected to continue.

Thus, the Court should also grant this petition to place the "fresh start" in bankruptcy in proper perspective, and to reaffirm the paramount importance of the Fifth Amendment's Due Process Clause, in Chapter 11 Bankruptcy, as in all other judicial proceedings. Our federal courts should be reminded as

well that *all* of the individual facts and circumstances of a given case need to be considered when making due process determinations, not merely the "pleadings."

The Court should also reaffirm that the Fifth Amendment's Due Process Clause cannot be ignored, when those facts and circumstances support the conclusion that a latent injury claimant neither knew, nor could have known that his or her claim existed, at the time the debtor's Claims Bar Date notices were circulated; and that, in such circumstances, however inconvenient this may be for a particular debtor, the *only* ruling consistent with due process, is that his or her claim *cannot* be discharged.

3. The Court Should Also Grant This Petition To Reaffirm The Importance Of Determining The Constitutional Sufficiency Of Chapter 11 Claims Bar Date Notices Not On The Basis Of Any "Formula," But On An Individual, Case By Case Basis, Through Consideration Of *All* Relevant Facts And Circumstances.

In addition to leaving no doubt that claims held by unknowing, or unknown future claimants are "property interests" subject to the protections of the Due Process clause, the rulings of this Court in *Tulsa Professional Collection Services, Inc. v. Pope* and *Mullane* serve another important purpose. They also make it clear that, even if constructive notice is normally sufficient for unknown claimants like the petitioners in this case, in Chapter 11 Bankruptcy proceedings, the *adequacy* of the *content* of any notice provided, for due process purposes, must also be decided on a case-by-case basis.

Such determinations also cannot be made in accordance with the formulaic approach applied by the Panel below. See, e.g., *Mullane*, 339 U.S. 306, at 314 (notice that "does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention," cannot be regarded "as more than a feint…"); *Id.* at 315 (requiring "notice and opportunity for hearing appropriate to the nature of the case…with due regard for the practicalities and peculiarities of the case.").

This Court also noted in *Mullane*, "[w]e have before indicated in reference to notice by publication that, 'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.'" 339 U.S. at 320.

A classic example of "fiction deny[ing] fair play," was Respondent's application for dismissal based upon "discharge in bankruptcy" of the latent injury claims of individuals like petitioners here, *despite* its own failure to include in its Claims Bar Date notices any reference whatsoever either to its four decades as the manufacturer of Pantopaque's key ingredient, or the known association between exposure to that product and chronic adhesive arachnoiditis, a devastating latent disease. Clearly, such "notices" were the equivalent of no notice at all. *Id.* at 315. That is especially true when one considers that respondent knew or should have known, at the time these "notices" were circulated, that nearly 50 lawsuits had already been brought against it, for spinal injuries following a Pantopaque myelogram.

Also fictional was the Panel's ruling that the "notice" provided to petitioners was "constitutionally

sufficient" (App. 9a), while also concluding that reference to such claims, in respondent's Claims Bar Date notices, could not possibly have helped them before they even knew that petitioner John Sweeney was injured by exposure to Pantopaque. (App. 9a, n. 9). In reality, no one can exclude the possibility that, if respondent's Claims Bar Date notices had been designed to "reasonably convey the required information…") (*Mullane*, 339 U.S. 306, at 314), that information would have been noticed, and brought to petitioners' attention.

Although the cause of his symptoms was still unknown, because they emerged in 2009, Mr. Sweeney was already being treated for those symptoms, at the time of respondent's bankruptcy filing in 2012. If respondent's notices had included reference to respondent Kodak's role in the manufacture of Pantopaque, and its association with chronic adhesive arachnoiditis claims, as they clearly should have, an individual familiar with petitioner John Sweeney's condition, such as an existing and/or former health care provider, might very well have seen or heard about that reference, and brought it to Mr. Sweeney's attention. That would have enabled petitioners to discover the existence of their claim against respondent *before* its Bankruptcy Plan was confirmed, and the assets of its Bankruptcy Estate were fully distributed.

Indeed, *Mullane* makes it clear that the "risk" that notice by publication travelling by word of mouth, will *not* reach unknown creditors implies the chance that it *will* reach them. (*Id.*, 339 U.S. at 319). That such chance is slight does not make it a nullity. (*Id.* at 317). Far more significant is the corresponding "risk"

that notices giving no hint of a link between the debtor's product and known, longstanding injuries associated with exposure to it, will serve to *extinguish* the latent-injury claims, like those of petitioners here, *without* notice or the opportunity to be heard, *in direct violation* of their rights under the Fifth Amendment's Due Process clause.

The Panel's failure to even recognize this possibility, at the same time it ruled respondent's "notices" to be "constitutionally sufficient" for due process purposes (App. 8a-9a), is yet another example of "fiction deny[ing] fair play." *Mullane*, 339 U.S. at 320; *cf.*, App. 9a, n.9. Petitioners due process rights could not possibly have been satisfied by vacuous notices, conveying no information remotely relevant to their claims, which could not possibly have received by them in time to provide them with notice of respondent's Claims Bar dates, and the opportunity to be heard in respondent's bankruptcy proceeding. (App. 9a, n. 9).

Yet another example of "fiction denying fair play," was the Panel's ostensible concern with the content of respondent's own books and records, at the time of its bankruptcy filing. (App. 8a-9a). Respondent itself filed with the District Court a sworn Declaration in support of its Motion to Dismiss which explicitly admitted that respondent Kodak's records contained, in 2017, a list detailing at least forty-five previous Pantopaque suits, filed against it between 1987 and 1999, logically compelling the conclusion that respondent must have had those records in 2012 as well, when it filed for bankruptcy. (App. 33a-35a). The Panel simply ignored this evidence, however, holding that "because the Fifth Amended Complaint does not allege that Kodak had

actual or constructive knowledge of Pantopaque claimholders as of 2012," it was unnecessary for the Panel to consider whether respondent's records "revealed the existence – but not the identities – of persons with claims against [it]," *even if* "due process would require that the nature of those claims be announced in the relevant notices." (App 8a and 9a, n.2).

Ironically, when the Panel's own erroneous view of the applicable pleading "requirement" is eliminated from it (see Point 1, *supra*), this ruling implicitly recognizes the validity of petitioners contention here, that due process *required* that the nature of petitioners' claims "should have been announced in the relevant notices." (App 8a and 9a, n.2).

For all of these reasons, the Court should also grant this petition to make it clear that the portion of the "due process" burden that requires notice to "reasonably convey the required information" (*Mullane*, at 314), cannot be dispensed with simply because notice by publication may be appropriate, and the possibility that information contained in the notice provided will actually be *received* by a prospective claimant, may be extremely small. (*Id.* at 315); (*cf.*, App. at 9a, n. 9). The Court should also make it clear that, like all other due process determinations, the constitutional adequacy of Chapter 11 Claims Bar Date notices must be determined not on the basis of any "formula," but on an individual, case by case basis, through consideration of *all* relevant facts and circumstances.

CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Third Circuit and, ultimately, to vacate and reverse the judgment and remand the matter to the Third Circuit Court of Appeals, with instructions to reinstate petitioners' Complaint in the United States District Court for the District of New Jersey, and/or provide petitioners with such further relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.

United States Court of Appeals, Third Circuit.

John M. SWEENEY; Regina Sweeney, Appellants

v.

ALCON LABORATORIES; Eastman Kodak Co.; ABC Corporation 1–10, a series of fictitious corporations; John Does 1–5, a series of fictitious names

No. 20-2066

Argued: March 24, 2021(Filed: April 20, 2021)

On Appeal from the United States District Court for the District of New Jersey (D.C. No. 2:16-cv-04860), District Judge: Honorable Esther Salas

Attorneys and Law Firms

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Before: HARDIMAN, GREENAWAY, JR., and BIBAS, Circuit Judges

OPINION*

GREENAWAY, JR., Circuit Judge.

The discharge of claims in bankruptcy applies with no less force to claims that are meritorious, sympathetic, or diligently pursued. Though the result may chafe one's innate sense of fairness, not all unfairness represents a violation of due process.

John Sweeney's symptoms first manifested in 2009. In 2014, he was diagnosed with adhesive arachnoiditis. It was not until 2015 that he identified a likely source of his injuries: his 1975 exposure to a product called Pantopaque, whose harmful ingredient (iophendylate) Kodak allegedly had manufactured.

By the time Mr. Sweeney ascertained this alleged causal connection, Kodak had undergone reorganization pursuant to chapter 11 of the Bankruptcy Code. As part of this process, prepetition claims against Kodak (such as those brought by Mr. Sweeney and Regina Sweeney, his wife) had been discharged.

The Sweeneys assert that the discharge of their claims was not effective because Kodak had not complied with the dictates of due process. They argue that Kodak's notice of the deadline for filing proofs of claim (the "claims bar date") should have included language announcing that persons injured as a result of Pantopaque exposure might have claims against Kodak. However, based on the facts pleaded in the Fifth

Amended Complaint, requiring such language here would work a dramatic expansion of a bankruptcy debtor's onus with respect to providing notice to unknown creditors.

The District Court correctly found that Kodak provided sufficient notice to satisfy due process. We will affirm.[1]

I. Background[2]

In 1975, fifteen-year-old Mr. Sweeney sustained significant injuries while playing football. During his treatment, physicians injected Pantopaque, a medical-imaging dye product, into his spinal canal. Kodak manufactured iophendylate, a chemical component of Pantopaque.

Articles in medical journals had warned as early as 1945 that dyes used in Pantopaque were linked to a severely debilitating condition known as adhesive arachnoiditis, and in 1969 the FDA requested that Pantopaque's distributor add specific cautionary language to that effect to its products. Yet the warning label used on Pantopaque in 1975 did not include such language and instead minimized the product's risks (though it did contain the phrase "severe arachnoiditis").

As of September 1976, Mr. Sweeney enjoyed a full recovery from his football injuries, but beginning in 2009, he began to experience increasing lower extremity weakness, numbness, clumsiness, and difficulty walking, resulting in increased falls. By 2013, he had been forced to relocate his bed to the lower floor of his home. He submitted to medical testing beginning in 2009 and was

diagnosed with advanced adhesive arachnoiditis in August 2014. This prompted him to search for the cause of his arachnoiditis, and an internet search revealed a possible causal link to his exposure to Pantopaque decades earlier. In late 2015, by which time Mr. Sweeney had been diagnosed with end-stage adhesive arachnoiditis, a neurosurgeon confirmed that his exposure to Pantopaque had likely caused his progressive loss of lower extremity function.

In 2012, before Mr. Sweeney had received a diagnosis, Kodak filed a voluntary petition with the Bankruptcy Court of the Southern District of New York (the "Bankruptcy Court") under chapter 11 of Title 11 of the United States Code. Pursuant to the Bankruptcy Court's directives, Kodak first published notice of the deadline for filing proofs of claim in the National Edition of *The New York Times* and in the *Democrat and Chronicle* in Kodak's home base of Rochester, New York. It later published notice of the confirmation hearing in *USA Today*; *The Wall Street Journal*, National Edition; and the *Democrat and Chronicle*.

On August 23, 2013, the Bankruptcy Court confirmed Kodak's plan of reorganization (the "Bankruptcy Plan"). The Bankruptcy Plan discharged and terminated all claims against Kodak, known or unknown, and enjoined the commencement or prosecution of any claims or causes of action so discharged. The Bankruptcy Court's Confirmation Order contained a similar injunction.

The Sweeneys commenced this personal injury lawsuit against Kodak and its codefendants (which are not party to this appeal) in 2016. In 2018, Kodak moved

to dismiss the claims against it pursuant to Sections 524 and 1141(d)(1) of the Bankruptcy Code; the Bankruptcy Court's August 23, 2013 order confirming Kodak's Bankruptcy Plan; and "the [District] Court's inherent judicial powers." App. 34a. The District Court treated the motion as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

The District Court granted the motion to dismiss the claims against Kodak, holding that "under either Second or Third Circuit law, Plaintiffs[']claims must be dismissed because, for unknown creditors, notice by publication was sufficient to satisfy due process." *Sweeney v. Lafayette Pharm., Inc.*, 2020 WL 2079283, at *2 (D.N.J. Apr. 30, 2020). The District Court found that the factors set forth by this Court in dicta in *Jeld-Wen, Inc. v. Van Brunt* (*In re Grossman's Inc.*), 607 F.3d 114, 127–28 (3d Cir. 2010) (en banc), bolstered the case for discharge. In assessing these factors, it noted that facts pertaining to other Pantopaque-related lawsuits were "not properly before the Court at the motion to dismiss stage"; while it "acknowledge[d] that discovery could allow it to do a more fulsome analysis," it found that the record was sufficient for it to decide the issue. *Sweeney*, 2020 WL 2079283, at *5 n.6.

II. Discussion[3]

Section 1141(d)(1)(A) of the Bankruptcy Code provides that the confirmation of a reorganization plan "discharges the debtor from any debt that arose before the date of such confirmation," notwithstanding whether "the holder of such claim has accepted the plan." 11 U.S.C. § 1141(d)(1)(A). Pursuant to 11 U.S.C. § 524(a)(2), a discharge "operates as an injunction against the

commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." These provisions were echoed in the Plan and Confirmation Order at issue here.

Because the parties agreed that Appellants' claims against Kodak were prepetition claims, due process is the dispositive issue; the Bankruptcy Court's Confirmation Order would have operated to discharge the Sweeneys' claims unless the notice of the claims bar date and bankruptcy confirmation hearing provided by Kodak failed to afford the Sweeneys due process. *Sweeney*, 2020 WL 2079283, at *2; *see In re Grossman's Inc.*, 607 F.3d at 125–26 (claims otherwise subject to discharge are not discharged where "fundamental principles of due process" have not been satisfied).

Appellants concede that the *manner* of notice—publication in papers of national circulation and one local periodical—was constitutionally sufficient. Yet they argue that due process was not satisfied because the *content* of the notice omitted critical information. While the case law in this area tends to focus on the manner of notice, generally content is a critical component of due process. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) ("The notice must be of such nature as reasonably to convey *the required information*."[4] (emphasis added)).

With respect to manner and content both, reasonableness is the touchstone of the due process analysis. Thus, the Supreme Court has endorsed "resort to publication as a customary substitute ... where it is not

reasonably possible or practicable to give more adequate warning," as "in the case of persons missing or unknown."[5] *Id.* at 317, 70 S.Ct. 652. In the same vein, persons who cannot be identified or located without travail may be deemed "missing or unknown": "impracticable and extended searches are not required in the name of due process." *Id.* at 317–18, 70 S.Ct. 652.

In this Circuit, reasonable diligence on the part of a debtor requires a "search ... focuse[d] on the debtor's own books and records," and a "careful examination of [those] documents." *Chemetron Corp. v. Jones*, 72 F.3d 341, 347 (3d Cir. 1995). A debtor need not conduct a "vast, open-ended investigation," nor must it "search out each conceivable or possible creditor and urge that person or entity to make a claim against it." *Id.* at 346 (quoting *In re Charter Co.*, 125 B.R. 650, 654 (M.D. Fla. 1991)). In *Chemetron*, we held that because the claimants were " 'unknown' creditors," "notice by publication was sufficient to satisfy the requirements of due process," and their claims were barred. *Id.* at 345–46. We have since reiterated that "claimants who were unknown at the time of the discharge" are "entitled only to publication notice of a property deprivation." *In re Energy Future Holdings Corp*, 949 F.3d 806, 822 (3d Cir. 2020).

There is no bright-line rule that the publication of purported notice, irrespective of its content, will discharge all prepetition claims held by unknown persons. Rather, as we stated in *Grossman's*, "[w]hether a particular claim has been discharged by a plan of reorganization depends on factors applicable to the particular case and is best determined by the appropriate bankruptcy court or the district court."[6] 607

F.3d at 127. It may be that if a debtor's records revealed the existence—but not the identities—of persons with claims against the debtor, due process would require that the nature of those claims be announced in the relevant notices.[7] We need not decide as much today, however, because the Fifth Amended Complaint does not allege that Kodak had actual or constructive knowledge of Pantopaque claimholders as of 2012.

Even when viewed in the light most favorable to Appellants, the Fifth Amended Complaint does not support the inference that Kodak, through reasonably diligent efforts, should have ascertained the existence of Pantopaque claims against it. In their briefs, Appellants point to a series of Pantopaque-related lawsuits filed in the late 1980s and the 1990s, urging that these suits demonstrate Kodak's knowledge of its liability. We may take judicial notice of "another court's opinion to use it as proof that evidence existed to put a party on notice of the facts underlying a claim." *Sands*, 502 F.3d at 268. However, none of the opinions Appellants cite speaks to the contents of Kodak's books and records in 2012.[8] *See Dohra v. Alcon (P.R.), Inc.*, 1994 WL 71449 (N.D. Ill. March 3, 1994); *Staub v. Eastman Kodak Co.*, 320 N.J.Super. 34, 726 A.2d 955 (N.J. Super. Ct. App. Div. 1999); *Ahearn v. Lafayette Pharmacal, Inc.*, 729 S.W.2d 501 (Mo. Ct. App. 1987). Nor is the mere existence of the cases sufficient to put Kodak on notice. The search a bankruptcy debtor must undertake is not "open-ended," but rather "focuses on the debtor's own books and records." *Chemetron*, 72 F.3d at 346–47.

There is no allegation that previous Pantopaque suits appeared in Kodak's books and records more than a decade after those actions were resolved. In the

absence of allegations tending to show that Kodak's records in 2012 disclosed outstanding Pantopaque claims, we must conclude that the notice provided here was constitutionally sufficient.[9] To hold otherwise would dramatically expand the burdens borne by debtors. *See Chemetron*, 72 F.3d at 346–47.

III. Conclusion

The published notice satisfied the standards of due process here. We will affirm the decision of the District Court.[10]

Footnotes

*This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1The District Court had jurisdiction pursuant to 28 U.S.C. § 1332. This Court has jurisdiction pursuant to 28 U.S.C. §§ 158(d)(1) and 1291(3).

2Because the District Court dismissed the Sweeneys' claims pursuant to Federal Rule of Civil Procedure 12(b)(6), we accept the facts pleaded in the Fifth Amended Complaint as true. We consider only the facts pleaded in the operative complaint or amenable to judicial notice. *Sands v. McCormick*, 502 F.3d 263, 268 (3d Cir. 2007).

3We exercise plenary review of the District Court's grant of the motion to dismiss. *See In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012).

4The Court also observed that notice by publication is especially unlikely to be effectual where it "does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention." *Mullane*, 339 U.S. at 315, 70 S.Ct. 652.

5In *Mullane*, the claims were unknown to the *debtor*. We have suggested that publication notice might not be enough if the claims were unknown even to the *creditor herself* during the bankruptcy. *See Wright v. Owens Corning*, 679 F.3d 101, 108 n.7 (3d Cir. 2012). But the Sweeneys do not make this argument.

6In *Grossman's*, we enumerated a non-exhaustive set of factors that district courts "may wish to consider." 607 F.3d at 127–28. Appellants assert the District Court applied these factors incorrectly, but this argument presumes that our list was prescriptive. It was not; the considerations were offered only in dicta, and the Court's diction ("may wish to consider" and "inter alia") underscores that we did not intend to impose a rigid test. *Id.* at 127.

7Such circumstances might also warrant the creation of a trust and/or the appointment of a future claims representative. We do not address the propriety of such measures in this case, as Appellants have forfeited any argument that they ought to have been implemented.

8In addition to the opinions directly cited, Appellants seek to rely on a chart submitted in support of Kodak's motion to dismiss. This chart (which is not properly before the Court at this posture) does not contain citations to court opinions.

9Judge Bibas would affirm because the Sweeneys' only objection to the notice is that it did not mention Kodak's connection to Pantopaque. That detail could not have helped Mr. Sweeney or anyone like him. Once a creditor learns he has been injured by Pantopaque, it would be easy for him to find out that Kodak made the active ingredient. Sweeney himself made the connection instantly. The creditor's problem is that he might not yet be injured by the time of the bankruptcy. Mentioning Kodak's connection to the drug would not solve that problem. So the detail was not required by due process.

10Because we will affirm the District Court's ruling, we do not reach the question whether the Bankruptcy Court for the Southern District of New York would have had jurisdiction concurrent with that of the District of New Jersey in this matter.

Not for Publication

United States District Court, D. New Jersey.

John M. SWEENEY, et al., Plaintiffs,

v.

LAFAYETTE PHARMACEUTICALS, INC., et al., Defendants.

Civil Action No. 16-4860 (ES) (MAH)

Filed 04/30/2020

Attorneys and Law Firms

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OPINION

Salas, District Judge

Before the Court is defendant Eastman Kodak Company's ("Eastman Kodak") motion to dismiss plaintiffs John and Regina Sweeney's ("Plaintiffs") fifth amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (D.E. No. 75). Having considered the parties' submissions and having held oral argument on the motion on April 15, 2020 (D.E. No. 126), the Court GRANTS Eastman Kodak's motion to dismiss.

I. Background

Plaintiffs bring this lawsuit against Eastman Kodak and several other defendants, alleging that defendants are liable for the negative effects of a medical-imaging dye called Pantopaque. (*See generally* D.E. No. 65 ("Fifth Amended Complaint" or "FAC")). Eastman Kodak "was a manufacturer and nationwide distributer of Pantopaque, and/or of materials used in the manufacture of Pantopaque." (*Id.* ¶ 2). Plaintiffs allege that Mr. Sweeney was injected with Pantopaque in November 1975, and as a result, has suffered significant medical ailments including lower extremity weakness, numbness, inability to run, inability to walk without assistance, and loss of bowel and bladder control. (*Id.* ¶¶ 16–25). As a result of these injuries, Plaintiffs bring claims against the defendants for products liability (defective design), products liability (failure to warn), breach of express warranty, and loss of consortium. (*Id.* ¶¶ 26–40).

On June 26, 2018, Eastman Kodak filed a motion to dismiss, arguing that an order of the Bankruptcy Court of the Southern District of New York ("the Bankruptcy Court") bars Plaintiffs' claims. (*See generally* D.E. No. 75-2 ("Def. Mov. Br.")). According to the motion, on January 19, 2012, Eastman Kodak filed a voluntary petition with the Bankruptcy Court under Chapter 11 of Title 11 of the United States Code. (*Id.* at 5). On August 23, 2013, the Bankruptcy Court confirmed Eastman Kodak's plan of reorganization ("Bankruptcy Plan"), which became effective on September 3, 2013. (*Id.* at 7; *see also* D.E. No. 75-6 ("Exhibit B")).[1]

The Bankruptcy Plan discharged and terminated all claims against Eastman Kodak, whether known or unknown, and contained an injunction enjoining the

commencement or prosecution of any claims or causes of action discharged pursuant to the Bankruptcy Plan. (Def. Mov. Br. at 8; *see also* Exhibit B at 63 & 73). The Bankruptcy Court's confirmation order contained a similar provision. (Def. Mov. Br. at 8; Exhibit B at 63). In addition, the Bankruptcy Court's confirmation order states that the Bankruptcy Court "shall retain exclusive jurisdiction over all matters arising out of, or related to, these Chapter 11 Cases and the [Bankruptcy] Plan pursuant to sections 105(a) and 1142 of the Bankruptcy Code ...." (Exhibit B at 55).[2]

The parties agree that determining whether the Bankruptcy Plan discharged Plaintiffs' claims involves a two-step analysis looking at (i) whether Plaintiffs' claims are considered "prepetition claims," and (ii) whether the discharge would comport with fundamental due process regarding notice. (Def. Mov. Br. at 13–16; D.E. No. 77 ("Pl. Opp. Br.") at 5). The parties also agree that Plaintiffs' claims are prepetition claims, and that Plaintiffs were in the category of unknown creditors at the time of the bankruptcy. (Pl. Opp. Br. at 5 & 14 ("Plaintiffs agree with [Eastman] Kodak that ... Plaintiffs were clearly in the category of 'Unknown Creditors' at the time of Kodak's Bankruptcy proceeding.")). Thus, the sole issue for the Court to decide is whether notice by publication of the claims bar date and bankruptcy confirmation hearing was sufficient to afford unknown creditors such as Plaintiffs due process.

However, in their initial briefing, the parties appeared to dispute whether Second or Third Circuit law should govern the Court's due process analysis. By way of a Letter Order, this Court ordered supplemental

briefing on the issue, and explained that, while all jurisdictions must recognize the right to fundamental due process, courts in different jurisdictions have different ways of evaluating whether an unknown creditor received adequate due process in a bankruptcy proceeding. (D.E. No. 110 at 4–5). Eastman Kodak suggests Second Circuit law should apply, and Plaintiffs suggest Third Circuit law should apply; however, each side contends that their arguments are supported under either circuit's law. (*See* D.E. No. 78 ("Def. Reply Br.") at 2; D.E. No. 118 ("Pl. Supp. Br.") at 1).

On April 15, 2020, the Court conducted a telephonic oral argument on the due process issue. (D.E. No. 126). Having now considered the parties' submissions and oral arguments, the Court agrees with Eastman Kodak that under either Second or Third Circuit law, Plaintiffs claims must be dismissed because, for unknown creditors, notice by publication was sufficient to satisfy due process.[3]

II. Legal Standards

a. Motion to Dismiss Standards

To withstand a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more

than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Bell*, 550 U.S. at 556).

"When reviewing a motion to dismiss, all allegations in the complaint must be accepted as true, and the plaintiff must be given the benefit of every favorable inference to be drawn therefrom." *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011) (internal quotation marks omitted). The Court is not required to accept as true "legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Finally, "[i]n deciding a Rule 12(b)(6) motion, a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010).

b. Due Process Standards

The Supreme Court has instructed that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 314 (1950). Moreover, the Supreme Court "has not hesitated to approve of resort to publication as a customary substitute ... where it is not reasonably possible or practicable to give more adequate warning." *Id.* at 317. In the case of persons missing or unknown, it has been recognized that "employment of an indirect and even a

probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Id.*

Courts in different jurisdictions have different ways of evaluating whether a creditor received adequate due process in a bankruptcy proceeding. The Third Circuit has provided six factors that a court may wish to consider to determine whether a particular claim has been discharged by a plan of reorganization, including: (i) the circumstances of the initial exposure to the product at issue, (ii) whether and/or when the claimants were aware of their vulnerability to the product at issue, (iii) whether notice of the claims bar date came to their attention, (iv) whether the claimants were known or unknown creditors, (v) whether the claimants had a colorable claim at the time of the bar date, and (vi) other circumstances specific to the parties, including whether it was reasonable or possible for the debtor to establish a trust for future claimants as provided by 11 U.S.C. § 524(g). *In re Grossman's Inc.*, 607 F.3d 114, 127–28 (3d Cir. 2010). Although the Third Circuit provided these factors in the context of an asbestos case, courts in the circuit have applied them in other contexts as well. *See, e.g.*, *Davis v. Grubb*, No. 12-4628, 2013 WL 2297185, at *6 (E.D. Pa. May 23, 2013).

As one court summarized the issue, "these factors, when considered in their totality, ultimately concern two key issues .... The first is whether there was a viable claim under the Bankruptcy Code and the second is whether sufficient notice was given to satisfy due process requirements." *Davis*, 2013 WL 2297185, at *7 n.6. To that end, some courts in the Third Circuit have stated that notice by publication generally satisfies due

process for unknown creditors. *Id.* at *7 (analyzing all six *Grossman* factors but explaining that "[g]enerally, notice by publication in national newspapers is sufficient to satisfy the notice requirements of due process for unknown claimants"); *see also In re Liquid Aluminum Sulfate Antitrust Litig.*, No. 16-2687, 2017 WL 3131977, at *12 (D.N.J. July 20, 2017) (concluding that the plaintiffs were known creditors, but explaining that "if the creditor is unknown to the debtor then notice by publication satisfies due process and serves as adequate notice"); *In re New Century TRS Holdings, Inc.*, 465 B.R. 38, 50 (Bankr. D. Del. 2012) ("Based upon consideration of relevant case law and the record ... I conclude that the Debtors' publication of Bar Date Notice in the national edition of *The Wall Street Journal*, supplemented with notice in the *Orange County Register*, was reasonable and constitutionally adequate notice for unknown creditors.").

The Second Circuit does not have the same factors analysis. In the Second Circuit, the relevant inquiry for the due process analysis is whether the party giving notice acted reasonably in selecting means likely to inform persons affected, and most courts hold that "for unknown creditors whose identities or claims are not reasonably ascertainable, and for creditors who hold only conceivable, conjectural or speculative claims, constructive notice of the bar date by publication is sufficient" to satisfy due process. *In re Chateaugay Corp. Reomar, Inc.*, No. 86-11270, 2009 WL 367490, at *5 (Bankr. S.D.N.Y. Jan. 14, 2009); *see also In re Chemtura Corp.*, No. 09-11233, 2016 WL 11651714, at *13 (Bankr. S.D.N.Y. Nov. 23, 2016); *DePippo v. Kmart Corp.*, 335 B.R. 290, 297 (S.D.N.Y. 2005).

III. Analysis

Applying these standards here, the Court concludes that Plaintiffs were afforded due process in the bankruptcy proceeding.

To start, Plaintiffs admit that the claims they bring against Eastman Kodak are prepetition claims that would be discharged by the Bankruptcy Plan and injunction if they were afforded due process. (Pl. Opp. Br. at 5 & 19). Plaintiffs also agree that they were unknown creditors at the time the bankruptcy proceeding took place. (*Id.* at 14). Moreover, the Bankruptcy Court documents demonstrate that, to reach unknown creditors such as Plaintiffs, Eastman Kodak gave publication notice of the bankruptcy proceedings, the claims bar date, and the hearing to consider confirmation of the plan (including the release and injunction provision thereof). (Def. Mov. Br. at 18; *see also* D.E. Nos. 75-7 to 75-11). These notices were published in the National Edition of the *New York Times*, the *Wall Street Journal*, *USA Today*, and the *Rochester Democrat & Chronicle*.[4] The Bankruptcy Court approved this notice as being "adequate and appropriate as to all parties affected or to be affected by the Plan" and "in compliance with the Bankruptcy Rules, the Local Rules and the Solicitation Procedures Order." (Exhibit B at 5 & 8–9). Despite Eastman Kodak's notice by publication, Plaintiffs argue that something more was required to afford them due process. But under the standards articulated by the Supreme Court and both the Second and Third Circuit, the Court does not agree.

In particular, the Court is guided by the abundance of case law suggesting that notice by

publication is generally sufficient for unknown creditors. *See, e.g.*, *Mullane*, 339 U.S. at 314; *Davis*, 2013 WL 2297185, at *7; *In re Liquid Aluminum Sulfate Antitrust Litig.*, 2017 WL 3131977, at *12; *In re Chemtura Corp.*, 2016 WL 11651714, at *13; *In re Chateaugay Corp. Reomar*, 2009 WL 367490, at *5. To confront this caselaw, Plaintiffs do not argue that they were entitled to actual notice, and they do not argue that the method of publication was insufficient; rather, Plaintiffs argue that because Eastman Kodak had been sued in the past for injuries related to Pantopaque, it should have included information about those potential claims in the notices. (Pl. Supp. Br. at 4–5). But the cases Plaintiffs rely upon for this position are either easily distinguishable from the present one or do not bind this Court. For instance, Plaintiffs point out that in *In re Johns-Manville Corporation*, the notice sent to unknown creditors contained information about potential asbestos claims. 552 B.R. 221, 243 (Bankr. S.D.N.Y. 2016). However, in that case, there were pending class action asbestos lawsuits at the time of the bankruptcy, and those adversary proceedings were transferred to the bankruptcy court. *Id.* at 242. Thus, there, unlike here, it was clear "that asbestos liability would play a factor in [debtor's] ability to reorganize," and therefore information about such claims was included as part of the notice. *Id.* at 243. Plaintiffs also rely on a case from the Eastern District of New York for the same position. (*See generally* Pl. Supp. Br. (citing *DPWN Holdings (USA), Inc. v. United Air Lines Inc.*, 871 F. Supp. 2d 143, 151 (E.D.N.Y. 2012)). There, the lower court held that "under the[ ] circumstances, discharge of the claim satisfies due process only if the debtor notified the claimant not only of the pending bankruptcy proceedings, but also provided sufficient

information to apprise the claimant of the nature of the claim to be discharged." *DPWN Holdings*, 871 F. Supp. 2d at 157. However, this Court is not bound by a decision out of the Eastern District of New York even if it were to apply the law of the Bankruptcy Court in the Southern District of New York. In any event, the Court does not find the reasoning of the *DPWN* court persuasive in the present case. Accordingly, the Court cannot conclude that under these particular circumstances, notice of the nature of every potential claim to be discharged was necessary.[5]

Moreover, even an analysis of the *Grossman* factors weighs in favor of dismissal.[6] The first factor—circumstances of the initial exposure to the product at issue—weighs in favor of Eastman Kodak because Mr. Sweeney was exposed to Pantopaque well before Eastman Kodak filed for bankruptcy. (FAC ¶ 9); *Davis*, 2013 WL 2297185, at *6 ("the notice of Defendants' bankruptcy, which was published in the newspaper subsequent to [p]laintiff's initial exposure, weighs in favor of finding that [p]laintiffs received adequate notice and that their claims should be discharged"). The second factor is whether and/or when the claimants were aware of their vulnerability to the product at issue. Accepting the allegations in the Fifth Amended Complaint as true, this factor weighs in favor of Plaintiffs, because Plaintiffs allege that they did not become aware of Mr. Sweeney's vulnerability until September 2014. (FAC ¶ 20).[7] The third and fourth factors—whether the notice of the claims bar date came to their attention and whether the claimants were known or unknown creditors—weigh in Eastman Kodak's favor. Plaintiffs acknowledge that they were unknown creditors, and thus "[u]nder the precedent established in *Grossman* and *Wright*,

Plaintiffs therefore were on notice through the publication of the bankruptcy." *Davis*, 2013 WL 2297185, at *8. The fifth factor is whether there was a colorable claim at the time of the bar date. Eastman Kodak argues that this factor weighs in its favor because, if Mr. Sweeney was reasonably diligent, he should have known of his claim by the time Kodak published its notice of bar date. However, according to Plaintiffs, they were not aware of their claims until at least September 2014. (FAC ¶ 20). Thus, accepting the facts in the Fifth Amended Complaint as true, the fifth factor weighs in Plaintiffs' favor. Finally, both sides rely on facts outside of the Fifth Amended Complaint to argue the sixth factor—whether it was reasonable or possible for the debtor to establish a trust for future claimants. The Court does not consider these facts, and because no trust was established in this case, "this factor is neutral." *Davis*, 2013 WL 2297185, at *8. After weighing the factors, the Court finds that three of the six *Grossman* factors, with one being neutral, warrant a finding that Plaintiffs' claims were discharged in bankruptcy. *See id.*

Based on all of the foregoing, including an analysis of the available case law in both the Second and the Third Circuit, the Court is satisfied that Plaintiffs, as unknown creditors with prepetition claims, were afforded due process through Eastman Kodak's notice by publication. A contrary result would interfere with the fundamental purpose of the Bankruptcy laws—to provide debtors with finality and a fresh start. *In re WR Grace & Co.*, 729 F.3d 332, 346 (3d Cir. 2013).

IV. Conclusion

For the reasons stated above, Eastman Kodak's motion to dismiss is GRANTED and Plaintiffs' claims against Eastman Kodak are dismissed *with prejudice*. An appropriate Order accompanies this Opinion.

1The Court considers the bankruptcy documents as matters of public record. *See Sanders v. CACH, LLC*, No. 19-996, 2019 WL 4271742, at *3 n.6 (D.N.J. Sept. 10, 2019).

2Based on the facts presented in the motion to dismiss, the Court became concerned that it might lack jurisdiction to adjudicate the claims between Plaintiffs and Eastman Kodak and thus issued an Order to Show Cause. (D.E. No. 99). Following briefing on the issue, the Court determined that both it and the Bankruptcy Court have jurisdiction over the pending motion and retained jurisdiction since both parties requested that this Court decide the motion to dismiss. (D.E. No. 110).

3The parties do not cite to any clear authority indicating which law this Court should apply in considering whether the Bankruptcy Court's confirmation of the Bankruptcy Plan and injunction bars Plaintiffs' claims, and the Court has found none. Although it is not necessary for the Court to decide this issue, the Court notes that Eastman Kodak's arguments for application of Second Circuit law are largely unrebutted by the Plaintiffs. (*See generally* Pl. Opp. Br. & Pl. Supp. Br.).

4Notice of the deadlines for filing proofs of claims was filed on May 23, 2012, in the *Rochester Democrat & Chronicle* and in the *New York Times*. (D.E. Nos. 75-7 & 75-8 (Exhibits C & D)). The notice of the confirmation

hearing was published on July 16, 2013, in the *Rochester Democrat & Chronicle*, *USA Today*, and in the National Edition of the *Wall Street Journal*. (Exhibit B at 3; *see also* D.E. Nos. 75-9, 75-10 & 79-11 (Exhibits E, F & G)).

5During oral argument, counsel for Plaintiffs also pointed the Court to *In re Chemtura*, 2016 WL 11651714, at *15. But there, the court rejected the claimants' argument that the notice should have contained more detailed information about the potential claims being discharged and held that "the Bar Date notice [published in national and local newspapers across the country] contained more than adequate information and language" to notify unknown creditors of their potential claims. *Id.*

6In the briefing and at oral argument, both sides referenced facts outside of the Fifth Amended Complaint that could potentially be relevant to this due process inquiry. In particular, the parties seem to agree that Eastman Kodak was sued approximately 45 to 48 times in lawsuits relating to Pantopaque, and that the latest cases against Eastman Kodak relating to Pantopaque were filed in the late 1990s—twelve years before Eastman Kodak filed for bankruptcy. While the Court considers these facts to be more favorable to Eastman Kodak, they are not properly before the Court at the motion to dismiss stage. The Court indicated as much at oral argument and asked the parties whether it needed to consider more information outside of the pleadings to adequately conduct a due process analysis using the *Grossman* factors. Although the Court acknowledges that discovery could allow it to do a more fulsome analysis of these factors, the Court agrees with Eastman Kodak that the record is sufficient to decide

this issue at this time. This is especially true because the *Grossman* factors are ones that the court "may wish to consider." *In re Grossman's*, 607 F.3d at 127.

7The Court notes that Mr. Sweeney began experiencing medical issues as early as 2009 (FAC ¶ 18), but Plaintiffs contend that they were not aware of the cause of those issues until much later. Given the Court's obligation at the motion to dismiss stage, it construes these facts in favor of Plaintiffs.

Date Filed: 05/20/2021

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2066

JOHN M. SWEENEY; REGINA SWEENEY,
Appellants v. ALCON LABORATORIES, ET AL.

On Appeal from the United States District Court

For the District of New Jersey
(D.C. Civ. No. 2-16-cv-04860)

District Judge: Honorable Esther Salas

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, *Circuit Judges*.

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having

voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,
s/ Joseph A. Greenaway, Jr.
Circuit Judge

Dated: May 20, 2021

CJG/cc: Gary M. Meyers, I, Esq.
Amy L. Hansell, Esq.
Jeffrey J. Harradine, Esq.
Eric J. Ward, Esq.

In The
United States Court of Appeals
For the Third Circuit
20-2066
JOHN M. SWEENEY AND REGINA SWEENEY
Plaintiff - Appellants

v.

ALCON LABORATORIES,
Defendant - Non-P articipating

EASTMAN KODAK CO.
Defendant - Appellee

On Appeal from Order and Judgment entered in the
United States District Court
for the District of New Jersey at No. 2-16-cv-04860.

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLANTS
VOL I OF II (pgs. 1a-13a)

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(App. Div. 1999); Ahearn v. Eastman Kodak Co., et al., 729 S.W.2d 501 (Mo App. I9S7); Dohra v. Eastman Kodak Co., et. al. 1994 WL 71449 (N.D. Ill. 1994).

Since Plaintiffs did not even discover the possible role of Pantopaque in producing Mr. Sweeney's chronic adhesive arachnoiditis until October 2014 (24a-25a, Par. 22), and there was no mention of either Pantopaque or of the potential claims of Pantopaque victims in any Kodak Claims Bar notice (242a-246a),the impact of Kodak's Bankruptcy Claims Bar notices upon the Plaintiffs' potential claims against Kodak could not possibly have come to the attention of either Plaintiffs or anyone who knew them, in time for Plaintiffs to assert a claim in Defendant Kodak's Chapter 11 Bankruptcy Reorganization proceeding. As a result, no claim was filed in Kodak's Bankruptcy proceeding either by Plaintiffs, or by anyone acting on their behalf.

C. Kodakos Knowledge Of The Potential Existence Of Numerous Pantopaque Victims Who Were Unaware Of Their Potential Claims.

At the time its five Bankruptcy Claims Bar notices were published in20l2 and2013, Kodak either knew, or should have been aware of at least forty-eight prior Pantopaque lawsuits against if, simply from a review of its own books and records. Indeed, forty-five of those cases were included in a "chart" filed with Kodak's own moving papers, in support of the Motion to Dismiss at issue in this appeal. (263a-280a). Curiously, however, the Staub, Ahearn, and Dohra cases were omitted from that"chart " (Id.). Moreover, almost all of the forty-eight prior

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil 2:16-cv-04860-ES-MAH

JOHN M. SWEENEY and REGINA SWEENEY, his Wife, Plaintiffs,

v.

ALCON LABORATORIES, INC, EASTMAN KODAK COMPANY, et al. Defendants

DEFENDANT EASTMAN KODAK COMPANY'S MOTION TO DISMISS PLAINTIFFS' THIRD-AMENDED COMPLAINT WITH PREJUDICE

Defendant Eastman Kodak Company, Inc., by and through its undersigned counsel, respectfully moves this Court for an Order dismissing Plaintiffs' Third Amended Complaint, with prejudice.

Defendant moves pursuant to Sections 524 and 1141(d)(1) of the Bankruptcy Code, an August 23, 2013 Order Confirming the First Amended Joint Chapter 11 Plan of Reorganization of Eastman Kodak Company and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code, and the Court's inherent judicial powers. A Brief in Support of Motion, Certification of Amy L. Hansell, Esquire, and proposed form of Order are provided.

Oral argument is requested.

Dated: July 28, 2017

Respectfully submitted,

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Filed 06/26/18

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil 2:16-cv-04860-ES-MAH
JOHN M. SWEENEY and REGINA SWEENEY, his Wife,
Plaintiffs,
v.
ALCON LABORATORIES, INC, EASTMAN KODAK COMPANY, et al.
Defendants.

Declaration of Esther A. Grakowsky in Support of Eastman Kodak Company's Motion to Dismiss Plaintiffs' Third-Amended Complaint with Prejudice

Esther A. Grakowsky, being first duly sworn, deposes and says:

1. I am over the age of 21, under no disability, and am competent to testify to the matters contained in this Affidavit.
2. I am a paralegal in the Legal Department of Eastman Kodak Company (Kodak). I've worked in this capacity at EKC for 18 years, at the company's headquarters in Rochester, New York. I base this Affidavit on my personal knowledge and on my review of records made and kept in the ordinary course of business by Kodak and by its employees. If called upon to testify thereto, I could and would do so in the manner set forth below.
3. Based on my review of Kodak's records, Kodak did not manufacture Pantopaque, but it did manufacture

a chemical component of Pantopaque known as iophendylate.

4. Kodak supplied iophendylate to Lafayette Pharmacal, Inc. and later to Alcon Laboratories, Inc. and they used the chemical to manufacture Pantopaque. Kodak did not sell or distribute Pantopaque.

5. It is my understanding that Kodak stopped manufacturing iophendylate in about
1987.

6. To the best of my knowledge and based on a review of the company's files, there were no Kodak employees with personal knowledge of the company's manufacture of iophendylate or sale of iophendylate to Lafayette or Alcon by the time Kodak filed for bankruptcy on January 19, 2012.

7. It is also my understanding based on a review of the company's files that Kodak and Alcon entered into a joint defense agreement in 1991, and that after 1991, Alcon assumed the defense of any product liability claims filed against Kodak relating to Pantopaque. As part of that arrangement, Kodak provided to Alcon all of its iophendylate or Pantopaque-related documents that it could locate for production as appropriate in the defense of the Pantopaque-related litigation.

8. Kodak retained certain limited records related to the actual filing of personal injury, claims allegedly due to exposure to Pantopaque. These records, housed in Kodak's Health, Safety and Environment group, consist of first, a TSCA 8(c) Allegation Report Form for claims asserted against Kodak. This form contains only the name of the product at issue, the date the allegation was made or received, the venue of any such claim, the name of the person alleging the claim, and a description of effects or injury allegedly caused by the exposure.

9. Second, the records also include a litigation report for each case prepared by Kodak in-house counsel, setting forth, among other information, the name of the case, the name of counsel for the plaintiff, the name of counsel defending Kodak- and a short summary of the allegations in the complaint.

10. My review of a log f for these Pantopaque-related claims, together with review of the files described above, reveals 45 claims dating from 1987 to 1999.

I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and that this declaration was executed in Rochester, NY on this 27th day of July 2017,

Esther A. Grakowsky