No. 23–124

In the Supreme Court of the United States

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 2,

Petitioner,

v.

PURDUE PHARMA L.P., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF ATLANTIC BASIN REFINING, INC. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

A recurring problem in bankruptcy matters is the granting of broad releases, to nondebtors, of claims that do not impact the bankruptcy estate and are not asserted against the debtor. Atlantic Basin Refining, Inc. ("ABR")[2] is the victim of one such release. In ABR's situation, a bankruptcy court granted a broad release that included ABR's claims against the *parent company* of the *purchaser* of the debtor's assets.

Although

(1) ABR had no claim against the debtor or the debtor's assets;

(2) the bankruptcy court had not acquired personal jurisdiction over ABR; and

(3) ABR was suing the parent company of the purchaser for pre-petition conduct;

the District Court of the Virgin Islands nevertheless determined that several of ABR's claims in ABR's independent action against the parent company were discharged by the broad release and dismissed those claims. *Atlantic. Basin Refining, Inc. v. ArcLight Cap. Partners, LLC*, No. CV 2015-0071, 2018 WL 3431974 (D.V.I. July 16, 2018). The district court held that one of the dismissed claims, a breach of fiduciary duty claim, was discharged by the bankruptcy-court-

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[1] No one contributed to the authorship of this brief other than counsel for *amicus*. This brief was funded solely by *amicus*.

[2] ABR is a privately held corporation. It has no parent company and no publicly held company owns any interest in it.

approved release, notwithstanding that breach of fiduciary duty claims are not dischargeable in bankruptcy. *See* 11 U.S.C. § 523(a)(4); *In re Strack*, 524 F.3d 493, 500 (4th Cir. 2008) (holding that breach of fiduciary duty claims cannot be discharged under section 523(a)(4)). ABR's claims were valued at $3 billion.[3] Thus, merely because a subsidiary bought the debtor's assets for approximately $184 *million*, the District Court of the Virgin Islands dismissed a $3 *billion* claim against the parent company.[4]

ABR fully supports the arguments advanced by the United States Trustee and the other respondents. It's *only* disagreement with the Trustee is with the *understated* assertion that the Purdue Pharma release is of "exceptional and unprecedented breath."[5] While the Purdue Pharma release is certainly exceptional and broad, the Sacklers were at least associated with the debtor and propose to provide funding to settle claims against the debtor. ABR's case is truly "unprecedented" because, the released party was not associated with the debtor except by virtue of the fact that it was the parent company of the purchaser of the

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[3] *See* Doc. No. 210-1 (expert damages report) in *Atlantic Basin Refining, Inc. v. ArcLight Capital Partners, LLC, et al.*, Case No. 1-15-cv-00071 pending in the District Court of the Virgin Islands.

[4] Some of ABR's claims survived the motion to dismiss but its overall claim is significantly circumscribed by the court's ruling about the effect of the release.

[5] William Harrington, U.S. Trustee, APPLICATION FOR A STAY OF THE MANDATE OF THE UNITED STATES COURT OF APPEALS, filed in these proceedings, p.2.

debtor's assets. Further, the released party contributed nothing to any settlement fund.

ABR files this brief in support of Petitioner to (1) address a personal jurisdiction argument not addressed by the parties; and (2) call the Court's attention to another way by which overly broad releases of nondebtors have worked their way into Chapter 11 bankruptcy proceedings.

SUMMARY OF ARGUMENT

Bankruptcy courts routinely approve broad releases of claims that individuals and entities have *against nondebtors* even when the claim holders are not participants in the bankruptcy proceeding and have no claim against the debtor or the debtor's estate. The courts do this without ever acquiring personal jurisdiction over the claim holders or their claims. This practice offends all notions of Due Process. It is a widespread problem that has caused many courts to adopt a variety of "guidance" documents or local rules designed to reign in, or at least offer a veneer of Due Process to, the practice. Amicus submits that this Court's precedents—establishing that a court has no power to extinguish a claim or enter judgment against party over whom the court lacks personal jurisdiction—apply with equal force in the bankruptcy setting.

ARGUMENT

Petitioner's brief and the briefs in support of Petitioner, focus, quite properly, on the reasons that the Bankruptcy Code does not authorize a bankruptcy court to grant a release of a nonparty's claim against a

nondebtor. But there is a more basic reason that a bankruptcy court cannot grant such relief and the briefs do not address that issue: A court lacks the power to release the claim of a person or entity over which it has not acquired personal jurisdiction.[6]

I. Getting back to fundamentals: personal jurisdiction.

"It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957). That rule applies equally to the adjudication of a plaintiff's claim: "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). *Accord Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 23 (1907). Thus, "[u]nless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Chase National Bank v. Norwalk*, 291 U.S. 431, 441 (1934).

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[6] Class actions are an exception to this rule. But class actions have a number of built-in Due Process protections. For example there are representative plaintiffs looking out for the interests of the absent class members; the judge overseeing the action ensures that class counsel will adequately represent the absent plaintiffs; and absent plaintiffs are notified of any settlement and given an opportunity to object to, or opt out of, the settlement.

If the Second Circuit is affirmed in this case, the claims of thousands of individuals who never appeared (and were never summoned to appear) in the Purdue Pharma bankruptcy will be barred forever—effectively adjudicated—without ever having an opportunity to have a jury decide the merits of their claims and without the bankruptcy court ever acquiring personal jurisdiction over them.[7] In other words, Justice Brandeis' assurance in *Chase National Bank* that a person may "rest assured" that its rights will not be affected without being summoned to appear will be rendered illusory.

II. Nonconsensual releases are a widespread problem.

Although the case before the Court arises out of a mass tort, the issue of nonconsensual releases extends

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[7] It should not matter that an individual (such as Respondent Ellen Isaacs) has filed a claim in the bankruptcy proceeding:

> As a general rule, a bankruptcy court has no power to say what happens to property that belongs to a third party, even if that third party is a creditor or otherwise is a party in interest. *See Callaway v. Benton*, 336 U.S. 132, 136-41 (1949).

In re Aegean Marine Petroleum Network Inc., 599 B.R. 717, 723 (Bankr. S.D.N.Y. 2019).

One forced to protect her interests by filing a claim in a bankruptcy case should not be deemed to have voluntarily consented to a forced dismissal of a cause of action against nondebtors. If the contrary is the case, then the creditor with a claim against a third party is treated worse in the bankruptcy than another creditor with the exact same claim against the debtor but who does not have a claim against a third party.

well-beyond the facts of this case and in contexts other than a settlement fund "channeled" by a nondebtor to the debtor. The practice is so common that Karen Cordry, the Bankruptcy and State Defensive Litigation Chief Counsel for the National Association of Attorneys General raises the question,

> how is it that in virtually every Chapter 11 plan, there are multiple pages of single-spaced, bolded, and capitalized text providing for releases, injunctions, and exculpations for parties ranging from high company officials in their corporate and personal capacities seemingly down to and including the janitor, as well as the professionals in the case; *and, even more surprisingly, those same categories of persons affiliated with numerous wholly separate entities with no corporate connections with the debtor*?

Karen Cordry, *Unraveling the Origins Behind Third Party Releases in Bankruptcy*, 36 COM. L. WORLD 12, 13 (2022) (emphasis added).

As Attorney Cordry observed, "[i]n recent years, we have come to find the notion that the discharge is limited [by 11 U.S.C. § 524] to the debtor is a concept that is far more honored in the breach than in the observance." *Id.*

A particularly pernicious version of the non-consensual, nondebtor release arises in the case of

"prepackaged" or "drive through"[8] bankruptcies."[9] Third party releases are just one of the "array of legal devices" used by "[t]he perpetrators of [these] lawless Chapter 11s."[10] With "prepacks" approved quickly, with little or no input from dissenting creditors, and with no notice to noncreditors whose claims are also being released, it is difficult to challenge the broad release language in sale orders. A good faith buyer is protected from having the sale reversed or modified on appeal unless the party challenging the sale obtains a stay pending appeal. 11 U.S.C. § 363(m). In a fast-moving drive-through bankruptcy, an appeal may be "statutorily moot"[11] before the nonparty victim of the

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[8] Laura N. Coordes, *Bankruptcy Overload*, 57 GA. L. REV. 1133, 1186 (2023).

[9] In a "drive-through" bankruptcy, the debtor negotiates with key creditors in advance of filing for bankruptcy and presents the bankruptcy plan to the bankruptcy court in what is essentially a *fiat accompli*. Drive-through bankruptcies achieve speed at the expense of creditors' rights and Due Process. For example, in the Belk bankruptcy (*In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630)), a department store with $3.7 billion in annual revenues filed for bankruptcy in the evening and before 10:30 the next morning, the bankruptcy court confirmed Belk's 267-page Disclosure Statement and Prepackaged Plan of Reorganization—before any creditors (other than those involved in the advance negotiations) were notified or had any opportunity to appear and contest the plan. Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 248–49 (2022) ("LoPucki").

[10] LoPucki, at 292.

[11] *See, e.g.*, *Matter of RE Palm Springs II, L.L.C.*, 65 F.4th 752, 759 n.14 (5th Cir. 2023) (describing mooting of appeal due to failure to obtain a stay of the sale order).

release even realizes that its claim is gone forever.

Amicus' situation provides an example of the problem. As alleged in its complaint, Amicus had agreed to explore a joint venture with a hedge fund for the purpose of purchasing and operating an oil refinery and terminal on St. Croix. Instead, the putative joint venturer used its relationship with Amicus to prevent it from joint venturing with others and then withdrew its financial commitment to Amicus when it was too late for Amicus to find another joint venturer. Amicus sued the putative joint venturer for its conduct in preventing Amicus' acquisition of the refinery/terminal. There was no suggestion that the owner of the refinery/terminal was involved in the putative joint venturer's conduct, and the case should not have been affected in any manner by the refinery/terminal owner's subsequent bankruptcy.

But when the refinery/terminal owner subsequently explored bankruptcy, the putative joint venturer formed a subsidiary to act as a stalking horse bidder and ultimately succeeded in acquiring the refinery/terminal assets. That relationship to the *purchaser* was sufficient for the District Court of the Virgin Islands to hold that Amicus' claim was barred by the release approved by the bankruptcy court, which encompassed claims against the purchaser *and its parent company* (the putative joint venturer)—all because the claims were related to the debtor's assets even though Amicus had no claim against those assets (or the debtor). *Atlantic. Basin Refining, Inc. v. ArcLight Cap. Partners, LLC*, No. CV 2015-0071, 2018 WL 3431974 (D.V.I. July 16, 2018). Had the subsidiary not been the

successful bidder, there would have been no release in favor of the parent company and all of Amicus' claims against the parent company would have survived the motion to dismiss.[12]

The problem with these broad, boilerplate, releases is so widespread that some courts around the country have taken steps to try to halt the abuse. They have adopted a hodgepodge of local procedures to supplement the Federal Rules of Bankruptcy Procedure. For example, the Bankruptcy Division of the Northern District of California has adopted "guidelines"[13] for sale orders under 11 U.S.C. § 363 because the bankruptcy judges in that jurisdiction "have become increasingly concerned about the orders they are being asked to sign on motions to approve sales of property of the estate." *Id.* As explained by those judges, "Many of the proposed orders . . . seek to affect parties not before the court." *Id.* A part of the solution adopted in that district is a requirement that there be evidence "that the party to be affected actually asserts a lien, claim, or other interest that would follow the property into the hands of the purchaser absent an order from the court." *Id.*

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[12] Given the district court's interpretation of the release, the stalking horse bidder also enjoyed a significant and unfair bidding advantage over all other bidders because none of the other bidders would gain the dismissal of claims totaling $3 billion against them if they were the successful bidder.

[13] http://www.canb.uscourts.gov/procedure/guidelines-re-sale-orders (accessed Sept. 25, 2023).

The bankruptcy court for the District of Oregon has adopted similar guidance:[14]

> The Sale Motion must disclose whether the sale will be free and clear of liens and other interests, and if so, *disclose the identity of each party that has a lien on or interest in the property to be sold and the nature of such interest*, the total amount of the claims secured by liens on the property, and the subsections of section 363(f) of the Bankruptcy Code that permit the property to be sold free and clear of such interests. As used herein, "interest" includes any interest that is not a lien, such as a possessory leasehold interest, license or other right.

Id. at 2, ¶4 ("Sales Free and Clear") (emphasis added).

The Southern District of New York has also adopted guidelines[15] for bankruptcy asset sales and requires that a debtor seeking to sell property "free and clear of a possessory leasehold interest, license *or other right*," must identify "the nondebtor parties whose interests will be affected, and explain what adequate protection will be provided for those interests." *See* Section I.D.15 (emphasis added). Further, notice of proposed sale procedures must be given to "all entities known or

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[14] https://www.orb.uscourts.gov/sites/orb/files/documents/forms/363.pdf (accessed Sept. 26, 2023).

[15] www.nysb.uscourts.gov/sites/default/files/pdf/Guidelines_for_Asset_Sales.pdf (accessed Sept. 26, 2023).

reasonably believed to have asserted a lien, encumbrance, claim or other interest in any of the assets offered for sale." *See* Section II.B.1.(g).[16]

The Bankruptcy Court for the Southern District of Florida has addressed the same problem by adopting Local Rule 6004-1(A), which requires that a sale motion be served upon, *inter alia*, "any party holding an interest in the property." Further, that court's Local Rule 6004-1(B)(7) then requires that the motion seeking approval of the sale include:

> the identity of all known potential lienholders *or interest holders* including the nature and extent of their liens or interests and whether such liens or interests are disputed;

(Emphasis added.)

The bankruptcy system needs a uniform rule regarding nonconsensual releases. Enforcing the Due

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[16] The Eastern District of New York has adopted guidelines that are similar to the Southern District of New York's guidelines: https://www.nyeb.uscourts.gov/sites/nyeb/files/general-ordes/ord_557.pdf (accessed Sept. 26, 2023). The District of New Jersey has guidance requiring Section 363 motions to "highlight" provisions that release any entity or waive claims against any entity. *See* https://www.njb.uscourts.gov/sites/default/files/general-ordes/JHW-LAC_Gen_Order_Ch11_363_Sale_Guidelines.pdf at Section 1(c)(i)(C) (accessed Sept. 26, 2023). The District of Delaware's Local Bankruptcy Rule 6004-1(b)(iv)(M) requires that a sale motion highlight any provision seeking to sell a property free and clear of a possessory leasehold interest, license *or other right*." (Emphasis added.) However, it does not require that provisions releasing entities be highlighted.

Process requirement that a bankruptcy court must acquire personal jurisdiction over a person or entity before it can release that party's claims would provide much needed uniformity.

CONCLUSION

From a statutory perspective, as Petitioner has argued, nonconsensual releases of nondebtors are not authorized by the Bankruptcy Code whether they arise in a confirmation order or a sale order. Regardless, Due Process requires that a bankruptcy court refuse to approve a nonconsensual release affecting a party that has not been hailed into the court through appropriate process. Amicus Atlantic Basin Refining respectfully submits that the Court should clearly state that bankruptcy courts lack the judicial power to release nonparty rights without first acquiring personal jurisdiction over the nonparty.

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Respectfully submitted,

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