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EXPERT REPORT OF PROFESSOR JOHN C. COFFEE, JR.

Matter Of: Purdue Pharma L.P., et al
DCP Case No. 107102

July 12, 2019

BEFORE THE DIVISION OF CONSUMER PROTECTION
OF THE UTAH DEPARTMENT OF COMMERCE

IN THE MATTER OF:

PURDUE PHARMA L.P., a Delaware limited partnership; **PURDUE PHARMA INC.**, a New York Corporation; **THE PURDUE FREDERICK COMPANY**, a Delaware corporation; **RICHARD SACKLER, M.D.**, individually and as an owner, officer, director, member, principal, manager, and/or key employee of the above named entities; and **KATHE SACKLER, M.D.**, individually and as an owner, officer, director, member, principal, manager, and/or key employee of the above named entities;

Respondents.

DCP Legal File No. CP-2019-005

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I. Introduction

1. I make this report as an expert in corporate governance and the more specialized law applicable to officers, directors and controlling shareholders. I have also long taught and written in the area of white collar crime. I have been retained by Motley Rice LLC, as counsel for the Utah Division of Consumer Protection ("DCP"), in connection with this action that the DCP has brought against Purdue Pharma, Inc. ("Purdue"), Purdue Pharma L.P. and the other defendants listed on the preceding page. I reserve the right to revise this Report based on additional testimony and materials that I might review, including materials that have not yet been made available for review because discovery is still ongoing.

2. In this report, I will focus mainly on corporate governance concepts and factual issues. Such expert corporate governance testimony is generally admissible. See United States v. Brooks, 2010 U.S. Dist. LEXIS 2277, 2010 WL 291769 at *3 - *4 (E.D.N.Y. Jan. 11, 2010); United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991) (upholding the use of my expert testimony on corporate governance issues in a federal criminal case). Some legal conclusions will be noted but these are expressed primarily by way of background.[1] I express no views on the Utah Consumer Sales Practices Act, but do consider relevant principles concerning liability for fraud.

3. I am the Adolf A. Berle Professor of Law at Columbia University Law School and Director of its Center on Corporate Governance. I have served as a Reporter to the American Law Institute for its Restatement-like Principles of Corporate Governance, in which the ALI

[1] This proceeding is not in federal court, and thus the Federal Rules of Evidence do not apply. Also, administrative proceedings have traditionally considered a broader range of evidence from both factual and expert witnesses. Nonetheless, my emphasis will be on the facts.

seeks to state the prevailing norms in the field of corporate governance. I am a Fellow of the American Academy of Arts and Sciences and a Fellow of the American College of Governance Counsel. My fuller qualifications as an expert on corporate governance and fiduciary duties are set forth in Appendix A to this report. My resume, including publications authored in the previous 10 years, is set forth in Appendix B to this report. I attach a separate list of cases in which I have testified as an expert at trial or by deposition in the previous five years, as Appendix C to this report. A compilation of the data and other information considered in forming my opinions is set forth in Appendix D to this report. I am being compensated for my services at a rate of $1,100 per hour.

4. In this report, I have been asked by counsel to focus on the following questions:

A. Under what factual circumstances, can a shareholder/director be held liable -- criminally or civilly -- for his or her involvement in a corporation's violations of law? Is the officer or director protected in some way from such liability by the business judgment rule?

B. Do the facts in this case suggest that Richard Sackler and Kathe Sackler were simply passive directors who were at most negligent in failing to detect problems or rather that they were controlling shareholders who dominated decision-making with respect to a range of business, decisions, particularly including the marketing and distribution of OxyContin by Purdue Pharma L.P. and Purdue Pharma, Inc.?

C. On the facts of this case, were Richard Sackler and Kathe Sackler under any special obligation to ensure that Purdue Pharma L.P. and Purdue Pharma Inc. take appropriate steps to avoid further violations of law and ensure the existence and adequacy of adequate internal controls? Does the factual evidence suggest they complied with these duties?

D. Factually, could the conduct engaged in by Richard Sackler and/or Kathe Sackler in their various capacities at Purdue have caused harm or injury to opioid victims? How and under what realistic assumptions?

II. Background: The Criminal and Civil Law Liability of Corporations and Corporate Officials.

5. Although the DCP has not brought criminal charges against Richard Sackler and Kathe Sackler, it is useful to begin with the criminal context where the standards are the most rigorous and liability is the most restricted. Under widely prevailing American criminal law, a corporation is vicariously liable for criminal acts engaged in by any officer, employee, agent, director or any other person controlling it, if (1) such individual engaged in the criminal act with the requisite intent (or *mens rea*); (2) such individual acted within the normal scope or course of his or her employment; and (3) such individual intended, at least in part, to benefit the corporation. This view was first fully articulated by the Supreme Court in New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 494 (1909), which basically extended the doctrine of respondeat superior to corporate criminal liability. In most jurisdictions, a corporation can only commit a crime based on conduct by one or more individuals acting for it with knowledge of the relevant elements of the crime.[2] But the individual gains no immunity from liability because he or she acted on behalf of a corporation (or other business entity). Most statutes apply by their terms to "whoever" or "any person" who violates their prohibitions, and

[2] Some courts have also permitted a corporation to be convicted based on the "collective knowledge" of its employees or agents, even though no one actor knew all the facts necessary for liability under the relevant statute. See U.S. v. Bank of New England, 821 F.2d 844, 856 (1st Cir 1987). It is not clear if other jurisdictions follow this rule, and I do not rely on this precedent in this report.

these terms have been uniformly read to include both individuals and corporations and other business entities.[3]

6. Early in the 20th Century, there was a brief period of doubt as to whether an individual could be held liable as an aider or abettor of a corporation's crime, but decisions soon came to a uniform agreement that an individual could so aid and abet the corporation's criminal conduct (and thus be held criminally liable as an accessory).[4] The modern reach of accessorial liability is best shown by the facts of United States v. Andreadis,[5] in which the Second Circuit upheld the conviction under the wire and mail fraud statutes of a corporate officer who dominated a closely held corporation in connection with a scheme to market fraudulent weight loss pills. Although the claims made about the pills were clearly false and fraudulent, the prosecutors had no evidence that the defendant officer had ever instructed the advertising agency to make the fraudulent claims. Still, the Second Circuit agreed that the evidence of the officer's close supervision of the company's marketing plans was sufficient to justify an inference that he had approved the use of the fraudulent ads. Domination of the firm and close supervision of marketing process was sufficient to support the conviction.

7. The charge of conspiracy is also available to reach corporate officers or directors, but it is slightly more complex in its application. Two or more individuals (or indeed most or all of the board of directors) can criminally conspire, and again they gain no immunity because they act within the corporation or for the benefit of the corporation (without seeking any personal benefit).[6] The one limitation on conspiracy is that a corporate official, acting alone on behalf of

[3] See, for example, United States v. A&P Trucking Co., 358 U.S. 121, 123 (1958); United States v. Polizzi, 500 F.2d 856, 907 (9th Cir. 1974).
[4] See, e.g., Wood v. United States, 204 Fed. 55, 58 (4th Cir. 1913); Kaufman v. United States, 212 Fed. 613 (2nd Cir. 1914).
[5] 366 F.2d 423 (2d Cir. 1966).
[6] In United States v. Sain, 141 F. 3d 463, 465 (3d Cir. 1998; United States v. Hughes Aircraft Co., 20 F. 3d 974, 979 (9th Cir. 1994); United States v. Ames Sintering Co., 927 F. 2d 236, 237 (6th Cir. 1990).

the corporation, cannot be convicted of conspiring with the corporation (because there is really only one actor in such a case[7]).

8. The only area where state law on corporate criminal liability differs materially from federal law is that, under the Model Penal Code and many state penal codes, corporate criminal liability may require that a management official above a junior level engage in or ratify the misconduct. Thus, in these jurisdictions, a low-level employee cannot on his own create liability for the corporation. Section 2.07 of the Model Penal Code requires (in most cases) that the misconduct be "authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment."[8] This seems of limited relevance here where both Richard and Kathe Sackler would qualify as "high managerial agents" where (1) both were directors, (2) Richard Sackler was the former President of Purdue Pharma Inc., (3) Kathe Sackler had long served as a Senior Vice President, and (4) the Sackler family as a whole constituted the control group that dominated Purdue.

9. Utah is in fact one of those states that does require that either a "high managerial agent" or the board of directors have either authorized or "recklessly tolerated" the crime. Section 76-2-204 of the Utah Criminal Code provides:

> 76-2-204 Criminal Responsibility Corporation or Association
>
> A corporation or association is guilty of an offense when:
>
> (1) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations or associations by law; or

[7] United States v. Steymens, 909 F. 2d 431, 432-34 (11th Cir. 1990); United States v. Peters, 732 f. 2d.
[8] See Utah Criminal Code Section 76-2-20, which largely follows this provision.

(2) The conduct constituting the offense is authorized, solicited, requested, commanded or undertaken, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and on behalf of the corporation or association"

10. Utah law is also explicit that an individual is criminally liable for conduct that "he performs or causes to be performed in the name of or on behalf of a corporation or association to the same extent as if such conduct were performed in his own name on behalf."[9] This "causes to be performed" language makes clear that an individual with controlling influence could be liable -- criminally or civilly -- for conduct performed by a corporation or association under that person's control. Thus, under Utah law, assuming that they "cause" the conduct of Purdue, Richard Sackler and/or Kathe Sackler could be criminally convicted or held civilly liable, including (1) for causing unlawful acts or misrepresentations performed or made by Purdue, (2) for aiding and abetting Purdue in committing a crime, or (3) for conspiring to commit a crime under the Utah conspiracy statutes. [10]

11. Little changes materially when we move from criminal law to civil law. Only the requisite standard of proof, which declines to a preponderance of the evidence standard, necessarily changes. As a matter of civil law, it is even clearer that the corporate entity is liable for acts of its employees, directors, and agents. The principle of *respondeat superior* applies fully in such civil cases. Similarly, officers, directors or controlling shareholders who "cause" a crime or other misconduct by a corporation (or other business entity) are themselves civilly liable. Utah law implies this in earlier noted Utah Criminal Code Section 76-2-205. But this is

[9] Utah Criminal Code Section 76-2-205.

[10] Section 76-4-201 ("Conspiracy") of the Utah criminal Code provides that one is "guilty of conspiracy when he, intending that conduct constituting a crime be performed, agrees with one or more persons to engage in or cause the performance of the conduct and any one of them commits an overt act in pursuance of the conspiracy…" This overt act requirement is waived in the case of certain serious crimes, including "a felony against the person."

the standard "black letter" law rule. As a leading treatise on corporate criminal liability properly states:

> "Section 13.09 ("Civil Damages Liability of Corporate Officers and Directors Based on Illegal Corporate Activity").
>
> Corporate directors and officers who knowingly initiate or tolerate criminal activity by corporate employees will bear civil damages liability for resulting harms to crime victims."[11]

Interestingly, most of the cases cited in support of this proposition by this treatise are New York state decisions,[12] and they thus apply to Purdue Pharma, Inc., which is a New York corporation. Under the "internal affairs rule," which all U.S. jurisdictions follow, the duties owed by corporate directors to shareholders and others is determined by the jurisdiction of incorporation (here, New York in the case of Purdue Pharma, Inc.).[13]

12. A special word must be said here about a rule that federal law (and an increasing number of states) apply in the case of offenses that threaten the public welfare. Under the "responsible corporate officer" doctrine, corporate officials have been held liable (both civilly and criminally) for corporate violations of statutes, "even where the officer did not personally participate in the wrongdoing, so long as the officer was in a position of responsibility that allowed the officer to influence corporate policies and activities and the corporate officer had a responsible share in the furtherance of the behavior that the statute outlawed."[14] Indeed, this doctrine was invoked to justify the conviction of three senior officers of Purdue in 2007, who

[11] Richard S. Gruner, CORPORATE CRIMINAL LIABILITY AND PREVENTION (2019).
[12] See, e.g., Ditomasso v. Loverro, 293 N.Y.S. 912, 916-917 (N.Y. App. Div.), aff'd 276 N.Y. 548, 12 N.E. 2d 570 (N.Y. 1937); Roth v. Robertson, 118 N.Y.S. 351 (N.Y. Supreme Court 1909). For a more recent decision, see Miller v. American Tel. & Tel. Co., 507 F.2d 759 (3d Cir. 1974).(illegal corporate contribution to facilitate profitable regulating change cannot be justified, even if it results in profit).
[13] See CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, at __ (1987).
[14] See Randy Sutton, "'Responsible Corporate' Office Doctrine or 'Responsible Relationship' of Corporate Officer to Corporate Violation of Law", 119 A.L.R. 5th 205.

were convicted of "misbranding" OxyContin in violation of federal law.[15] This doctrine has been applied chiefly in cases involving the public welfare, such as cases involving "misbranded" pharmaceutical drugs or environmental violations. Indeed, in the leading case in this field, the Supreme Court upheld criminal liability, under the Food and Drug Act of 1906, for a corporation's president who was not personally involved in (or had knowledge of) the misconduct.[16] This statute prohibits the shipment of misbranded drugs in interstate commerce, and the Supreme Court determined that, in the case of such public welfare offenses, strict liability was appropriate because the president of the company was in a much better position than members of the public to protect against the possible dangers of the product. More recently, the Supreme Court has re-affirmed this result in United States v. Park,[17] which again was a case under the federal Food, Drug and Cosmetics Act; it involved a corporate president who was not remotely involved in the misconduct (which consisted of contamination by rats of a food warehouse).

13. Although strict liability criminal statutes are disfavored (and not here endorsed), there has been a recent strong trend among the states towards employing this doctrine civilly against senior corporate officials, often in environmental cases, but also in consumer fraud and securities actions.[18] In this civil context, there has been less opposition to the doctrine. Who then is a responsible corporate officer? The Ninth Circuit has defined this status as follows:

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[15] See United States v. Purdue Frederick Co., Inc., 495 F. Supp. 2d 569, 570 (W.D. Va. 2007)(describing the guilty pleas of these three officers as based on their status "solely as responsible corporate officers").

[16] See United States v. Dotterweich, 320 U.S. 277 1943).

[17] 421 U.S. 658 (1975). This doctrine continues to be used by prosecutors (although as next noted it has been expanded even more in the civil context). For a recent criminal case based on this doctrine, see United States v. DeCoster, 828 F.3d 626 (8th Cir. 2016), cert. denied, 2017 WL 120919 (May 27, 2017).

[18] For state decisions upholding awards of civil damages against corporate officer under the "Responsible Corporate Officer" doctrine, see BEC Corp. v. Dept. of Environmental Protection, 775 A.2d 928 (Conn. 2001); Roscoe v. Biafore, 2003 WL 21101096 (Conn Super. Ct. 2003); Commonwealth, Dept. of Environmental Management v. RLG Inc., 755 N.E. 2d 556 (Ind. 2011); Commonwealth, Dept. of Environmental Management v. Roland, 775 N.E. 2d 1118 (Ind. Ct. App. 2002), Matter of Dougherty, 482 N.W. 2d 485 (Minn. Ct. App. 1992); State Dept. of Ecology v.

> "[A] person is a 'responsible corporate officer' if the person has authority to exercise control over the corporation's activity that is causing the [violation]."[19]

Under such a definition, it is not necessary to show that an individual controlled all corporate activities, but only that (in a case involving marketing violations) that he or she controlled (possibly with others) the activity that caused the violations. Although I am unaware of Utah cases relating to this doctrine, Utah law does say that an individual is liable because of a corporation's violation of law if he or she "causes to be performed" the conduct in question.[20] Evidence of domination or control of a particular activity should satisfy this standard. Of course, this report is focused not on criminal liability, but instead on such an individual's civil liability (including to the DCP).

14. What then is the relationship at the business judgment rule to this topic of corporate and individual liability? The short answer is that there is no relationship. The business judgment rule is a defense in a direct or derivative action where the corporation or shareholder plaintiffs are asserting that a corporate director or officer breached his or her duty of care. It also has no application to a duty of loyalty violation (as later discussed). Shareholders in effect waive their civil claim for damages from any breach of the duty of care when the defendant complies with the business judgment rule. But it is not liability to shareholders that is at issue in this case, and the business judgment rule has no application to fraudulent or criminal behavior or to actions brought by the State.

The foregoing is intended only as a backdrop to the factual evidence that will next be assessed.

Lundgren, 971 P.2d 948 (Wash. 1999). For a state civil case employing this doctrine in connection with a consumer fraud statute, see State ex rel. Miller v. State Rosa Sales and Marketing, Inc., 475 N.W. 2d 210 (Iowa 1991).

[19] United States v. Iverson, 162 F.3d 1015, 1025 (9th Cir. 1998).

[20] See Utah Criminal Code, Section 76-2-205.

III. The Factual Context of Privately Held Corporations and Business Entities.

15. Privately held corporations (such as Purdue Pharma, Inc.) and other privately held business entities (such as Purdue Pharma L.P.) display a very different pattern of governance from that of publicly held corporations. In privately held firms, there is seldom any "separation of ownership from control"; rather, a small group of shareholders typically own and control the firm, and there is often a high overlap between the firm's owners and the firm's managers. This pattern long characterized Purdue, where Richard Sackler worked since 1971, holding a variety of managerial positions in marketing and research, and ultimately rising to President from 1999 to 2003, and then serving as Co-Chairman of Purdue from 2003 to 2017 (and remaining as a board member from 1990 until 2018). Kathe Sackler similarly served as a Senior Vice President (with a variety of duties) and as a director from 1990 until 2018.[21]

16. The board of a privately held firm is typically in more direct contact with senior and middle-level management than is the board of a public company. This was certainly true at Purdue, where quarterly reports went to the board that were more detailed in my judgment than the written reports distributed by most public companies. Often, privately held firms may delegate considerably less power to the chief executive officer, retaining for itself most important business decisions. This was certainly true at Purdue, which described its board as its "'de facto' CEO."[22] This seems an accurate characterization, as the Purdue board did not simply monitor but became deeply involved in most important business decisions, including even revising profit and sales forecasts for the next quarter. Most strikingly, Purdue did not appoint those CEOs that were not members of the Sackler family to its board. None of Michael Friedman, John Stewart or

[21] These dates for Richard Sackler and Kathe Sackler's services as directors of Purdue come from "Purdue's Written Responses to 30(b)(6) Topics," filed in In Re: National Prescription Opiate Litigation, MDL No. 2804, on November 7, 2018.

[22] See PPLPC020001106306 (first bullet point under "The Issues Facing Our Business" heading).

Mark Timney were appointed as directors of Purdue, even though they were trusted and loyal CEOs. This is highly unusual as a matter of corporate governance, and it further evidences that the Sacklers, even though they were technically beneficial owners under trusts, held actual control. Also, over the last decade or so, there has been a high turnover in chief executives at Purdue (Michael Friedman, John H. Stewart, and Mark Timney all followed Richard Sackler as CEO of Purdue), which further indicates that control lay with the board and the Sackler family.

17. From the outset, the Purdue board was kept a Sackler family-dominated club, with at least nine Sackler family members serving, at various and generally overlapping times, as directors: Ilene Sackler Lefcourt (1990-2018), Beverly Sackler (1993-2017), David Sackler (2012-2018), Kathe A. Sackler (1990-2018), Mortimer D. Sackler (1990-2018), Mortimer D. A. Sackler (1993-N/A), Raymond B. Sackler (1990-2017), Richard S. Sackler (1990-2018), and Theresa Sackler (1993-2018).[23] Two factual conclusions follow from this pattern: First, control of Purdue lay in the Sackler family and particularly its board representatives. Second, much more than in most corporations, ordinary business decisions were made by representatives of the Sackler family serving as directors. Such persons could "cause" conduct taken and representations made by Purdue.

18. Unlike most public companies, which may produce a broad array of products across a wide range of markets, privately held firms often have a narrower focus. Purdue represents an extreme example of this pattern as, over the period from 1996 to 2018, almost all its revenues came from one product, OxyContin. Purdue (and its affiliates) have estimated their cumulative "Opioid Sales" from 1995 to September 2018. The cumulative total for all Purdue opioid products was $31,989,862,082, of which OxyContin accounted for $29,193,539,155 (over

[23] These dates come from Purdue's 30(b)(6) submission, supra note 14 at pp. 1-2.

91%).[24] No other Purdue product accounted for cumulative sales equal to 4% of Purdue's cumulative sales.[25]All told, since its introduction in 1996, OxyContin is reported to have generated over $35 billion in sales for Purdue.[26]

19. Given the centrality of OxyContin, Purdue's board was consistently focused on all decisions about OxyContin: pricing, marketing, brand positioning, and potential liability. To give two simple examples, the Purdue Board on November 4, 2008 approved a resolution stating:

> "Partnership…is authorized and directed to increase the price of OxyContin tablets by 6.5% as of November 1, 2008…increase the price for MS Contin by 9% as of December 1, 2008."

Similarly, another board resolution adopted on June 26, 2009 directed an increase in the price for OxyContin Tablets by 5.5% as of August 1, 2009 and for MS-Contin by 7.0% by September 1, 2009." This is the kind of fine tuning that in most corporations is left to management. But at Purdue, the board performed many of the basic managerial functions. Also, these resolutions show a continuing desire by the Purdue board to keep OxyContin less expensive than MS-Contin, which policy (as discussed later) enabled OxyContin to be marketed more easily to the much larger non-cancer drug market.

20. Sometimes the Purdue board even delegated typically managerial decisions to individual directors. A good example is the board resolution adopted on November 3, 2009 when the Purdue board approved the 2010 budget, "subject to (1) Review of the top line sales numbers, (2) review of the royalty payable to Grunenthal" and then in this same resolution delegated this review to a special committee composed "of Richard S. Sackler M.D. and Kathe A. Sackler." Another such committee consisting of Richard Sackler and Kathe Sackler (along with Jonathan D. Sackler and Mortimer D.A. Sackler) was created by a board resolution on April 10, 2013 to

[24] See Exhibit A to Purdue's Written Responses to 30(B)(6) Topics.
[25] Id. This product was MS-Contin, and its sales declined greatly after 2010.
[26] See Jared S. Hopkins, "OxyContin Maker's Sales Drop Amid Suits," The Wall Street Journal. July 1, 2019 at p. 1.

deal with licensing of "Grunenthal's tamper resistant technology." Both resolutions show the Purdue board handling normally executive functions and delegating important decisions to Sackler family members.

21. This pattern will become even more evident when we examine the separate cases of Richard Sackler and Kathe Sackler. Still, both share one common characteristic that needs to be stressed at the outset: both were M.D.s, highly sophisticated about pharmaceutical products (and particularly opioids), much more so than would be the directors of a public company. Logically, one would expect that the other directors (who were generally not M.D.s) and the firm's managers would defer to their expertise on issues of medical benefits and risks. For example, on the issues surrounding the propriety of marketing OxyContin for chronic non-cancer pain, they should logically have had disproportionate influence. Still, as the above-noted decision to appoint them as a special review committee indicates, they were also deferred to on other issues as well, including financial issues. This then is not the normal corporate structure or decision-making process, but one in which certain individuals had special control rights.

Both Richard Sackler and Kathe Sackler require a separate analysis:

22. A. Richard Sackler. Richard Sackler spent over 43 years of his life working, more or less full-time, for Purdue Pharma. This markedly distinguishes him from the outside directors of a typical publicly held corporation (who are almost always part-time agents with other important and competing responsibilities), and it also undercuts any possible claim that Richard Sackler was unaware of the strategic decisions that Purdue made or faced. Indeed, he had worked on the development and roll-out of OxyContin from before its initial launch, running

at various points both the research and the marketing programs that supported it.[27] And he continued his active involvement until his board resignation in 2018.

23. Nothing better reveals his obsession with OxyContin than a much quoted statement he made in 1999, when he emailed to colleagues that:

> "You won't believe how committed I am to making OxyContin a huge success. It is almost that I dedicated my life to it."[28]

No detail relating to OxyContin seems to have been too insignificant to gain his attention.

24. As the executive in charge of the development and marketing of OxyContin, Richard Sackler shaped how the drug was presented to both the market and regulators. In this capacity, he pushed a number of ideas on his subordinates and staff. As earlier noted, one such idea was that OxyContin should be used for even moderate, non-cancer pain. Another was that risk of addiction for OxyContin users was very low. Related to this position was another overbroad claim that those who overdosed on OxyContin were "abusers" and "criminals". He repeated this claim regularly, even to shocked listeners. One such example was his February 1, 2001 email to [redacted] (who was not a Purdue employee). He wrote:

> "Meanwhile, we have to hammer on the abusers in every way possible. They are the culprits and the problem. They are reckless criminals."[29]

Even if some "abusers" may have committed criminal acts, Richard Sackler had no basis for this sweeping generalization, which may have helped him rationalize the risks that he had allowed OxyContin to impose on its users.

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[27] Richard Sackler testified that his primary responsibilities, before he became Purdue's President, were "R&D, medical, and marketing, and sales." Deposition of Richard Sackler on March 7, 2019 at p. 81. This pretty well describes the range within which Purdue violated the law, both in 2007 and allegedly in this case.

[28] This statement was quoted in an August 28, 2015 deposition given by Richard Sackler and has been widely reported. A copy of the deposition was obtained by ProPublica. See David Armstrong, "Purdue's Sackler backed hiding drug's strength from doctors; Sealed deposition reveals 1997 OxyContin exchange," The Boston Globe, February 22, 2019 at Business Section, p. 1. The actual statement was in a 1999 email by Richard Sackler to another Purdue employee.

[29] See PDD8801133516.

25. Those who have described Richard Sackler (both friends and foes) agree that he engaged in obsessive "micromanagement."[30] Examples of his uniquely intrusive management style, which persisted whether he was acting as manager or as a director, fill the pages of his 2019 deposition. For example, as a director, he recurrently challenged sales forecasts and indicated that he would not accept them.[31] Or, he would ask if there was "any chance" that the forecasts could be improved.[32] This is not the after-the-fact review that most directors engage in, but is instead a forward-looking intervention before a forecast is even announced. It is a safe generalization that such behavior would be rare to unknown in the case of a non-executive director at a public corporation.

26. Often, Richard Sackler had very specific suggestions. [redacted]

Factually, this is not a question from a diligent director, but an instruction from a superior to a subordinate. Richard Sackler is here seeking to minimize [redacted] But his broader goal was always to increase OxyContin sales.

27. Richard Sackler's style caused considerable internal friction within Purdue. [redacted]

[30] See Richard Sackler Deposition, supra note 27, at 90. The transcript refers to an article in Esquire magazine.
[31] See Deposition of Richard Sackler, supra note 27, at 105 to 107.
[32] Id. at 109 to 110.
[33] Id. at 119.

[redacted] The point here is not simply that his style was sometimes abusive, but that he was deeply involved in these decisions, still acting as if he were Purdue's de facto CEO. Some employees asked Purdue's then CEO (John H. Stewart) to call Richard Sackler off. For example, on March 7, 2012, Russell Gasdia, head of marketing, complained by email to Stewart, that Richard Sackler's constant bombardment of one employee (David Rosen) with questions and demands "is taking a lot of energy, almost every day." Stewart replied, with obvious resignation:

> "Russ:
>
> > I work on this every day, some with more success than others. You are right about the ultimate solution, and in the meantime when RSS does ask for data--I find it best to just give it to him…"[35]

In short, even Purdue's CEO did not seemingly dare to challenge Richard Sackler frontally.

28. While a director, Richard Sackler also participated in discussions with Purdue's middle management about (1) the pricing of OxyContin,[36] (2) forthcoming meetings relating to OxyContin with the FDA, (3) press releases that needed to be issued or modified, and (4) developing relationships with professional or non-profit associations that Purdue both funded and used as its proxy. By the end of 2014, just as the opioid epidemic was coming into full view, he began to press Purdue middle management for aggressive price increases for OxyContin tablets. In a confidential email that he sent on December 31, 2014 from his residence in Alta, Utah to Mark Timney (Purdue's new CEO) and others, Richard Sackler pushed for a new, more aggressive pricing policy for OxyContin. Standing alone, none of these interventions was inherently wrongful, but this style of "hands-on" management is more characteristic of a chief executive than a director. Ultimately, these examples paint a picture of Richard Sackler being

[34] Id. at 132 to 133.
[35] Id. at 101.
[36] Id. at 148.

involved in virtually every decision or policy choice of any importance that was considered at Purdue -- and generally having his way.

29. Particularly important was Richard Sackler's involvement of changes in the "package insert" for OxyContin. "Package inserts" are closely monitored and regulated by the Food and Drug Administration ("FDA"), and thus changes to them are sensitive matters with important legal consequences. One email to Purdue colleagues from Mark Alfonso underlined Richard Sackler's veto power in this area:

> "Colleagues, Michael Friedman and I are not in support of this PI (or package insert) change. Michael has indicated that Dr. Richard is not in support of this change, and any OxyContin PI change will require Dr. Richard's approval. I would suggest that we don't meet until this issue has been discussed with Dr. Richard."[37]

The between-the-lines message here is that even on technical and regulatory issues, one did not cross "Dr. Richard," and one got his approval before proceeding. This quotation also reminds us that some Purdue officials were simply not capable of being independent of "Dr. Richard." Michael Friedman had been Richard Sackler's subordinate and protégé when Richard Sackler ran marketing at Purdue and he was Richard Sackler's choice to succeed him as Purdue's CEO. That history makes him fall well short of "independent."

30. Although the package insert and the label were intended to warn patients and prescribing physicians about the risks associated with a drug, Richard Sackler saw them as a marketing opportunity. He congratulated his staff for making the label a "better, stronger, a more potent selling instrument" and the package insert "the most powerful selling package insert in the category and in the industry."[38] But "powerful selling" leads almost inevitably to greater addiction.

[37] Id. at pp. 216 to 217.
[38] Id. at p. 222.

31. Beyond simply micromanaging others, Richard Sackler also publicly asked the medical community (and instructed his own sales representatives) to recommend OxyContin for many forms of moderate but chronic, non-cancer related pain. In a Spring 2000 edition of the company's publication "@purdue," he estimated that some 46 million Americans suffered from "significant persistent pain," and he specifically urged the prescription of OxyContin for:

> "Osteoarthritis, complex and severe back pain, shingles, pain of circulatory compromise, the pain of rehabilitation, and numerous other conditions that can debilitate patients for weeks, months, and even years."[39]

There seems to have been few, if any, limitations on the kinds of pain for which he would prescribe OxyContin.

32. In overview, the significance of Richard Sackler's pervasive involvement in all aspects of Purdue's business -- pricing, sales, regulatory approvals -- is that he possessed an effective veto power that gave him a high degree of control over Purdue. As the officer who designed the original marketing campaign for OxyContin and as a former President, Chairman, director and a substantial owner, his consent to important policies seems to have been necessary. Such evidence goes directly and immediately to the issue of who controlled Purdue and who "caused" it to commit legal violations.

33. As a practical matter, Richard Sackler had it both ways. Although nominally only a director (and co-chairman), and not an executive, he often acted as if he were still the CEO who had to be obeyed by the staff. Unquestionably, this benefitted Richard Sackler in one very important respect: When the U.S. Attorney indicted Purdue and charged three of its officers with the crime of "misbranding" in 2007, the prosecutors focused on Purdue's current managers (its CEO, its chief legal officer, and its chief medical officer). The U.S. Attorney did not charge any

[39] PPLP004425997.

directors, because non-executive directors are almost never charged. Prosecutors understandably assume that directors ratify the basic business decisions, but do not become involved in the messy details. Of course, I cannot conclude what was the motive for Richard Sackler's resigning as CEO on March 4, 2003 (and then assuming the title of Co-Chairman on that same day), but I do think it is a fair and safe conclusion that this switch effectively spared him from a criminal prosecution in 2007-08.

34. B. Kathe Sackler. As Richard's cousin, Kathe Sackler seems to have served as a representative of the descendants of Mortimer Sackler, her father and a co-founder of Purdue. She began working at Purdue in the mid-1990s and quickly went on the board, resigning only in 2018 when the remaining family members all exited collectively.

35. The two doctors -- Kathe and Richard -- often worked together at board and similar meetings. Earlier, it was noted that they had been appointed by the board to serve as a special committee to review aspects of the 2010 budget. Another example also involved this Budget Presentation for 2010 on November 2nd and 3rd, 2009, as the record shows that on the topic of OxyContin:

> "Dr. Richard and Dr. Kathe asked for:
>
> i. a detailed review of the long acting SEO market, the OER market and the OxyContin growth rate for purposes of projecting into the future.
> ii. identify specific programs that sales and marketing will implement to profitably grow the OER market and OxyContin in light of competitions.
> iii. provide analytics around why/how the proposed increase in share-of-voice translates into sales and profitability growth.
> iv. clarify the situation with respect to OxyContin being used by 35% of new patients, but only 30% of ongoing patients.
> v. provide a copy of the OxyContin McKinsey report on possible ways to increase OxyContin sales and market share."[40]

[40] See PPLPC012000248328 ("Budget Presentation 2010 - November 2nd, 3rd, 2009).

Although not as abrasive as Richard, she also did not defer to management and was focused on growing OxyContin's market share.

36. Kathe Sackler claims to have originated the key idea underlying OxyContin: namely, that its tablets would offer a continuous release over a 12 hour period.[41] Although her role as the original inventor of OxyContin seems debatable, she clearly did recognize both the value and the risks of "controlled" or "continuous" release. On the benefit side, OxyContin would be administered just twice a day, and this enabled Purdue to market OxyContin as a unique drug that enabled its patients to "sleep through the night" (whereas alternative drugs, including MS-Contin, worked only for a more limited period). But Kathe Sackler also recognized that while OxyContin's continuous release over 12 hours gave Purdue a competitive advantage, this feature carried real risks. As she acknowledged at her deposition, it is inevitable that there is "a certain amount of variability in patients."[42] She recognized that some patients would need immediate-release opioids during the course of that 12 hour period, as the 12 hour dosage would wear off early in their case.[43] She conceded that "individuals metabolize drugs with variability… so in some patients, physicians would use immediate-release opioids."[44] This combination of continuous release coupled with supplementary immediate release tablets invited overdosing. Also, if the OxyContin tablet's effect wore off during the 12 hours it was supposed to be effective, this contributed to the "peak and valley" effect on patients that also encouraged addiction.

37. As early as 1997 at the outset of OxyContin's marketing, Kathe Sackler participated in team meetings with the Purdue staff in which it was recognized that OxyContin

[41] See Deposition of Kathe Sackler, April 1, 2019, at 37 to 38.
[42] Id. at 225.
[43] Id. at 226.
[44] Id. at 227.

had two key competitive advantages: First, it was designed around continuous relief, which carried with it the implication (misleading for some patients) that the patient could sleep through the night. Second, it was perceived by many physicians "as not being as strong as MS-Contin."[45] MS-Contin is, of course, a morphine derivative, and morphine carried a stigma -- well known to doctors and patients -- because it was historically used for end stage relief in severe cancer cases. As a staff memo told both her and Richard Sackler:

> "Since oxycodone is perceived as being a quote weaker opioid than morphine, it has resulted in OxyContin being used much earlier for noncancer pain. Physicians are positioning this product where Percocet, hydrocodone, and Tylenol with codeine have been traditionally used.
>
> Since the noncancer pain market is much greater than the cancer pain market, it is important that we allow this product to be positioned where it currently is in the physician's mind."[46]

The sad irony here is that OxyContin was twice as strong as morphine. Still, it was better for marketing purposes (as the above memo made clear) to hide this fact. Only if the physician wanted a stronger drug were sales representatives instructed to point out that it actually had double the potency of morphine. The truth was revealed only when it helped sales.

38. Although it seems obvious that a higher dosage increased the risk of addiction, Purdue saw instead that a higher potency could enable it to charge a higher price. Richard Sackler in particular saw higher potency as another competitive advantage of OxyContin. In 1991, at the outset of the planning for OxyContin, Richard Sackler wrote and distributed a memo to Kathe Sackler and other Purdue staffers describing research in which oxycodone was being used in extremely high dosages of up to 1,000 milligrams per day. Richard Sackler summarized this research, concluding:

[45] Id. at 183.
[46] Id. at 184.

> "This new information is excellent and important, as it confirms one of our hopes for CR "controlled-release" "oxycodone."[47]

In fairness, Kathe Sackler responded at her deposition:

> "That's pretty shocking, a thousand milligrams. My God, that's an enormous dosage."[48]

But even if Kathe Sackler was more concerned about the medical risks than Richard Sackler, who seems to have had virtually no concerns about OxyContin's dangers, both shaped the Purdue plan to present OxyContin as a softer, milder alternative to morphine derivatives, while actually marketing OxyContin in much higher potency tablets.

C. Initial Conclusions:

39. The point of the foregoing analysis should now be clear: If the Sackler family (most notably through Richard Sackler and Kathe Sackler) controlled Purdue (and its affiliates), particularly with respect to the marketing of OxyContin, then they logically should be responsible, just as a principal is, for the foreseeable consequences of the acts of their agents, including for misrepresentations made by Purdue (and its affiliates) that were consistent with the marketing plan that they imposed in order to maximize OxyContin sales. Purdue was their agent both because they controlled it and because Richard Sackler deliberately designed the original marketing campaign to focus on prescribing physicians and to market OxyContin for non-cancer pain in order to reach the much broader non-cancer market.

40. What were the key misrepresentations? They would include the claims that the DCP has most stressed in its Administrative Citation, namely:

(1) The claim that OxyContin rarely was addictive (and only then in the case of "true" abusers);

[47] Id. at pp. 54 to 55.
[48] Id. at p. 57.

(2) The claim that OxyContin was a safer, milder drug than morphine and its derivatives;

(3) The claim that OxyContin could be safely and appropriately used for chronic non-cancer related pain (including such common run-of-the-mill problems as osteoarthritis and lower back pain); and

(4) The claim that OxyContin's controlled and continuous release over a 12 hour period would benefit all of its users (even though many would need additional medication over this period and might therefore increase their daily dosage).

As a non-medical expert, I cannot testify that these claims are true or false. That must be shown at trial. But, it is clear that Richard Sackler pushed these claims on Purdue's sales representatives and others around him. From a corporate governance perspective, I find it easy to conclude that the Sackler family, with its 100% ownership of Purdue, its control of Purdue's board, and the aggressive leadership of, in particular, Richard Sackler, had the power to impose its will on Purdue.

41. My view that the Sacklers, as controlling shareholders, owe a duty to the users of OxyContin is hardly unique. In a very recent decision in New York, New York Supreme Court Justice Jerry Gargulio has ruled not only that Purdue owed a duty of care to the plaintiffs (principally New York counties) in that litigation, but that this "analysis [is] equally applicable to the individuals alleged to have controlled Purdue and its associated companies." See In re Opioid Litigation, Index NO. 400000/2017, Slip Opinion at 14 (June 21, 2019). The New York Court's key rationale for this holding that a duty existed was "whether the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm." As it further explained:

> "Specifically, the plaintiffs allege that because the manufacturer defendant had knowledge of the actual risks and benefits of their products, including their addictive nature, which they did not disclose, they were in the best position to protect the plaintiffs against the expenses incurred for opioids prescribed for their employees and for Medicaid beneficiaries that would not have been approved for payment, and against the extraordinary amounts expended to combat the opioid crisis allegedly caused by deceptive marketing campaigns." Id. at 14.

Both in Utah and New York, the facts are the same, and the Sacklers should logically owe the same duty in both jurisdictions because they were clearly in the "best position" to protect the victims of opioids.

IV. The Duty to Monitor Compliance and Safety.

42. In 2007, after an extended negotiation and investigation, Purdue caused its affiliate, The Purdue Frederick Company, Inc. ("Purdue Frederick"), to plead guilty to the felony of "misbranding." According to the Information filed in this case, "Purdue supervisors and employees, with intent to defraud or mislead, marketed and promoted OxyContin as less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications."[49] Specifically, the Information further alleged that Purdue:

> a. "Trained Purdue sales representatives and told some health care providers that it was more difficult to extract the oxycodone from an OxyContin tablet for the purpose of intravenous abuse, although Purdue's own study showed that a drug abuser could extract approximately 68% of the oxycodone from a single 10 mg OxyContin tablet…"

[49] Information at Paragraph 20.

b. Told Purdue sales representatives that they could tell health care providers that OxyContin potentially create less chance for addiction than immediate release opioids;

c. Sponsored training that taught PURDUE sales supervisors that OxyContin had fewer 'peak and trough' blood level effects than immediate-release opioids resulting in less euphoria and less potential for abuse than short-acting opioids;

e. Told certain health care providers that OxyContin did not cause a "buzz" or euphoria, caused less euphoria, had less addiction, had less addiction abuse potential, was less likely to be diverted than immediate-release opioids, and could be used to 'weed out' addicts and drug seekers."[50]

43. Although there was much more in this Information (particularly involving FDA approval and the package insert for OxyContin), it should be clear that the allegations in this criminal prosecution (which were admitted) bear a high resemblance to the instant civil case; indeed, in Yogi Berra's immortal phrase, it is "*déjà vu* all over again." That case in 2007, which was resolved in guilty pleas by Purdue Frederick and by three of Purdue's three highest ranking officers, conceded these allegations in an "AGREED STATEMENT OF FACTS," executed by Purdue Frederick and those three officers (which included Purdue's then Chief Executive Officer, Michael Friedman). Pursuant to this settlement, Purdue paid approximately $[600] million in fines, penalties and restitution to a variety of U.S. agencies and entered into a

[50] Id.

Corporate Integrity Agreement with the Office of Inspector General of the U.S. Department of Health and Human Services, and the three officers resigned.

44. If even some of the facts alleged by the DCP are accurate, Purdue's efforts at reform seem not to have worked, and Purdue remained undeterred and continued business as usual. But the greater relevance of Purdue's criminal experience in 2007 was that it indisputably triggered one of the most important duties in corporate law: namely, the duty under In re Caremark Int'l Inc. Derivative Litig.[51] to ensure the safety and legality of the corporation's operations. Under Caremark and later Delaware cases, directors have a duty "to monitor the corporation's operational viability, legal compliance, and financial performance."[52] While this duty would have existed even before the 2007 guilty plea (and Purdue's consequent entry into its Corporate Integrity Agreement), that experience made its prior shortcomings apparent to all and placed the Purdue board on notice. Under Caremark, a sustained failure to install adequate internal controls and a reliable monitoring system "is an act of bad faith in breach of the duty of loyalty."[53]

45. Although Caremark liability requires that there be a sustained failure to monitor (and not simply a one shot case of negligence), Delaware has applied this rule more rigorously when it is clear that the failure concerned critical safety risks that surrounded the company's principal product. The best example of this stricter attitude is Marchand v. Barnhill, decided by the Delaware Supreme Court just last month.[54] This case has strikingly similar facts to Purdue's experience. Blue Bell Creameries USA, Inc., "one of the country's largest ice cream manufactures, suffered a listeria outbreak in 2015, causing the company to recall all of its

[51] 698 A. 2d 959 (Del. Ch. 1996). Although this is a Chancery Court decision, the Delaware Supreme Court later fully adopted it in Stone v. Ritter, 911 A. 2d 362, 370 (Del. 2001).
[52] See Marchand v. Barnhill, 2019 Del. LEXIS 310 (Del. June 20 2019).
[53] Id. at *5.
[54] See note 52 supra.

products, shut down production at all of its plants, and lay off a third of its workplace."[55] Three people died as a result of the listeria outbreak (a minor number in comparison to the many thousands who have died from OxyContin).

46. The lower court had dismissed the action, finding that "what the Plaintiff really attempts to challenge is not the existence of monitoring and reporting controls, but the effectiveness of monitoring and reporting controls in particular instances" and "[t]his is not a valid theory under…Caremark."[56] The Delaware Supreme Court reversed, finding "that the Blue Bell board failed to implement any system to monitor Blue Bell's food safety performance or compliance."[57] With only a few changes, the Court's analysis of Blue Bell can be applied equally well to Purdue:

> "As a monoline company that makes a single product - ice cream- Blue Bell can only thrive if its consumers enjoyed its products and were confident that its products were safe to eat. That is, one of Blue Bell's central compliance issues is food safety. Despite this fact, the complaint alleges that Blue Bell's board had no committee overseeing food safety, no full board-level process to address food safety issues, and no protocol by which the board was expected to be advised of food safety reports and developments."[58]

The bottom line, it said, was that "the board was not presented with any material information about food safety."[59]

47. Actually, the facts relating to Purdue are far more egregious. Blue Bell had no prior listeria incident, whereas, as of 2009, Purdue had just experienced criminal convictions of its affiliate and its most senior officers. Also, Purdue's board could not have avoided knowledge that many were dying of OxyContin overdoses. Yet, I can find no indication that Purdue

[55] Id. at *1 to *2.
[56] Id. at *3 to *4.
[57] Id. at *5.
[58] Id. at *5 to *6.
[59] Id. at *6.

established any board level committee or that it introduced any board-level process to address the safety and marketing of OxyContin. Instead, it just deferred to Richard Sackler and received occasional very short reports from a compliance officer that the 2007 settlement required it to hire.[60] Moreover, Richard Sackler remained angrily skeptical of the opioid crisis, asking in November 2013 why all the alerts he is receiving are about "negatives" and "not one" about the positives of OxyContin.[61] In my judgment, this shows a very biased perspective.

48. Did Purdue change its behavior after the 2007 criminal convictions in any significant way to prevent a re-occurrence of the same violations? Of course, it took some formal steps (as required by its Corporate Integrity Agreement), but a better measure was how earnestly it searched for violations, including its serving as a supplier to phony "drug mills" that sought to buy OxyContin from it. Here, there is evidence that Purdue did relatively little. Specifically, Purdue's staff regularly filed a Quarterly Report with its board covering designated areas, including "Risk Management and Health Policy" and "Corporate Compliance." It is useful to examine here on a "before" and "after" basis what these reports told the Purdue board. Three examples are discussed below.

49. In its Quarterly Report to the Board on July 15, 2006, Purdue staff informed the board in response to the "Risk Management and Health Policy" section that:

> "Received 3,244 inquiries this quarter (6,682 YTD). Eighty-seven percent were answered within one business day and 98.5% were answered within one week."[62]

[60] Pursuant to its Corporate Integrity Agreement, Purdue named Bert Weinstein as its Vice President for Compliance. But no board level committee was appointed. Mr. Weinstein made occasional short reports to the Purdue board, generally stating only that the "Partnership is in full compliance with its compliance requirements including, but not limited to the Corporate Integrity Agreement." See Purdue board minutes for February 5, 2009, May 8, 2009, October 19, 2009, May 6, 2010, July 22, 2010, November 18, 2010, February 3, 2011, July 21, 2011, November 2, 2011, January 19, 2012, July 19, 2012, and October 14, 2012. There is no indication (from minutes or emails that I have seen) that this short conclusory statement from him was ever discussed at board meetings. Mr. Weinstein retired from Purdue in 2014.

[61] See PPLPC023000633066

[62] PDD8901796334, Section Risk Management & Health Policy. Pp. 6 to 7.

Then, under the "Corporate Compliance" section, the staff reported:

> "While we investigated 47 matters during the Second Quarter of 2006, including 13 months that had compliance implications, none of these matters were of significant concern to warrant reporting to the board."[63]

If "inquiries" were answered within a day (or at most a week), little investigation could have been made. Similarly, if 47 matters were investigated and 13 had "compliance implications," an active board would ask: "Well, what were they about? Give us some sense of them." In fairness, this was before Purdue's criminal law experience.

50. In 2008 (after the guilty pleas), the Purdue Quarterly Report dated July 15, 2008 said in its "Risk Management and Health Policy" section under the heading "Monitored Abuse and Diversion of PPLP Marketed Opioids Analgesics":

> - "89 Reports of Concern (ROCs) regarding abuse and diversion of PPLP marketed opioid analgesics reviewed and entered into Risk Management Datamark for 2d Quarter 2008.
> - 25 filed inquiries conducted in response to signals of abuse or diversion of OxyContin as identified via review of ROCs…"[64]

ROCs are obviously sensitive and based on some evidence that buyers were abusing OxyContin (or other drugs sold by Purdue). Yet, no information is provided as to what these field inquiries found. Because it is unlikely that ROCs are filed casually, the fact that 89 ROCs were filed regarding "abuse and diversion" just in this quarter should be grounds for considerable concern.

51. Finally, in Purdue's Quarterly Report for the 4th Quarter of 2013, it states under the "Corporate Compliance" heading:

> "While compliance matters are detected, investigated, and remediated on an on-going basis, there have been no significant

[63] PDD8901796334, Section "Corporate Compliance" at p. 10.
[64] PKY180013132 Section "Risk Management and Health Policy," p. 19.

> compliance exposures to report. The Company continues to have a compliant culture, and good systems in place to prevent violations of law, regulation and other standards."[65]

This is both conclusory and self-serving, and no hard data is provided. Complaints, tips, and ROCs are being received by the Purdue staff, but nothing filters up to the board. Why? It may be that the Purdue staff had learned that the Purdue board (and Richard Sackler in particular) did not like such reports. Or it may be that little resources were allocated for this activity. Any answer is speculative, but as a watchdog, the staff appears never to have found anything worthy of the board's attention. An active board would have inquired further, and Marchand v Barnhill so requires.

52. What else did the Purdue board do in response to the 2007 conviction? If one reads the board minutes in the years after this conviction, one finds no serious discussion of the charges to which Purdue Frederick and Purdue's own officers plead guilty. One does find much discussion of the following themes:

> (1) the hiring of a large number of new sales representatives, thus increasing the danger that sales representatives would continue to make misrepresentations about OxyContin, both as to its addictive potential and its utility for treating chronic non-cancer pain.[66]
>
> (2) the increased level of "risk" associated with the Sackler family's investment in Purdue and thus the desirability of either selling Purdue or making diversifying acquisitions to reduce that risk;[67]

[65] PKY180013132, Section "Corporate Compliance" p. 39.
[66] PKY183212603, p. 18.
[67] One of the fullest statements of this theme is in a memo by Richard Sackler sent on April 18, 2008 to other Sacklers, entitled "CEO Considerations." See PDD9316300629. See also PPLPC042000011895 and PPLPC04000011897.

(3) the need to distribute Purdue's cash resources to the Sackler family and the approval of distributions that board minutes showed came to approximately $2.4 billion;[68] and

(4) the need to mount an aggressive public relations campaign to defend the public's right to have access to OxyContin and similar drugs.

53. Other than for occasional reports from its Compliance Officer (which only said that there were no compliance issues), no serious discussion of the legal and safety risks that Purdue faced is evident in board minutes or the emails among directors that I have seen.

54. Thus, on the evidence that I have seen, I find the conclusion unavoidable that Purdue's directors did not make a good faith effort to comply with their monitoring duties under Caremark, despite their knowledge that many were dying from OxyContin and their knowledge that Purdue had just plead guilty to charges that it marketed OxyContin in a false and fraudulent manner. Under Caremark, this implies that the board breached its duty of loyalty. To some degree, this failure to exercise oversight over safety and law compliance issues seems attributable to Richard Sackler's adamant insistence that those dying from OxyContin overdoses were all "criminals" and "drug abusers." It may also relate to Purdue's desire to consummate sales even to dubious buyers (and their sales representatives' desire to earn commissions). Whatever the motivation, little evidence of realistic controls is apparent.

55. Although Caremark is a Delaware decision, other courts, dealing with the law of other jurisdictions, have expressly endorsed and followed it.[69] I am aware of no U.S. decision

[68] The exact number was $2,452,795,027, which was the sum of distributions by Purdue Pharma LP, chiefly to PLP Associates Holdings LP but sometimes to Purdue, between 4/28/2008 and 9/1/11.

[69] See, for example, In re Abbott Labs. Derivative Shareholders Litig, 325 F.3d 795 (7th Cir 2003) (deciding that Illinois courts would follow Caremark); State v. Custard, 2010 NCBC LEXIS 9 (N.C. Super., March 19, 2010) (North Carolina follows Caremark).

rejecting its rule. Here, it must be emphasized that we are not dealing with Utah law, but, under the internal affairs rule, with the law of Purdue's jurisdiction of incorporation (i.e., New York).

56. Although the normal remedy for a fiduciary breach is a derivative action on behalf of the minority shareholders, Purdue has no minority shareholders (because all its stock is owned beneficially by the Sackler family). The failure by Purdue's board to monitor as required by law injured Purdue's stakeholders as well, and this factor justifies public enforcement (including by the DCP) where private enforcement is not available.

57. Under standard corporate law principles, the fiduciary duties of the directors run to the shareholders, except when the corporation becomes insolvent.[70] At this point of insolvency, the directors' duty shifts from the shareholders to the creditors, and the directors must serve as trustees on their behalf. Under Delaware law, the moment of this shift occurs when the corporation actually becomes insolvent (not when it later files for bankruptcy).[71] Thus, if Purdue is already insolvent (in the sense that its liabilities exceed its assets or it is unable to meet its liabilities as they become due), the directors' duties run to its creditors (including opioid victims). Clearly, significant distributions have recently been approved by the Purdue board, which could be fraudulent conveyances and thus a breach of their fiduciary duties. On the facts available to me, I cannot at this time opine whether Purdue is insolvent, but, if it is, these conveyances would represent an additional breach of the Sacklers' duty of loyalty.

[70] See Federal Deposit Insurance Corp v. Sea Pines Co., 692 F.2d 673 (4th Cir. 1982); Clarkson Co. Ltd. v. Shaheen, 660 F.2d 506 (2d Cir. 1981); North American Catholic Educational Programming Foundation v. Gheewalla, 930 A.2d 92 (Del. 2007).
[71] See Geyer v. Ingersoll Publications Co., 621 A.2d 764 (Del. Ch. 1992).

V. The Factual Evidence on Harm, Fraud and Persistence.

58. Counsel for Richard Sackler and Kathe Sackler have argued that their clients could not be liable to opioid victims that they never met and with whom they never directly communicated. That is much too simple. Individuals who cause the corporation to commit unlawful acts can be liable for those acts under Utah law. Going even further, defense counsel have argued that the DCP cannot demonstrate proximate causation, and the chain of causation is broken by the independent decisions of prescribing physicians to prescribe OxyContin. Again, this misses the forest for the trees.

59. The fallacy here is that this is a public enforcement action, and proximate causation need not be shown in such a case. Also, Purdue clearly can and did cause harm to patients without directly communicating with them. As Richard Sackler made clear in his deposition earlier this year, Purdue's marketing was aimed at prescribing physicians. Asked if Purdue's marketing activities from 1996 to 2001 were seeking "to influence the prescribing habits of physicians," he replied:

> "I think that is a fair statement. It's not one I'm used to, but I think that's fair"[72]

He was then asked if "sales of OxyContin are a function of the extent to which a physician is willing to prescribe the drug," and he agreed.[73]

60. The DCP has contended that Purdue hid facts from prescribing physicians. Clearly, Purdue knew that many physicians believed OxyContin was milder and less potent than morphine (when the truth was the reverse). Purdue also knew (or reasonably should have known) that it had no valid evidence that the risk of addiction was low for OxyContin or other prescribed opioids. Still, it communicated the now discredited claim of a very low or "below 1%" risk as if

[72] Deposition of Richard Sackler on March 8, 2019 at p. 413.
[73] Id.

it were a proven scientific fact. In addition, Purdue pushed the use of OxyContin for moderate, but chronic, non-cancer pain (including very common and lesser maladies, such as chronic back pain), even though it should have recognized it was using a very powerful and dangerous drug that carried a higher risk of addiction.

61. The reality, in the case of prescription drugs, can be simply stated: if you defraud the physician, you effectively defraud the patient who relies on him. This truth is not unique to the world of prescription drugs. In commercial and securities transactions, if you direct material misrepresentations to an investment adviser (on whom a client relies), your false statements to this adviser have effectively injured the client who relies on this adviser.[74] Both the doctor and the investment adviser are fiduciaries to their clients, and it is entirely predictable that their clients will rely on them.

62. To sum up, fool the adviser and you fool the client (here, the patient).

63. Given that the DCP's action does not seek compensation for opioid victims, what is the relevance of the harm caused by Purdue and the Sacklers? The short answer is that under Utah Code § 13-11-17, the fine that may be imposed by the DCP should be based on the factors set forth in that provision, which include:

> "(a) the seriousness, nature, circumstances, and persistence of the conduct constituting the violation;
>
> (b) the harm to other persons resulting either directly or indirectly from the violation;
>
> …

[74] The New York Court in In re Opioid Litigation, Index No. 5000000/2017 (Suffolk County June 21, 2019) similarly noted:

> "[A]n alleged fraudulent representation need not be made directly to a plaintiff, and a defendant will be held liable to any person who is intended to rely on it and who does so rely to his or her detriment." [citing John Blair Communications v. Reliance Capital Group, 549 N.Y.S. 2d 678 (1st Dept. 1990); Pasternack v. Laboratory Corp. of Am Holdings, 37 N.Y.S. 3d 750 (2016)].

(f) the history of previous violations by the supplier;

(g) the need to deter the supplier or other suppliers from committing the violation in the future: and

(h) other matters as justice may require."

64. The most reliable quantitative data on the opioid crisis comes from the Centers for Disease Control and Prevention. They estimate that between 1999 and 2017, "more than 700,000 people have died from a drug overdose."[75] Around 68% of the more than 70,200 drug overdoses in 2017 involved an opioid.[76] On average, 130 Americans die every day from an opioid overdose.[77] In 2017, "the number of overdose deaths involving opioids … was six times higher than in 1999.[78] Of course, many of these opioid deaths came not from prescription drugs, but from illegal drugs (such as heroin). But the rise in deaths from 1999 to 2017 can only be explained by reference to new events and new conditions. Also, much of the recent increase in overdose deaths have occurred in rural areas that are remote from urban illegal drug networks, and this increase follows introduction of OxyContin in 1996. I concede that I cannot compute Utah's share of these deaths, the number caused by OxyContin, or the deaths caused by OxyCodone produced by Purdue (versus OxyCodone produced by others). Nonetheless, the conclusion still seems inescapable that deaths caused by OxyContin produced by Purdue (its

[75] See https://www.cdc.gov/druboverdose/epidemic/index.html. The 700,000 figure includes all drug overdoses, but the CDC estimates that:

> "From 1999 to 2017, almost 400,000 people died from an overdose involving any opioid, including prescription and illicit drugs."

See CDC, "Understanding the Epidemic."
[76] Id.
[77] Id.
[78] Id.

originator and dominant producer) were very high, exceeding all the deaths caused by mass murderers, organized crime gangs, and some U.S. military actions.

65. Another above-quoted factor in Utah Code § 13-11-17 is subparagraph (b)'s focus on "the history of previous violations by the supplier." Obviously, a Purdue affiliate plead guilty in 2007 to charges that roughly parallel those alleged in this action, as did three senior Purdue officers. This fact goes as well to the "need to deter" in subparagraph (g). Purdue seems then to have been a "persistent" violator under subparagraph (a), and even the roughly $600 million imposed in 2007 appears not to have worked. Finally, subparagraph (h) alludes to "other matters as justice may require." Here, it is relevant that Purdue has been unrepentant, and Richard Sackler seems to believe that the opioid victims of OxyContin were largely "criminals" and "addicts".

66. Ultimately, I make no specific recommendation with regard to fines or penalties, but I do suggest that the "harm" that should be considered under subparagraph(b) is extraordinary and directly relates to the marketing of OxyContin (under the direction of the Sacklers) as a safer, milder alternative to other drugs and suitable for many forms of moderate chronic pain.

VI. Conclusions

67. In response to the questions posed earlier at paragraph 4, my responses are:

A. Shareholder/directors who exercise a controlling influence over the corporation can be held liable for injuries caused to third parties (including opioid victims), where those injuries were caused by policies, practices, or representations that they sponsored, authorized, or approved, even if they did not directly interact or communicate with those injured. As a civil law

matter, this conclusion is supported both by general principles of accessorial liability and by the responsible corporate officer doctrine. Imposing greater responsibility on controlling persons is particularly appropriate in civil cases and especially those involving closely held corporations where control is often centralized in the board and where controlling shareholders sometimes directly instruct managers and employees.

B. Richard Sackler oversaw the development and introduction of OxyContin and shaped its original (and continuing) marketing policy. Kathe Sackler was also a senior officer during this period, and as a medical doctor, had far more relevant expertise than other managers. Richard Sackler in particular oversaw the marketing policy that advised both regulators and prescribing physicians that (1) OxyContin earned a very low risk (sometimes phrased as a "less than 1%") of addiction; (2) OxyContin was a milder, safer, and less addictive drug than morphine; (3) OxyContin could be safely and appropriately used for chronic moderate pain (as well as severe pain) that was not related to cancer; and (4) OxyContin continuous release formula made it safer and more useful (without explaining that this would prove dangerous for some patients). Kathe Sackler was at least aware of these risks and knew that Richard Sackler wanted to market high dosages of OxyContin.

C. Richard and Kathe Sackler were well aware that one Purdue entity (Purdue Frederick) had plead guilty to a criminal charge because of its false and fraudulent marketing during a period in which they were senior executive officers. Nonetheless, in the period after 2009 until they resigned as directors in 2018, they took no special (or even minimally adequate) steps to reform the marketing of OxyContin or the disclosures made in connection with it.

D. To the extent, Purdue and the Sacklers communicated false or misleading information to recommend the drug to physicians who in turn recommend the drug to patients, the harm is the same as if they directly made misrepresentations to patients.

68. As the twig is bent, so grows the tree. Richard Sackler and Kathe Sacker were present at the creation when misrepresentations to patients and physicians were first made, which resulted in a guilty pleas in 2007. They continued in control until 2018, and these same policies continued to be followed under their supervision. Blaming the opioid crisis simplistically on criminals and drug addicts, Richard Sackler was an effective roadblock to internal reform at Purdue, which persisted in the same errors and misrepresentations long after their tragic consequences had become apparent.

69. Finally, this is not a case seeking to impose civil liability on non-executive directors. Richard Sackler and Kathe Sackler were much more than that; as officers, directors and part of the 100% controlling ownership group at Purdue, they were in control (particularly over decisions involving marketing, package inserts, and regulatory affairs), and others dared not interfere with them. This is dysfunctional corporate governance, and there is little to distinguish the control that the Sacklers exercised over Purdue from the control that the Godfather held over his Mafia family.[79]

Respectfully submitted,

John C. Coffee, Jr.

Dated July 11, 2019

[79] One difference is that Purdue sells OxyContin and the Mafia distributes heroin, but which is the more dangerous drug can be debated.

Exhibit A

Qualifications

1. I am the Adolf A. Berle Professor of Law at Columbia University Law School, where I have taught since 1980, and am a member of the Bars of the State of New York and the District of Columbia. I am also a Fellow of the American Academy of Arts and Sciences, a Life Fellow of the American Bar Foundation, a Fellow of the American College of Governance Counsel, and a member of, and former Reporter for, the American Law Institute. I have also been a Visiting Professor of Law at Harvard Law School, Stanford Law School, the University of Virginia Law School, and the University of Michigan Law School. I have lectured as a visiting professor at law schools in Australia, Brazil, Canada, and Europe. I began my academic career teaching at Georgetown University Law School from 1976 to 1980. Prior to that, I practiced law with the firm of Cravath, Swaine & Moore in New York City from 1970 to 1976. I am a 1969 graduate of Yale Law School.

2. In my professional work as a scholar of corporate governance and securities law, I have served as a member of the Legal Advisory Committee to the New York Stock Exchange ("NYSE"), the Legal Advisory Board of the National Association of Securities Dealers ("NASD"), the self-regulatory body that formerly owned and operated Nasdaq, the Economic Advisory Board to Nasdaq, the Subcouncil on Capital Markets of the United States Competitiveness Policy Council (a. U.S. governmental agency), and the Market Regulation Committee of the NASD (which is a disciplinary committee). I have also served as a member of the U.S. Securities and Exchange Commission ("SEC") Advisory Committee on the Capital Formation and Regulatory Processes, which recommended certain changes in the rules and procedures applicable to public offerings of securities, which were later largely adopted by the SEC.

3. I have served on the New York City Bar Association's Corporations Committee, its Securities Regulation Committee, and its Special Committee on Mergers and Acquisitions.

4. I have also served as a Reporter to the American Law Institute in connection with its decade-long effort to codify in a Restatement-like format the common law of fiduciary duties for corporate officers and directors. See American Law Institute, Principles Of Corporate Governance: Analysis and Recommendations (1992). I have also testified and lectured before the Chinese Securities Regulatory Commission in Beijing, the Australian Securities and Investments Commission in Melbourne, Australia, and the Securities and Exchange Commission in Washington, D.C.

5. I am the co-author of Coffee, Sale and Henderson, Securities Regulation: Cases and Materials (Foundation Press 13th ed. 2015), the oldest and first casebook in the securities field. I have also co-authored a Corporations law casebook that focuses extensively on securities litigation. See Choper, Coffee and Gilson, Cases and Materials On Corporations (Aspen Law and Business 8th ed. 2013) and have written an introductory text on business law with Professors William Klein and Frank Partnoy that has been widely used in U.S. law schools. See Klein, Coffee and Partnoy, Business Organization And Finance (Foundation Press 11th ed. 2010).

6. I have testified before congressional committees of the House and Senate on securities law issues on numerous occasions. I have also repeatedly testified as an expert witness in securities fraud and similar class actions, including for the SEC in civil cases, and for the Department of Justice in criminal cases. See United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991) (upholding admissibility of my testimony). A list of my writings is included in my resume, which is attached as Appendix B.

Exhibit B

John Collins Coffee, Jr.
320 Wyoming Avenue
Maplewood, New Jersey 07040

POSITION: Adolf A. Berle Professor of Law, Columbia University Law School
Director, Center on Corporate Governance, Columbia University Law School

EDUCATION: Amherst College 1966 B.A. (*magna cum laude*) Bond Fifteen (highest fifteen ranking seniors); Phi Beta Kappa

LAW SCHOOLS: Yale Law School 1969, LL.B; New York University Law School, 1976 LL.M (in Taxation).

OCCUPATIONAL HISTORY: Columbia Law School 1980 - present; Berle Chair since 1986

Harvard Law School 2001 -- Joseph H. Flom Visiting Professor of Law, Fall 2001

Stanford Law School - Visiting Professor, Spring 1987

Virginia Law School - Visiting Professor, Fall 1979

Michigan Law School - Visiting Professor, Summer 1979

Georgetown University Law School - Professor and Associate Professor, 1976-1980

Cravath, Swaine and Moore - Associate, 1970-1976

Reginald Heber Smith Fellowship, 1969-1970

SPECIALIZATIONS:

My academic and teaching specialties include corporate and securities law, corporate governance, class actions and complex litigation, criminal law, and white collar crime.

OTHER ACTIVITIES

and HONORS:

1. Fellow, American Academy of Arts and Sciences

2. Fellow, American College of Governance Counsel

3. Fellow, European Corporate Governance Institute

4. Life Fellow, American Bar Foundation

5. Order of the Coif Visiting Lecturer for 2005 (each year Order of the Coif selects one visiting lecturer to speak at a series of law schools)

6. Reporter (for Litigation Remedies), American Law Institute, PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE (1980-1993: Final Draft 1993)

7. Donald Cressey Award for Lifetime Achievement (awarded by the ACFE in 2011)

8. Member, Strategic Advisory Board, Public Company Accounting Oversight Board (PCAOB) (2007-)

9. Fellow, European Corporate Governance Institute

10. Clarendon Lectures (Oxford University 2006)

11. Anton Phillips Chair, University of Tilburg (2005-2006)

12. Reporter, American Bar Association, MINIMUM STANDARDS FOR CRIMINAL JUSTICE (2nd ed. 1980)

13. Member, Advisory Committee on Capital Formation and Regulatory Processes, Securities and Exchange Commission (1995-1996)

14. Member, Legal Advisory Committee to the Board of Directors, New York Stock Exchange (1992-1995) (currently, emeritus member)

15. Member, Legal Advisory Board, National Association of Securities Dealers (NASD) (1996-2000)

16. Member, Economic Advisory Board, Nasdaq (2001-2004)

17. Member, Market Practices Committee, NASD Regulation, Inc. (1997-2000)

18. Member, Subcouncil on Capital Allocation, United States Competitiveness Policy Council (created by Omnibus Trade and Competitiveness Act of 1988) (1993-1995)

19. Member, Standing Committee on Law and Justice, Commission on Behavioral and Social Sciences and Education, National Research Council (elected to 1990-1994 term)

20. Member, National Academy of Sciences Panel on Research on Sentencing (1979-1982)

21. General Counsel, American Economic Association (1992-1998)

22. Life Member, American Law Institute

23. Chairperson, Section on Business Associations, Association of American Law Schools (AALS) (1981-1982)

24. Chairperson, Audit and Investment Policy Committee, AALS (1992-1994) and former member, Nominating Committee, AALS (1990-1991)

25. Chairperson, Committee on Sections, AALS (1984-1985)

26. Board of Editors, M&A and Corporate Governance Law Reporter

27. Board of Contributing Editors, American Lawyer Newspaper Group

28. Columnist on Corporate and Securities Law, New York Law Journal

29. Businesswatch Columnist, National Law Journal

30. Member, Special Committee on Mergers, Acquisitions and Corporate Control, Contests (1996-1998), and former member, Committee on Corporate Laws (1994-1995), Committee on Securities Regulation (1991-1994) and Committee on Corporate Laws (1983-1985), Association of the Bar of the City of New York

31. Member, Executive Committee, Securities Regulation Institute (1992-2002) (currently, member, Board of Advisors).

32. Chairperson, Appointments Committee, Columbia Law School (1987-1990)

33. Chair, ALI-ABA National Institute on Corporate Governance (1995-2005)

34. Frequent Panelist at PLI, ABA, ALI-ABA, SEC and other Seminars and Institutes and have testified before Congress on approximately eight occasions.

35. In 1998, in 2001, and again in 2006, Professor Coffee was listed by the National Law Journal as one of its “100 Most Influential Lawyers” in the United States.

BOOKS, AND CASEBOOKS

1. Coffee, ENTREPRENEURIAL LITIGATION: Its Rise, Fall and Future (Harvard University Press, 2015)

2. Coffee, GATEKEEPERS: The Professions and Corporate Governance (Oxford University Press 2006)

3. Choper, Coffee and Gilson, CASES AND MATERIALS ON CORPORATIONS, (Little Brown & Co.) (8th ed. 2013)

4. Coffee, Sale and Henderson CASES AND MATERIALS ON SECURITIES REGULATION (13th ed. 2015) (formerly, Jennings, Marsh, Coffee and Seligman)

5. Reporter, ABA MINIMUM STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) (Chapter 18)

6. Klein, Coffee and Partnoy, BUSINESS ORGANIZATION AND FINANCE (11th ed. 2010)

7. Coffee, Lowenstein and Rose-Ackerman, KNIGHTS RAIDERS AND TARGETS: The Impact of The Hostile Takeover (Oxford University Press, 1988)

8. Ferran, Maloney, Hall and Coffee THE REGULATORY AFTERMATH OF THE GLOBAL FINANCIAL CRISIS (2012 Cambridge University Press)

LAW REVIEW

ARTICLES: (in reverse chronological order)

1. Coffee, Jackson, Mitts and Bishop, Activist Directors and Agency Costs, What Happens When An Activist Director Goes On The Board?, 104 Cornell L. Rev. 381 (2019).

2. Coffee, The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives, 165 U. Pa. L. Rev. 1895 (2017)

3. Coffee and Palia, The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance, 41 J. Corp. L. 545 (2016)

4. Coffee, Extraterritorial Financial Regulation: Why E.T. Cannot Come Home, 99 Cornell L. Rev. 1259 (2014).

5. Coffee, Mapping the Future of Insider Trading Law: Of Boundaries, Gaps and Strategies, 2013 Columbia Business Law Review 281 (2013).

6. Coffee, The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated, 97 Cornell L. Rev. 1019 (2012).

7. Coffee, Systemic Risk After Dodd-Frank: Contingent Capital And the Need for Regulatory Strategies, 111 Colum. L. Rev. 795 (2011).

8. Coffee, Ratings Reform: The Good, The Bad, and The Ugly, 1 Harv. Bus. L. Rev. 231 (2011).

9. Coffee, Litigation Governance: Taking Accountability Seriously, 110 Colum. L. Rev. 288 (2010).

10. Coffee and Sale, Redesigning the SEC: Does the Treasury Have A Better Idea?, 95 Va. L. Rev. 707 (2009).

11. Coffee, Law and the Market: The Impact of Enforcement, 156 U. Penn. L. Rev. 299 (2007).

12. Coffee, Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534 (2006).

13. Coffee, Can Lawyers Wear Blinders?: Gatekeepers and Third Party Opinions, 84 Texas L. Rev. 59 (2005).

14. Coffee, A Theory of Corporate Scandals: Why the U.S. and Europe are Different, 21 Oxford Review of Economic Policy 198 (2005).

15. Coffee, Causation by Presumption? Why the Supreme Court Should Reject Phantom Losses and Reverse Broudo, 60 Bus. Law. 533 (2005).

16. Coffee, Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms, 84 B.U. L. Rev. 301 (2004).

17. Coffee, What Caused Enron?: A Capsule Social and Economic History of the 1990s, 89 Cornell L. Rev. 269 (2004).

18. Coffee, The Attorney As Gatekeeper: An Agenda for the SEC, 103 Colum. L. Rev. 1293 (2003).

19. Coffee, Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance, 102 Colum L. Rev. 1757 (2002).

20. Coffee, Understanding Enron: "It's About the Gatekeepers, Stupid", 57 Bus. Law. 1403 (2002).

21. Coffee, Law and Regulatory Competition: Can They Co-Exist? 80 Texas L. Rev. 1657 (2002).

22. Coffee, The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control, 111 Yale L. J. 1 (2001).

23. Coffee, Do Norms Matter? A Cross-Country Evaluation, 149 U. Pa. L. Rev. 2151 (2001).

24. Coffee, Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation, 100 Colum. L. Rev.370 (2000).

25. Coffee, Privatization and Corporate Governance: The Lessons from Securities Market Failure, 25 J. Corp. L. 1 (1999).

26. Coffee, The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications, 93 Nw. U. L. Rev. 641 (1999).

27. Coffee, Modern Mail Fraud: The Restoration of the Public/Private Distinction, 35 Amer. Crim. L. Rev. 427 (1998).

28. Coffee, Brave New World?: The Impact(s) of the Internet on Modern Securities Regulation, 52 Bus. Law. 1195 (1997).

29. Coffee, The Bylaw, Battlefield: Can Institutions Change the Outcome of Corporate Control Contests, 51 U. Miami L. Rev. 605 (1997).

30. Coffee, Transfers of Corporate Control and the Triggering Thesis: Can Delaware Law Encourage Efficient Transactions While Chilling Inefficient Ones?, 21 Del. J. Corp. L. 359 (1996).

31. Coffee, The Future of the Private Securities Litigation Reform Act of 1995: or Why the Fat Lady Has Not Yet Sung, 51 Bus. Law. 975 (1996).

32. Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343 (1995).

33. Coffee, Competition versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation, 50 Bus. Law. 447 (1995).

34. Black and Coffee, Hail Britannia?: Institutional Investor Behavior Under Limited Regulation, 92 Mich. L. Rev. 1997 (1994) (with Bernard Black).

35. Coffee, The SEC and the Institutional Investor: A Half-Time Report, 15 Cardozo Law Review 837 (1994).

36. Coffee, New Myths and Old Realities: The American Law Institute Faces the Derivative Action, 48 Bus. Law. 1407 (1993).

37. Coffee, Paradigms Lost: The Blurring of the Criminal and Civil Law Models--And What Can Be Done About It, 101 Yale L.J. 1875 (1992).

38. Coffee, Liquidity Versus Control: The Institutional Investor as Corporate Monitor, 91 Colum. L. Rev. 1277 (1991).

39. Coffee and Klein, Bondholder Coercion: The Problem of Constrained Choice in Debt Tender Offers and Recapitalizations, 58 U. Chi. L. Rev. 1207 (1991).

40. Coffee, Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U.L. Rev. 193 (1991).

41. Coffee, Unstable Coalitions: Corporate Governance as a Multi-Player Game, 78 Geo. L.J. 1495 (1990).

42. Coffee, The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role, 89 Columbia. L. Rev. 1618 (1989).

43. Coffee, Hush!: The Criminal Law Status of Confidential Business Information After McNally and Carpenter and the Enduring Problem of Overcriminalization, 26 Amer. Crim. L. Rev. 121 (1989).

44. Coffee, The Uncertain Case for Takeover Reform: An Essay on Stockholders Stakeholders and Bust-ups, 1988 Wisc. L. Rev. 435.

45. Coffee, The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877 (1987).

46. Coffee, Rethinking the Class Action: A Policy Primer on Reform, 62 Ind. L. Rev. 625 (1987).

47. Coffee, Shareholders Versus Managers: The Strain in the Corporate Web, 85 Michigan L. Rev. 1 (1986).

48. Coffee, Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669 (1986).

49. Coffee, The Future of Corporate Federalism, 8 Cardozo L. Rev. 759 (1987).

50. Coffee, The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, 48 Law and Contemporary Problems 5 (1985).

51. Coffee, Partial Justice: Balancing Fairness and Efficiency in Partial Bids, 3 Companies and Securities Law Review 216 (Australian Law Review).

52. Coffee, Litigation and Corporate Governance: An Essay on Steering Between Scylla and Charybdis, 52 Geo. Wash. L. Rev. 789 (1985).

53. Coffee, Market Failure and the Economic Case for a Mandatory Disclosure System, 70 Va. L. Rev. 717 (1984).

54. Coffee, Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance, 84 Colum. L. Rev. 1145 (1984).

55. Coffee, Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter is Not Working, 42 Maryland Law Review 215 (1983).

56. Coffee, The Metastasis of Mail Fraud: The Continuing Story of the Evolution of a White Collar Crime, 21 Am. Crim. L. Rev. 1 (1983).

57. Coffee and Schwartz, The Survival of the Derivative Suit: An Evaluation and a Proposal Legislative Reform, 81 Colum. L. Rev. 261 (1981).

58. Coffee, "No Soul To Damn; No Body Kick," An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386 (1981).

59. Coffee, "Twisting Slowly In the Wind": A Search for Constitutional Limits on Coercion of the Criminal Defendant, 1980 Supreme Court Review 211 (1981).

60. Coffee, From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics, 19 Am. Crim. L. Rev. 117 (1981).

61. Coffee, Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response, 62 Va. L. Rev. 1099 (1977).

62. Coffee, The Repressed Issues in Sentencing: Accountability, Predictability and Equality in the Era of the Sentencing Commission, 66 Geo. L.J. 975 (1978).

63. Coffee, The Future of Sentencing Reform, 73 Mich. L. Rev. 1361 (1975).

64. Coffee, Making the Punishment Fit the Corporation: The Problems of Finding an Optimal Corporate Criminal Sanction, 1 N. Ill. L. Rev. 1 (1980).

65. Coffee, Privacy versus Parens Patriae, 57 Cornell L. Review 571 (1972).

ENDOWED LECTURES

Professor Coffee served as the Order of the Coif Visiting Lecturer in 2005 and has delivered annual endowed lectures at numerous American and foreign law schools. He has also served as a Distinguished Visiting Scholar at the University of Toronto Law School and Osgoode Hall Law School and in a similar capacity at the University of British Columbia, and has taught as a visiting professor at the University of Tokyo and the University of Sydney. He has also lectured at Oxford, Cambridge, the University of Amsterdam and a variety of other law schools in the United States, Europe and Asia.

Exhibit C

TESTIMONY BY PROFESSOR COFFEE

(2008 through 2019)

2018

1. Deason v. FujiFilm Holdings Corp and Xerox Corp., Court File No. 650675/2018 (New York Supreme Court) (Expert Report in New York State action on behalf of plaintiffs against proposed merger; merger enjoined).

2017

1. Paniceia v MDC Partners, Inc, Court File No: 16-CV-564039-COCP (Ontario Superior Court of Justice) (Expert Report regarding class certification standards in Canada on behalf of defendant officers of MDC).

2016

1. Nortel Arbitration, (testimony for Nortel in Canadian arbitration proceedings in action brought by former CEO for executive compensation and damages).

2. BlackBerry Securities Fraud Litigation, (testimony for BlackBerry regarding class certification issues in Ontario, Canada)

2015

1. Holton v Standard Parking Corporation, 3:10-CV-00452 (U.S.D.C. Conn.) (testimony regarding corporate governance standards on behalf of plaintiff/defendant Holton).

2014

1. Deutsche Bank National Trust Company v. Federal Deposit Insurance Corporation, Case No. 09-CV-1656 RMC (D.D.C.) (expert report and deposition for FDIC and Deutsche Bank).

2. Third Point LLC v Ruprecht, 2014 Del Ch. LEXIS (testimony for Sotheby's regarding use of poison pill against a hedge fund activist).

2013

1. McReynolds v. Merrill Lynch, Pierce Fenner & Smith, Case No. 05-C-6583 (testimony by declaration regarding plaintiffs' attorneys fee award in Title VII class action in the N.D. Ill.).

2012

1. MNBA Insurance Corporation v. Countrywide Home Loans Inc. (deposition as expert for Bank of America in litigation in New York State Court before Bransten, J. regarding "de facto" merger doctrine and triangular mergers).

2. Rio Tinto International Holdings Limited and Ivanhoe Mines Ltd. (testimony at arbitration hearing in Toronto, Canada as expert for Rio Tinto regarding the concept of "group" under the Williams Act).

3. In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010 (testimony in New Orleans federal court as expert for BP and plaintiffs' class regarding class certification standards).

4. Ormond v. Anthem, Inc. (testimony in expert report and at deposition for plaintiffs regarding "going private" transaction by large mutual insurance company in Southern District of Indiana federal court).

5. In re Citigroup Securities Litigation, No. 07 Civ. 9901 (SHS), (testimony by declaration regarding appropriate plaintiffs' attorneys fee award in securities class action in S.D.N.Y.).

2011

1. The Travelers Companies, Inc. v. Houston Casualty Company, et al., (deposition as expert for D&O insurance carriers in an arbitration).

2. Abdula and Canadian Solar Inc., Court File C-710-10 (Affidavit as expert witness and at deposition for Canadian Solar in a securities class action in Ontario Superior Court of Justice).

3 Icahn v. Lions Gate Entertainment Corp (testimony in litigation in New York state court and provincial court in British Columbia, Canada as expert for Lions Gate regarding construction of standstill agreements).

4. In re IMAX Corporation Securities Litigation (testimony as expert witness for IMAX and in deposition in securities litigation pending in both Ontario and the S.D.N.Y. regarding parallel class actions).

5. In re Wachovia Preferred Securities and Bondholder Litigation, (No. 09 Civ. 6351 RJS) (testimony by declaration regarding approval of settlement and award of plaintiffs' attorneys fees in class action in S.D.N.Y.).

2010

1. In re Kinder Morgan, Inc. Shareholders Litigation, Consol. Case No. 06 C 801 (deposition as expert for plaintiffs in action in Shawnee County, Kansas, regarding "going private" transaction).

2. Schmitz v. Liberty Mutual Insurance Company, Civil Action No. 4:08-cv-02945 (S.D. Tex.) (declaration regarding appropriate plaintiffs' attorneys fees in a class action).

2009

1. Brown v. Brewer, No. CV-06-03731 (C.D. Cal) (depositions as expert for plaintiffs in class action relating to proxy rules and Delaware fiduciary duties in merger auction context).

2. In re National Century Financial Enterprises, Inc., Case No. 2:03-md-1565 (S.D. Ohio) (Graham, J.) (deposition as expert for Met Life and Lloyd's Bank regarding due diligence standards applicable to placement agent in a Rule 144A offering of asset-backed securities).

3. Official Committee of Unsecured Creditors of Dwight's Piano Company v. Hencricks (In re: Dwight's Piano Company), Case No. 1:04-CV-00066 (S.D. Ohio) (Rose, J.) (trial testimony as expert for defendant CEO of Baldwin piano company in a bankruptcy action brought by creditors).

4. In re Dollar General Corporation Shareholder Litigation, (Sixth Circuit Court, Davidson County Tennessee) (deposition as expert testimony for defendant investment bankers regarding fiduciary duties in "going private" buy out context).

2008

1. Levie v. Sears Roebuck & Co., 496 F. Supp. 2d 944 (N.D. Ill. 2007) (deposition as expert for defendant Sears in securities class action).

2. Kaplan v. IMAX Corporation, 240 F.R.D. 88 (S.D.N.Y. 2007) (testimony on behalf of IMAX by affidavit in joint U.S. and Canadian securities class action).

3. In re Enron Corp. Securities, Derivative & "ERISA" Litigation (Newby v. Enron), MDL-1446 (S.D. Texas) (testimony by affidavit on behalf of plaintiffs regarding attorneys fees in a securities class action).

4. Engle v. R.J. Reynolds Tobacco Company, Case No.: 94-08273 CA (22) (11th Judicial Circuit, Dade County, Florida) (testimony on behalf of plaintiff's attorneys re approval of settlement and attorney's fees in tobacco class action).

EXHIBIT B

List of Materials Considered

COURT CASES CONSIDERED		
United States v. Brooks, 2010 U.S. Dist. LEXIS 2277, 2010 WL 291769 at *3 - *4 (E.D.N.Y. Jan. 11, 2010)		
United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991)		
U.S. v. Bank of New England, 821 F.2d 844, 856 (1st Cir 1987)		
United States v. A&P Trucking Co., 358 U.S. 121, 123 (1958)		
United States v. Polizzi, 500 F.2d 856, 907 (9th Cir. 1974)		
Wood v. United States, 204 Fed. 55, 58 (4th Cir. 1913)		
Kaufman v. United States, 212 Fed. 613 (2nd Cir. 1914)		
366 F.2d 423 (2d Cir. 1966)		
United States v. Sain, 141 F. 3d 463, 465 (3d Cir. 1998; United States v. Hughes Aircraft Co., 20 F. 3d 974, 979 (9th Cir. 1994)		
United States v. Ames Sintering Co., 927 F. 2d 236, 237 (6th Cir. 1990)		
United States v. Steymens, 909 F. 2d 431, 432-34 (11th Cir. 1990);		
United States v. Peters, 732 f. 2d.		
Ditomasso v. Loverro, 293 N.Y.S. 912, 916-917 (N.Y. App. Div.), aff'd 276 N.Y. 548, 12 N.E. 2d 570 (N.Y. 1937)		
Roth v. Robertson, 118 N.Y.S. 351 (N.Y. Supreme Court 1909)		
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In re Opioid Litigation, Index No. 5000000/2017 (Suffolk County June 21, 2019)		
In re Avandia, 804 F.3d 633 (3d Cir. 2012)		

In re Neurontin Mktg & Sales Practices Litig, 712 F.3d 21 (1st Cir. 2013)			
COURT FILES & POLICIES CONSIDERED			
Utah Criminal Code, Sections: 76-2-20, 76-2-205, 76-4-201,			
Purdue's Written Responses to 30(b)(6) Topics In Re: National Prescription Opiate Litigation, MDL No. 2804, (11/07/2018)			
Deposition of Richard Sackler on (03/07/2019)			
Deposition of Kathe Sackler (04/01/2019)			
Deposition of Richard Sackler (03/08/2019)			
Respondents Purdue Pharma L.P.'s Purdue Pharma Inc.'s Motion to Dismiss the Division's Citation and Notice of Agency Action (DCP Case No. 107102); Motion & Exhibits A-G			
Affidavit of Syndenham B. Alexander III Accompanying the Commonwealth's Opposition to the Director Defendant's Motion to Dismiss the First Amended Complaint Persuant to Massachusetts Rule of Civil Procedure12(b)(2) (DCP Case No. 107102); Exhibits 1-22			
Response of Richard Sackler and Kathe Sackler to the Division's Notice of Agency Action and Administrative Citation			
Plea Agreement in the case of United States of America v. Purdue (Case No. 1:07cr29)			
Attachment A to Plea Agreement; List of Companies Indicted in Plea Agreement			
Attachment L to Plea Agreement; Charges to Which I am Pleading Guilt and Waiver of Rights			
BATES CONSIDERED			
		PPLPC020001106306	
		PDD8801133516	
		PPLP004425997	
		PPLPC012000248328	
		PPLPC023000633066	
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		PPLP004415297	
		PPLP004415294	
		PPLP004415296	
		PPLPC042000011810	
		PDD9316399629	

OTHER DOCUMENTS CONSIDERED

Purdue Board Meeting Minutes; 2007-2012		
Audited Combined Financial Information PRA Holdings, Inc. and Subsidiaries Purdue Pharma L.P.. Purdue Pharma Inc., AB Generics L.P., and Norwell Land Company; 1994-2002		
Purdue Disbursements; 2008-2011		

MISCELLANEOUS CONSIDERED

Date	**Author**	**Title**	**Journal or Publication**
2019	Richard S. Gruner	CORPORATE CRIMINAL LIABILITY AND PREVENTION	

	Randy Sutton	"'Responsible Corporate' Office Doctrine or 'Responsible Relationship' of Corporate Officer to Corporate Violation of Law"	119 A.L.R. 5th 205
7/1/2019	Jared S. Hopkins	"OxyContin Maker's Sales Drop Amid Suits,"	The Wall Street Journal
2/22/2019	David Armstrong	"Purdue's Sackler backed hiding drug's strength from doctors; Sealed deposition reveals 1997 OxyContin exchange,"	The Boston Globe
2019		"Understanding the Epidemic"	The Centers for Disease Control
2019		"Richard Sackler"	Wikipedia