No. 23A87

In the
Supreme Court of the United States

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

Applicant,

v.

PURDUE PHARMA L.P., ET AL.,

Respondents.

DEBTORS' RESPONSE IN OPPOSITION TO
APPLICATION FOR A STAY OF THE MANDATE OF THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
PENDING THE FILING AND DISPOSITION OF A
PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, the debtors in the underlying bankruptcy proceedings, respondents Purdue Pharma L.P. and its affiliates (collectively, the "Debtors" or "Purdue"), respectfully disclose the following:

1. *Purdue Pharma L.P.:* Non-debtor Pharmaceutical Research Associates L.P. directly owns 100% of the ownership interests of Purdue Pharma L.P. ("PPLP"). Non-debtor PLP Associates Holdings L.P. directly owns approximately 99.5061% of the ownership interests of Pharmaceutical Research Associates L.P. Non-debtor BR Holdings Associates L.P. directly owns 100% of the ownership interests of PLP Associates Holdings L.P. Non-debtor Beacon Company and non-debtor Rosebay Medical Company L.P. each directly owns 50% of the ownership interests of BR Holdings Associates L.P. Non-debtor Heatheridge Trust Company Limited, as Trustee under Settlement dated December 31, 1993, directly owns 100% of the ownership interests of Beacon Company. Non-debtors Richard S. Sackler, M.D. and Cedar Cliff Fiduciary Management Inc., as Trustees under Trust Agreement dated November 5, 1974, directly own 98% of the ownership interests of Rosebay Medical Company L.P. To the best of the Debtors' knowledge and belief, none of these entities is publicly held, and no other person or entity directly or indirectly owns 10% or more of the ownership interests of PPLP.

2. *Purdue Pharma Inc.:* Non-debtor Banela Corporation directly owns 50% of the ownership interests of debtor Purdue Pharma Inc. ("PPI"); non-debtor Linarite Holdings LLC directly owns 25% of the ownership interests of PPI; and non-debtor Perthlite Holdings LLC directly owns 25% of the ownership interests of PPI. Non-

debtor Millborne Trust Company Limited, as Trustee of the Hercules Trust under Declaration of Trust dated March 2, 1999, directly owns 100% of the ownership interests of Banela Corporation. Non-debtor Data LLC, as Trustee under Trust Agreement dated December 23, 1989, directly owns 100% of the ownership interests of Linarite Holdings LLC. Non-debtor Cornice Fiduciary Management LLC, as Trustee under Trust Agreement dated December 23, 1989, directly owns 100% of the ownership interests of Perthlite Holdings LLC. To the best of the Debtors' knowledge and belief, none of these entities is publicly held, and no other person or entity directly or indirectly owns 10% or more of the ownership interests of PPI.

3. *Other debtors:* Each of the remaining debtors is wholly owned, directly or indirectly, by PPLP and PPI, as follows:

a. PPLP directly owns 100% of the ownership interests of debtors Purdue Transdermal Technologies L.P., Purdue Pharma Manufacturing L.P., Purdue Pharmaceuticals L.P., Imbrium Therapeutics L.P., Adlon Therapeutics L.P., Greenfield BioVentures L.P., Seven Seas Hill Corp., Ophir Green Corp., Purdue Products L.P. (f/k/a Avrio Health L.P.), Purdue Pharmaceutical Products L.P., Nayatt Cove Lifescience Inc., and Rhodes Associates L.P.

b. PPLP directly owns 99% of the ownership interests of debtor Purdue Neuroscience Company. PPI directly owns the remaining 1% of the ownership interests of Purdue Neuroscience Company.

c. Seven Seas Hill Corp. and Ophir Green Corp. each directly owns 50% of the ownership interests of debtor Purdue Pharma of Puerto Rico.

d. Rhodes Associates L.P. directly owns 100% of the ownership interests of debtors Paul Land Inc., Rhodes Pharmaceuticals L.P., and Rhodes Technologies.

e. Rhodes Technologies directly owns 100% of the ownership interests of debtors UDF LP and SVC Pharma Inc.

f. UDF LP directly owns 100% of the ownership interests of debtors Button Land L.P. and Quidnick Land L.P.

g. UDF LP directly owns 99% of the ownership interests of debtor SVC Pharma LP. SVC Pharma Inc. directly owns the remaining 1% of the ownership interests of SVC Pharma LP.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT 6

A. The Tidal Wave Of Litigation Against The Debtors 6

B. A Comprehensive Resolution, Including Releases Of Certain Claims Against The Sacklers, Garners Near-Universal Support 7

1. Mediation Of Intercreditor Allocation Issues 8

2. Resolution Of The United States' Claim 9

3. Settlement With The Sacklers 10

C. The Plan Embodying The Global Settlement Is Filed And Receives Support From 95% Of Voting Creditors 12

1. Overview Of The Plan 12

2. Shareholder Releases 13

3. Unprecedented Notice And Creditor Support For The Plan 15

D. Challenge To The Plan And The Second Circuit Decision Ordering Confirmation Of The Plan 17

E. Pathway To Emergence 20

ARGUMENT 21

I. THERE IS NO REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI 22

A. There Is No Circuit Split Warranting This Court's Review 22

1. There Is No Split On Whether Third-Party Releases Are Categorically Barred In The Circumstances Here 23

TABLE OF CONTENTS—Continued

Page

2. The Question The Trustee Presents Warrants Further Percolation 29

B. This Case Is A Singularly Poor Vehicle For Review 32

1. The Trustee Lacks Statutory And Constitutional Authority To Independently Pursue This Appeal 32

2. The Public Importance Of The Plan Weighs Against Certiorari 37

C. The Court Has Repeatedly Denied Certiorari On This Issue, And There Is No Pressing Need To Grant Certiorari In This Case 39

II. THERE IS NO FAIR PROSPECT OF REVERSAL 42

A. The Bankruptcy Code Expressly Authorizes Third-Party Releases In Exceptional Circumstances 43

B. The Trustee's Attempts To Sow Doubt About The Merits Fail 50

1. Third-Party Releases Are Not Inconsistent With Any Provision Of The Bankruptcy Code 50

2. There Is No Constitutional Problem To Avoid 56

3. The Trustee's Policy Argument Fails 59

III. THE TRUSTEE HAS NOT SHOWN IRREPARABLE HARM, AND THE EQUITIES STRONGLY DISFAVOR A STAY 62

A. The Trustee Cannot Demonstrate Irreparable Harm 63

B. The Balance Of Equities Strongly Weighs Against A Stay 66

IV. THE COURT SHOULD TREAT THE STAY APPLICATION AS A PETITION FOR CERTIORARI AND DENY IT 69

CONCLUSION 71

TABLE OF AUTHORITIES

Page(s)

CASES

Ad Hoc Committee of Kenton County Bondholders v. Delta Air Lines, Inc.,
558 U.S. 1007 (2009) (mem.) 40

Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.),
701 F.3d 1031 (5th Cir. 2012), *cert. dismissed*, 569 U.S. 944 (2013) 25, 26

In re Aearo Technologies LLC,
No. 22-02890-JJG-11, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023) 61

In re Aegean Marine Petroleum Network Inc.,
599 B.R. 717 (Bankr. S.D.N.Y. 2019) 41

Airadigm Communications, Inc. v. FCC (In re Airadigm Communications, Inc.),
519 F.3d 640 (7th Cir. 2008) 23, 31, 51

Alberta Energy Partners v. Blast Energy Services, Inc. (In re Blast Energy Services, Inc.),
593 F.3d 418 (5th Cir. 2010) 65

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,
458 U.S. 592 (1982) 38

Ali v. Federal Bureau of Prisons,
552 U.S. 214 (2008) 44

American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.),
885 F.2d 621 (9th Cir. 1989) 26, 30

In re Archdiocese of Saint Paul & Minneapolis,
578 B.R. 823 (Bankr. D. Minn. 2017) 29

Bank of America National Trust & Savings Association v. 203 North LaSalle Street Partnership,
526 U.S. 434 (1999) 58

Page(s)

Bank of New York Trust Co., N.A. v. Official Unsecured Creditors' Committee (In re Pacific Lumber),
584 F.3d 229 (5th Cir. 2009) 24, 25

Bast Amron LLP v. United States Trustee Region 21,
142 S. Ct. 2862 (2022) (mem.) 36

Blixseth v. Credit Suisse,
141 S. Ct. 1394 (2021) (mem.) 39

Blixseth v. Credit Suisse,
961 F.3d 1074 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1394 (2021) 27, 31

Bostock v. Clayton County,
140 S. Ct. 1731 (2020) 49

Celotex Corp. v. Edwards,
514 U.S. 300 (1995) 43

Central Virginia Community College v. Katz,
546 U.S. 356 (2006) 58

Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.),
280 F.3d 648 (6th Cir.), *cert. denied*, 537 U.S. 816 (2002) 23, 62

Class Five Nevada Claimants v. Dow Corning Corp.,
537 U.S. 816 (2002) (mem.) 40

In re Clay,
35 F.3d 190 (5th Cir. 1994) 59

Conkright v. Frommert,
556 U.S. 1401 (2009) (Ginsburg, J., in chambers) 21, 42, 65

Czyzewski v. Jevic Holding Corp.,
580 U.S. 451 (2017) 54, 55, 56

Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.),
416 F.3d 136 (2d Cir. 2005) 65

Page(s)

In re Dow Corning Corp.,
215 B.R. 346 (Bankr. E.D. Mich. 1997) 59

In re Edwards,
50 B.R. 933 (Bankr. S.D.N.Y. 1985) 54

In re Energy Resources Co.,
59 B.R. 702 (Bankr. D. Mass. 1986), *aff'd*, No. CIV. A. 86-1533MC, 1987 WL 42960 (D. Mass. Aug. 5, 1987), *aff'd*, 871 F.2d 223 (1st Cir. 1989), *aff'd sub nom. United States v. Energy Resources Co.*, 495 U.S. 545 (1990) 45

Feld v. Zale Corp. (In re Zale Corp.),
62 F.3d 746 (5th Cir. 1995) 25, 30

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33 (1989) 58, 59

Halliburton Co. v. Erica P. John Fund, Inc.,
573 U.S. 258 (2014) 46

Harrington v. Clinton Nurseries, Inc.,
143 S. Ct. 297 (2022) (mem.) 36

Hollingsworth v. Perry,
558 U.S. 183 (2010) (per curiam) 22

Hollingsworth v. Perry,
570 U.S. 693 (2013) 32

ISL Loan Trust v. Millennium Lab Holdings II, LLC,
140 S. Ct. 2805 (2020) (mem.) 39

Katchen v. Landy,
382 U.S. 323 (1966) 58

Kimble v. Marvel Entertainment, LLC,
576 U.S. 446 (2015) 46

Lamie v. United States Trustee,
504 U.S. 526 (2004) 36

Page(s)

Landsing Diversified Properties-II v. First National Bank & Trust Co. of Tulsa (In re Western Real Estate Fund, Inc.),
922 F.2d 592 (10th Cir. 1990) (per curiam), *modified sub nom. Abel v. West*, 932 F.2d 898 (10th Cir. 1991) 27, 28, 30

Langenkamp v. Culp,
498 U.S. 42 (1990) (per curiam) 59

Law v. Siegel,
571 U.S. 415 (2014) 54, 55

Lowenschuss v. Resorts International, Inc.,
517 U.S. 1243 (1996) (mem.) 40

In re Lower Bucks Hospital,
571 F. App'x 139 (3d Cir. 2014) 41

LTL Management, LLC v. Those Parties Listed on Appendix A to Complaint (In re LTL Management, LLC),
64 F.4th 84 (3d Cir. 2023) 61

LTV Corp. v. Aetna Casualty & Surety Co. (In re Chateaugay Corp.),
167 B.R. 776 (S.D.N.Y. 1994) 51

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 35

MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.),
837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988) 23, 52

In re Mallinckrodt PLC,
639 B.R. 837 (Bankr. D. Del. Feb. 8, 2022) 40

Martin v. Wilks,
490 U.S. 755 (1989) 57

Menard-Sanford v. Mabey (In re A.H. Robins Co.),
880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) 23, 52

In re Midway Gold US, Inc.,
575 B.R. 475 (Bankr. D. Colo. 2017) 28

TABLE OF AUTHORITIES—Continued

Page(s)

Milavetz, Gallop & Milavetz, P.A. v. United States,
559 U.S. 229 (2010) 60

In re Millennium Lab Holdings II, LLC,
945 F.3d 126 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2805 (2020) 23

Monarch Life Insurance Co. v. Ropes & Gray,
65 F.3d 973 (1st Cir. 1995) 28

Morley v. Ontos, Inc.,
552 U.S. 823 (2007) (mem.) 40

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 57

Muskrat v. United States,
219 U.S. 346 (1911) 35

National Heritage Foundation, Inc. v. Highbourne Foundation,
574 U.S. 1076 (2015) (mem.) 39

National Heritage Foundation, Inc. v. Highbourne Foundation,
760 F.3d 344 (4th Cir. 2014), *cert. denied*, 574 U.S. 1076 (2015) 41, 62

National Pork Producers Council v. Ross,
143 S. Ct. 1142 (2023) 29

New York Times Co. v. Jascalevich,
439 U.S. 1304 (1978) (Marshall, J., in chambers) 22

In re Newport Offshore, Ltd.,
75 B.R. 919 (Bankr. D.R.I. 1987), *aff'd*, 871 F.2d 223 (1st Cir. 1989), *aff'd sub nom. United States v. Energy Resources Co.*, 495 U.S. 545 (1990) 45

NexPoint Advisors, L.P. v. Highland Capital Management, L.P.,
48 F.4th 419 (5th Cir. 2022), *cert. pending*, No. 22-631 (U.S. filed Jan. 5, 2023) 25

Nken v. Holder,
556 U.S. 418 (2009) 21

TABLE OF AUTHORITIES—Continued

Page(s)

NLRB v. SW General, Inc.,
580 U.S. 288, 302 (2017) 53

Patterson v. Mahwah Bergen Retail Group, Inc.,
636 B.R. 641 (E.D. Va. 2022) 41

Pennsylvania Department of Corrections v. Yeskey,
524 U.S. 206 (1998) 49

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 58

In re PWS Holding Corp.,
228 F.3d 224 (3d Cir. 2000) 31, 34

RadLAX Gateway Hotel, LLC v. Amalgamated Bank,
566 U.S. 639 (2012) 54, 56

Raines v. Byrd,
521 U.S. 811 (1997) 35

Resorts International, Inc. v. Lowenschuss (In re Lowenschuss),
67 F.3d 1394 (9th Cir. 1995), *cert. denied*, 517 U.S. 1243 (1996).............. 26, 27

Rostker v. Goldberg,
448 U.S. 1306 (1980) (Brennan, J., in chambers) 21

Ruckelshaus v. Monsanto Co.,
463 U.S. 1315 (1983) (Blackmun, J., in chambers).. 62, 64

SE Property Holdings, LLC v. Seaside Engineering & Surveying, Inc. (In re Seaside Engineering & Surveying, Inc.),
780 F.3d 1070 (11th Cir.), *cert. denied*, 577 U.S. 823 (2015)............... 24, 31, 51

SEC v. U.S. Realty & Improvement Co.,
310 U.S. 434 (1940) 34

Siegel v. Fitzgerald,
142 S. Ct. 1770 (2022) 34, 36

Stern v. Marshall,
564 U.S. 462 (2011) 18

TABLE OF AUTHORITIES—Continued

Page(s)

TransUnion LLC v. Ramirez,
141 S. Ct. 2190 (2021) 35

Truck Insurance Exchange v. Kaiser Gypsum Co. (In re Kaiser Gypsum Co.),
60 F.4th 73 (4th Cir. 2023) (citation omitted) 34

U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,
513 U.S. 18 (1994) 61

United States v. Energy Resources Co.,
495 U.S. 545 (1990) 5, 42, 44, 45, 46, 47, 49

United States v. Monsanto,
491 U.S. 600 (1989) 44

United States v. Oakland Cannabis Buyers' Cooperative,
532 U.S. 483 (2001) 61

In re Voyager Digital Holdings, Inc.,
649 B.R. 111 (Bankr. S.D.N.Y. 2023), *appeal pending*,
No. 1:23-cv-02171-JHR (S.D.N.Y. filed Mar. 14, 2023) 60

Vision-Park Properties, LLC v. Seaside Engineering & Surveying, LLC,
577 U.S. 823 (2015) (mem.) 39

Whalen v. Roe,
423 U.S. 1313 (1975) (Marshall, J., in chambers) 62

CONSTITUTIONAL PROVISIONS AND STATUTES

11 U.S.C. § 105(a) 5, 17, 42, 44, 45, 46, 49, 52, 56, 59

11 U.S.C. § 1123(a)(5) 48

11 U.S.C. § 1123(b)(3)(A) 48

11 U.S.C. § 1123(b)(5) (1988) 45

11 U.S.C. § 1123(b)(6) 5, 17, 42, 44, 45, 46, 48, 49, 51, 52, 56, 59

11 U.S.C. § 1129(a) 52

11 U.S.C. § 1129(b)(2)(A) 56

TABLE OF AUTHORITIES—Continued

Page(s)

11 U.S.C. § 307 .... 4, 33

11 U.S.C. § 522(k) 55

11 U.S.C. § 523(a) 54

11 U.S.C. § 523(a)(2) 54

11 U.S.C. § 523(a)(4) 54

11 U.S.C. § 523(a)(6) 54

11 U.S.C. § 523(c)(1) 54

11 U.S.C. § 524 note 53

11 U.S.C. § 524(e) 18, 27, 30, 31, 51, 53

11 U.S.C. § 524(g) 18, 52, 54, 57

11 U.S.C. § 524(g)(4)(A)(ii) 53

28 U.S.C. § 1411 .... 58, 59

28 U.S.C. § 586(a) 33

28 U.S.C. § 586(a)(3)(A) 33

28 U.S.C. § 586(a)(3)(B) 33

28 U.S.C. § 586(a)(3)(C) 33

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 ... 18, 52, 53, 54

U.S. Const. art. I, § 8, cl. 4 58

RULES

Fed. R. Bankr. P. 2002(b) 20, 63

Fed. R. Bankr. P. 3020(e) 20, 63

Page(s)

OTHER AUTHORITIES

140 Cong. Rec. 27692 (Oct. 4, 1994) 53

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 53

Collier on Bankruptcy (16th ed. June 2023 update) 33

Edward Neiger & Jennifer Christian, *Despite Its Plan Objections, UST Also Won in Purdue Ch. 11*, Law360 (June 12, 2023), https://www.law360.com/articles/1687439/despite-its-plan-objections-ust-also-won-in-purdue-ch-11 41

H.R. Rep. No. 95-595 (1977) 36

Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 Emory Bankr. Dev. J. 13 (2006) 46

Victims' Ltr. to Att'y Gen. Merrick Garland et al. (Apr. 25, 2022) 39

INTRODUCTION

This is a baseless stay application that, if granted, would harm victims and needlessly delay the distribution of billions of dollars to abate the opioid crisis. The Trustee seeks a stay of the mandate to ensure that this Court can consider a petition for certiorari he intends to file by August 28. His principal contention (at 5-6, 26-27) is that, without such a stay, there could be "substantial consummation" of the reorganization plan at issue, which, in turn, could raise a question of "equitable mootness" should this Court grant certiorari. But the Trustee himself acknowledges (at 6) that there is no risk of "substantial consummation" for some period of time; and as explained below, there is *zero* risk that the plan could be substantially consummated before this Court acts on the Trustee's certiorari petition. That is all the Court needs to know to deny the Trustee's stay application.

The stay application is predicated entirely upon a false assertion: that, without a stay, the debtors—Purdue Pharma L.P. and its affiliates (the "Debtors" or "Purdue")—will be able to substantially consummate the plan at issue in this case and equitably moot the Trustee's forthcoming certiorari petition. But that cannot happen in the relatively brief period before the Court could act on the Trustee's petition. Numerous steps must still be completed on remand before the plan can be substantially consummated. For example, the plan must be updated and re-approved by the bankruptcy court to reflect the most recent settlement terms, and the district court must carry out the Second Circuit's mandate to confirm the plan. At this point, the earliest the Debtors could emerge from bankruptcy is January 2024, well after

this Court is likely to act on the Trustee's certiorari petition. For this reason, the Trustee has failed to demonstrate the requisite irreparable harm for a stay.

The balance of equities also weighs heavily against granting a stay. The plan at issue will provide billions of dollars and lifesaving benefits to the victims of the opioid crisis, but those funds cannot be distributed until the plan is consummated. A stay would waste valuable time—potentially several months—that could be used to take some of the initial procedural steps that are necessary to ready the plan for final approval, but fall far short of substantial consummation. The Trustee claims (at 6) that taking these steps now is "potentially wasteful." But any potentially "waste[d]" resources from these ministerial steps pale in comparison to the far greater costs of further delay and the resources the Trustee has forced parties to expend to oppose his meritless stay requests. Further unnecessary delay in consummating the plan (including by preventing the preliminary steps that could be taken in parallel over the next few months) would harm the countless victims awaiting relief if—and when—the Court denies certiorari. As the bankruptcy court found, every day of delay in "liquidating personal injury claims and making distributions on them and making the initial distributions for abatement purposes seriously causes harm to the creditors," and "at some point, a stay can lead to additional deaths if it results in a meaningful delay of funds." Debtor App. 412a:2-4, 419a:14-17.[1]

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[1] References to "Debtor App." are to the appendix filed with this opposition. References to "App." are to the appendix filed with the Trustee's stay application.

The Trustee tries to shift the focus to the Sacklers. But the Sacklers are the only individuals who have *benefitted* from the two-year-and-counting delay in implementing the plan. Moreover, the Trustee ignores the overwhelming victim and governmental support for the plan. Voter turnout for the plan was unprecedented in a mass tort bankruptcy, *id.* at 150a-52a, and the level of support of more than 120,000 voting creditors was overwhelming, App. 24a. The Trustee purports to speak for individual tort victims here, but the victims have spoken for themselves. They were—and are—zealously represented by their own counsel, they overwhelmingly support the plan, and they oppose the Trustee. Likewise, the Trustee's insinuation (at 27-28) that victims might recover *more* if they could opt out of the plan to sue the Sacklers is entirely unfounded. After a multi-week trial involving dozens of witnesses, the bankruptcy court found that individual victims would recover materially less—or nothing at all—in the wake of the free-for-all that would ensue with respect to any remaining assets. Debtor App. 146a, 283a-85a. This fact explains why the plan is supported by every organized victim group in the case and is no longer opposed by a single represented creditor in the United States.

Nor is there a reasonable prospect that this Court will grant certiorari. The Trustee claims (at 4) a "sharp[] and intractabl[e]" circuit conflict meriting the Court's review. But he mischaracterizes the position of various circuits and glosses over important distinctions among the cases. In actuality, the few courts of appeals ostensibly in conflict with the substantial majority have not adopted the categorical rule that the Trustee asserts—and have not addressed the question of third-party

releases in the mass tort context at issue here. And the question the Trustee presents would benefit from further percolation. Much of the caselaw that the Trustee points to addresses a different question from the one he poses, is stale, and is likely to evolve in light of the Second Circuit's thorough and careful decision in this case.

The Trustee's certiorari request also suffers from a glaring vehicle defect: the Trustee's attempt to seize control of this case in the absence of any concrete interest in the question presented. Congress has authorized the Trustee to "appear and be heard" in cases, 11 U.S.C. § 307, not to take over the litigation for the parties themselves when the Trustee lacks any concrete interest in the case. The United States government itself is carved out of the releases at issue here, and the Trustee lacks all but the most generalized interest in his own view of federal law. That is patently insufficient to establish standing to appeal under this Court's precedents. Moreover, the Trustee—a part of the federal government—is taking this position in a case where the United States played a key role in the design of the plan at issue. The overwhelming public interest in the plan—which now has all 50 States on board and 97% of almost 5,000 governmental entities voting in favor—also counsels heavily in favor of denying certiorari. Indeed, the Trustee's own appointed fiduciaries in this case are urging a rejection of the Trustee's position. This Court has denied certiorari on the question presented on numerous prior occasions. There is no reason to do anything different here.

There also is no reasonable prospect of reversal. The Trustee premises his argument on the notion that the Second Circuit created out of "'statutory silence'" a

"vast power" at odds with other provisions of the Bankruptcy Code. Stay Appl. 22-23 (citation omitted). But, in fact, the Second Circuit—in line with multiple other circuits—explicitly anchored its decision in the *text* of the Bankruptcy Code—§§ 105(a) and 1123(b)(6). This Court has already recognized the authority conferred by those provisions—in a decision that involved a de facto release and is entitled to statutory *stare decisis*, even if the Trustee tries to largely sweep it under the rug. *See United States v. Energy Res. Co.*, 495 U.S. 545, 549-51 (1990). At the same time, the authority to approve third-party releases recognized by the Second Circuit is hardly "vast"; the Second Circuit's decision carefully restricts it to rare and limited circumstances. And the authority recognized by the Second Circuit does not conflict with any other provision of the Code. In fact, Congress expressly forbade the very construction that the Trustee advances in a Public Law the Trustee neglects to mention. In short, the Trustee's position on the merits crumbles on inspection.

Ultimately, however, the Debtors agree with the Trustee (at 7, 31) on one important thing: The best course would be for this Court to treat the Trustee's stay application as a certiorari petition, so that the Court can expedite the resolution of that petition—and its denial. As the Trustee acknowledges (at 7), there is a substantial public interest in the "prompt resolution" of this case. That understates it. As virtually every other governmental entity across the country has recognized, there is an overwhelming public need to distribute the billions of dollars of opioid abatement funds made available by the plan as soon as humanly possible. As the victims and their families have explained in heartbreaking terms, every day of delay

in distributing those benefits exacerbates the harms and literally risks lives. The Debtors therefore urge this Court not only to deny the Trustee's unfounded stay application, but to embrace the Trustee's request to treat that application as a certiorari petition and to deny that petition now, so the overwhelming benefits of the universally supported plan—negotiated by creditors, for creditors—can be distributed to the victims of the opioid crisis as soon as possible.

The stay application—and petition for certiorari—should be denied.

STATEMENT

Because the Trustee's stay application relies on an incomplete and misleading narrative of the events preceding the Second Circuit's decision, we briefly recount the relevant and undisputed history of this case and the plan.

A. The Tidal Wave Of Litigation Against The Debtors

At the time of the bankruptcy filing, thousands of lawsuits had been filed against the Debtors alleging that they had acted improperly in the marketing and sale of opioids and seeking damages based on public nuisance, consumer protection laws, unjust enrichment, false claims acts, and similar theories. *See, e.g.*, App. 21a; Debtor App. 26a-34a. Many lawsuits against the Debtors also named as defendants members of the Sackler family—all of whom left Purdue board and management positions by the end of 2018 and long before the bankruptcy filing. *See* App. 19a, 21a. *Contra* Stay Appl. 2. Lawsuits against Sackler family members asserted claims that are substantially similar (and often identical) to the claims asserted against the Debtors. *See, e.g.*, Debtor App. 26a-36a. The gravamen of the allegations is that these individuals played an active role in the Debtors' alleged conduct. *See id.* At the

time of the Debtors' bankruptcy filing, "claims against the Debtors and Sacklers were estimated at more than $40 trillion." App. 22a.

By mid-2019, it had become apparent that this "veritable deluge of litigation" would result in Purdue's financial and operational ruin, leaving nothing for victims. *Id.* at 12a. Bankruptcy provided the only viable solution to halt the decimation of the company in the face of this litigation and to facilitate a value-maximizing and equitable resolution for creditors and victims.

B. A Comprehensive Resolution, Including Releases Of Certain Claims Against The Sacklers, Garners Near-Universal Support

Before the Debtors filed for Chapter 11 relief, a number of plaintiff constituencies, the Sackler family, and Purdue reached an agreement in principle on the structure of a global resolution of opioid litigation related to the Debtors. The cornerstone of this settlement framework required the Sacklers to, among other things, relinquish 100% of their equity in the Debtors and make additional cash payments totaling at least $3 billion. *See* Debtor App. 42a. With the settlement framework in hand, the Debtors filed for Chapter 11 bankruptcy protection in September 2019. For the next two years, the Debtors and their creditor constituencies undertook to improve upon the settlement framework's terms and build upon its initial support.[2] An enormous amount of information was produced—

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[2] The organized creditor groups include the Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants, the Ad Hoc Committee of NAS Children, the Ad Hoc Group of Individual Victims, the Multi-State Governmental Entities Group, the States that formerly constituted the Ad Hoc Group of Non-Consenting States, the Ratepayer Mediation Participants, the Ad Hoc Group of Hospitals, the Third-Party Payor Group, the Native American Tribes Group, and the Public School

the Debtors alone provided over 90 million pages of documents—to allow the parties to assess potential claims against the Sacklers and their associated entities. *See id.* at 61a-62a. And the parties engaged in a series of mediated negotiations led by three of the nation's most respected mediators in an effort to resolve allocation issues among Purdue's creditors and determine if a satisfactory agreement with the Sacklers could be reached. *See id.* at 47a. These intense efforts culminated in the settlement agreements reflected in the Debtors' plan.

1. Mediation Of Intercreditor Allocation Issues

In the first round of mediation, the Debtors and key creditor constituencies resolved how to allocate the value of Purdue's assets among non-federal public claimants (States, federal districts and U.S. territories, political subdivisions, and Native American tribes) and private claimants (hospitals, private health insurance carriers and third-party payors, and individuals and estates asserting personal injury). *Id.* at 47a-48a. This mediation yielded three critical sets of agreements. *First*, the non-federal public claimants made a historic commitment to dedicate all value received by them to abate the opioid crisis. *Id.* at 49a. *Second*, the non-federal public claimants resolved critical issues as to the allocation of value among themselves. *See id.* And *third*, agreements were reached with certain private claimant groups that addressed the allocation of value to each group. *Id.*

District Claimants. Debtor App. 45a-46a. The Trustee also appointed an Official Committee of Unsecured Creditors as fiduciary for all unsecured creditors. *See id.* at 8a, 45a.

Critically, all of these agreements were—and remain—conditioned by the creditors themselves on the confirmation of a plan of reorganization that includes participation by the Sackler family. *Id.* These agreements, premised on multi-billion dollar settlement payments from the Sacklers, form the basis of the framework for the distributions contemplated under the plan.

2. Resolution Of The United States' Claim

To resolve the United States' civil and criminal investigations into the Debtors' past practices related to opioid products, Purdue Pharma L.P. entered into a plea agreement and civil settlement with the United States in November 2020. *Id.* at 2a. Pursuant to the plea agreement, Purdue Pharma L.P. and the United States agreed to a $2 billion criminal forfeiture judgment that will be entered upon acceptance of the plea agreement and will be deemed to have the status of an allowed superpriority administrative expense claim. *Id.* at 2a, 188a. The United States also agreed that up to $1.775 billion of the value distributed in respect of claims asserted by non-federal public claimants would be credited against the forfeiture judgment. *Id.* at 187a-88a. Without this $1.775 billion credit, there would not have been enough remaining value to satisfy the universe of other creditors. *Id.* at 279a.

Because of this agreed upon offset, much more value from the settlements underlying the plan will flow to opioid crisis abatement rather than general governmental coffers. As the United States explained to the bankruptcy court, "instead of aggressively pressing these claims through a prosecution, the government believes that these funds would be better used if put towards the abatement

objectives of federal, state and tribal governments that they had achieved in the mediation." *Id.* at 307a:12-16.

3. Settlement With The Sacklers

With key intercreditor allocation issues and claims by the Debtors' largest priority creditor resolved, the Debtors and their creditors next directed their attention toward a second phase of mediation to see if an enhanced settlement could be reached with the Sacklers—the critical element for ensuring the viability of the plan. *Id.* at 50a-51a. During this phase, numerous offers and counteroffers were exchanged. *Id.* at 51a. This back-and-forth produced a settlement agreed to by nearly all of the mediation parties; the only hold-outs were a limited number of States. *Id.* Under this agreement, the minimum amount the Sacklers were required to pay increased by over 40%—to $4.275 billion from $3 billion under the original settlement. App. 23a.

A further settlement with the remaining hold-out States was reached following more mediation during the pendency of the Second Circuit appeal, reflecting even greater victim recoveries. Under the terms of the enhanced settlement, the Sacklers will now pay at least $5.5 billion (and up to $6 billion). App. 75a. Between 2008 and 2017, approximately $10.4 billion of cash was distributed by Purdue to, or as directed by, the Sacklers. *See* Debtor App. 337a Nearly half of that money was distributed to pay taxes on Purdue's earnings (Purdue was a "passthrough" entity taxed at the owner rather than the entity level) and so primarily went to the federal government and other taxing authorities. *See id.* *Contra* Stay Appl. 8. The enhanced settlement

requires the Sacklers to repay at least *97%* of the non-tax cash distributions made to them in the nearly 12 years prior to the bankruptcy filing.

The principal consideration for these payments is the release of certain actual or potential claims against parties associated with the Sackler family (the scope of which is detailed further below). Debtor App. 51a. These releases are integral to the settlements underlying the plan and the plan itself. App. 72a-74a. Indeed, all the major creditor groups—including the Official Committee of Unsecured Creditors, which was appointed by the Trustee himself as fiduciary for all unsecured creditors—represented to the bankruptcy court that *they* would not support a plan that permitted opt-outs to destroy what the vast majority had worked for years to achieve. *See, e.g.*, Debtor App. 351a:8-25, 356a:9-22. Allowing opt-outs could provide opt-outs with grossly disproportionate recoveries ahead of all those who settled and deplete the Sacklers' assets, leaving them unable to pay the billions owed under the plan settlement. App. 72a-74a; Debtor App. 283a-85a.

The Trustee's assertion (at 21) that "[t]he Sacklers . . . would not have been able to shield billions of dollars from their creditors because, absent individual creditor consent, debtors must devote substantially all assets to the payment of creditors," is belied by both the uncontested record and the Second Circuit's opinion. As the Second Circuit noted, the bankruptcy court found that the Sacklers "are a large family whose assets are 'widely scattered and primarily held' in spendthrift trusts—both offshore and in the United States." App. 28a (quoting Debtor App. 227a). These trusts "are largely unreachable via bankruptcy proceedings" and in fact

are not eligible to file for bankruptcy. *Id.* Many Sacklers also live overseas and are not even U.S. citizens. Debtor App. 227a. Continued litigation "would be extremely expensive and lead to delays," destroying the settlement and resulting in a major escalation of costs. App. 28a. The bankruptcy court found that creditors had actually obtained a "settlement premium," extracting additional value from the Sacklers due to the global peace the releases facilitate. Debtor App. 201a.

C. The Plan Embodying The Global Settlement Is Filed And Receives Support From 95% Of Voting Creditors

1. Overview Of The Plan

The plan that emerged from this yearslong process was, in the words of the Official Committee of Unsecured Creditors, "the *creditors' Plan*, reflecting the *creditors' compromises*, and designed to further the *creditors' interests*." CA2 Official Comm. Reply Br. 9.

The plan has four key components. *First*, the plan embodies many critical and interlocking intercreditor settlement agreements reached during the three phases of mediation that together establish an historic, abatement-centric distribution framework. Debtor App. 53a-54a. *Second*, the plan delivers on a critical commitment made by the Debtors at the outset of the Chapter 11 cases: the creation of a public document repository. *Id.* at 54a. Third, the plan requires the Debtors' operating assets to be transferred to a new entity structured as a public benefit company—also a requirement to earn the $1.775 billion forfeiture judgment credit—dedicated to

mitigating the opioid crisis. *Id.* at 204a, 306a:1-6.[3] Finally, the plan subjects the Sackler family to restrictions on participation in any opioid business worldwide and contains a variety of other critical covenants and limitations. *Id.* at 367a-70a.

It is estimated that, upon the effective date of the plan, approximately $1.339 billion will immediately be paid to creditors. *Id.* at 446a-48a (¶ 18). This includes approximately $750 million that will be transferred to the abatement trusts for the purpose of funding programs and efforts to abate the opioid crisis and $300 million that will be transferred to the personal injury claimants' trust for distribution to personal injury victims. *Id.* The remaining billions contemplated by the original settlement will be distributed through 2031, *id.* at 442a-43a (¶ 11), and the additional funds from the enhanced settlement will continue to flow through 2039, *id.* at 429a.

2. Shareholder Releases

To facilitate the plan's global, abatement-centric resolution of claims, the plan includes provisions that channel civil liability with respect to Purdue-related opioid claims to creditor trusts. These provisions enjoin prosecution of these civil claims, including claims that might be asserted against certain non-debtor third parties. In exchange, the plan releases the Debtors, the Sacklers, and certain related parties from such claims. *Id.* at 378a-86a. In addition, the Sacklers agreed to release claims

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[3] The post-emergent company will be called Knoa Pharma and led by a new board of directors with no involvement from or relation to the Sacklers. The company will operate in the public interest and be subject to a strict operating injunction ensuring the safe sales of opioid medications. Among other initiatives, the company will develop and distribute on a not-for-profit basis innovative new opioid overdose reversal medicines, including medicines that have the potential to reverse overdoses caused by fentanyl and other synthetic opioids. Debtor App. 54a-55a.

they may have against the Debtors for, among other things, indemnification for claims asserted by third parties. *Id.* at 377a, 383a-84a.

The final language governing the releases of members of the Sackler family and related parties is the result of extensive negotiation by creditors opposite the Sacklers—as well as significant further narrowing by the bankruptcy court. *See, e.g.*, *id.* at 273a. To potentially be subject to the third-party shareholder releases, a claim must meet many criteria, designed to ensure that the releases capture only claims closely related to Purdue's past conduct. *Id.* at 382a-83a.

First, the claim must be held by a "Releasing Party," which includes "Holders of Claims . . . against . . . the Debtors," *i.e.*, creditors of Purdue. *Id.* at 375a. Thus, any person with a present injury who was harmed by the Sacklers but not by the Debtors is not bound by the releases. *Second*, only "Shareholder Released Parties" are released, a term tailored to include only those persons and entities related to the Sacklers that are necessary to ensure that the parties receive their bargained-for protection from collateral attacks on the plan. *Id.* at 376a, 382a-84a. *Third*, as a condition of confirming the plan, the bankruptcy court significantly narrowed the claims subject to the releases to include only those for which "any conduct, omission or liability of any Debtor or any Estate is the legal cause or is otherwise a legally relevant factor." *Id.* at 382a; *see id.* at 273a. The releases are further limited to claims that arise from or relate to opioid-related conduct or allegations made in pending opioid-related litigation or allege liability of the Sacklers that is derivative of liability of the Debtors. *Id.* at 373a.

If a third-party claim does not meet all of these criteria, then it is not released. Furthermore, many claims that *do* meet these criteria are carved out. A broadly defined category of "Excluded Claims" are not covered by the releases, preserving, among other things, actions against released parties for conduct occurring after the plan's effective date and—notably—States' ability to prosecute released parties for criminal or tax liability. *Id.* at 372a. "Special" provisions of the plan also carve the United States out of the releases. *Id.* at 387a; *see id.* at 387a-90a.

3. Unprecedented Notice And Creditor Support For The Plan

The plan developed by and for the creditors garnered, as the Second Circuit found, "overwhelming[]" support. App. 76a. Purdue undertook what the bankruptcy court called an "unprecedentedly broad" campaign, Debtor App. 150a, to notify parties about the Debtors' bankruptcy cases, the plan, and the third-party releases in "simple . . . plain English," *id.* at 149a. The Debtors' supplemental confirmation hearing notice "reached an estimated 87% of all U.S. adults, with an average message frequency of five times," *id.* at 147a, and followed the bar date notice, which "reached 98% of adults in the United States," App. 24a; *see* Debtor App. 147a.

The Trustee's suggestion (at 9) that support for the plan was not overwhelming because "hundreds of thousands of claimants failed to vote at all" omits critical details and context. The bankruptcy system (like democracy in general) has long functioned on the reality that a vote is determined only by those who vote. And as the bankruptcy court noted, support for the plan was "remarkable . . . given the very large number of people who got notice, who were entitled to vote, and who voted." Debtor App. 151a. Almost 85% of all non-voting creditors were insurance plans asserting

third-party payor claims—not victims. *Id.* at 150a-52a, 317a, 322a. *Contra* Stay Appl. 9. For the tens of thousands of voting personal injury claimants, "the vote was 95.7 percent . . . to over 98 percent." Debtor App. 151a. And in the aggregate, over 95% of the ballots cast, including nearly 97% of governmental creditors, voted to accept the plan. *Id.* at 151, 182. That support reflects a determination by the public's elected representatives—almost 5,000 State, local, and tribal governmental creditors—that the plan serves the public interest. *Id.* at 322a.

That overwhelming consensus has only grown. Today, no State, local, or tribal governmental creditor in the United States is appealing the plan. App. 41a. Indeed, of the 618,194 creditors, not *a single represented party in the United States* opposes the plan. *Id.*

This virtually unanimous support is partially explained by the uncontested and extensive evidence underlying the bankruptcy court's detailed findings that the plan is in the best interests of creditors. Debtor App. 285a-91a. Specifically, the court found that in a litigation scenario "the resulting claims would likely not only receive zero from the Debtors' estates but also . . . only a small pro rata share of any recovery from the shareholder released parties," and that their aggregate recovery would be far lower. *Id.* at 284a. Acknowledging these uncontroverted findings, the Second Circuit concluded that there is no evidence that claimants could recover more if they retained their right to litigate against the Sacklers, and there is extensive evidence that the releases are necessary "to ensure the fair distribution of any recovery for claimants," who would otherwise "go without" the assistance funded by the plan and

instead "face an uphill battle of litigation . . . without fair distribution." App. 72a-74a. The Trustee does not contest any of these factual findings.

D. Challenge To The Plan And The Second Circuit Decision Ordering Confirmation Of The Plan

Despite the extraordinary consensus in support of the plan, a tiny group of objectors—collectively comprising less than one-fifth of one percent of all claimants—objected to the plan, and the third-party releases of claims against the Sacklers in particular. Over the course of six days, the bankruptcy court heard testimony from 41 witnesses and accepted into evidence "a courtroom full of exhibits." Debtor App. 146a. After "two full days of oral argument," the bankruptcy court issued an extensive opinion that carefully considered the objections to the plan, the evidence, and the pertinent law, and confirmed the plan. *Id.*; *see* App. 25a-35a. On appeal, the district court vacated the bankruptcy court's decision and held that the Bankruptcy Code did not authorize the third-party releases. App. 35a.

In relevant part, the Second Circuit reversed the district court's order holding that the Bankruptcy Code does not permit nonconsensual releases of third-party direct claims against non-debtors, affirmed the bankruptcy court's approval of the plan, and remanded the case to the district court for further proceedings as may be required, consistent with its opinion. *Id.* at 13a-14a. In particular, the court held that two sections of the Bankruptcy Code, 11 U.S.C. §§ 105(a) and 1123(b)(6), jointly provide the statutory basis for the bankruptcy court's authority to approve a plan that includes nonconsensual releases of third-party claims against non-debtors; and that the uncontested factual record and equitable considerations support approval of

the plan in this case. App. 52a-77a. The court further held that, under *Stern v. Marshall*, 564 U.S. 462 (2011), only an Article III district court may exercise this authority to finally approve nonconsensual third-party releases. App. 41a-43a.

The Second Circuit considered and rejected the Trustee's statutory arguments—holding that § 524(e) does not purport to limit the bankruptcy court's powers to release a non-debtor from a creditor's claims, and that the negative inference he attempts to draw from § 524(g) is expressly prohibited by the rule of construction enacted in the Bankruptcy Reform Act of 1994. *Id.* at 56a-62a. Against a "backdrop of equity, *id.* at 69a, " and "informed by th[e] risk" of the "'potential for abuse' posed by" third-party releases, *id.* at 65a (citation omitted), the Second Circuit also outlined seven factors that courts should consider before approving nonconsensual third-party releases and including them in a plan.[4] A bankruptcy court must support each factor with "specific and detailed findings" after "extensive discovery into the facts surrounding the claims against the released parties." *Id.* at

[4] The seven factors consider whether (1) there is an identity of interests between the debtor and released third parties, including indemnification relationships, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) claims against the debtor and non-debtor are factually and legally intertwined, including whether the debtor and the released parties share common defenses, insurance coverage, or levels of culpability; (3) the scope of the releases is appropriate; (4) the releases are essential to the reorganization, in that the debtor needs the claims to be settled in order for the *res* to be allocated, rather than because the released party is somehow manipulating the process to its own advantage; (5) the non-debtor contributed substantial assets to the reorganization; (6) the impacted class of creditors overwhelmingly voted in support of the plan with the releases; and (7) the plan provides for the fair payment of released claims. App. 66a-69a.

69a. Notably, the court cautioned that "there may even be cases in which all factors are present, but the inclusion of third-party releases . . . should not be approved." *Id.*

Relying on the extensive uncontested factual findings and record evidence presented to the bankruptcy court, the Second Circuit held that the Debtors' plan satisfied all seven factors and that equity supported granting the releases. The court held that (1) there was an identity of interests between the Debtors and those Sacklers named as defendants in the litigations given the Sacklers' "major role in corporate decision-making" during the time periods at issue in the litigation; (2) there is substantial overlap between claims against the Debtors and the settled third-party claims because the releases apply only where a debtor's conduct or the claims asserted against it are a legal cause or a legally relevant factor to the cause of action against the shareholder released party; (3-4) the scope of the releases is appropriate and they are essential to the reorganization because the Debtors would otherwise be required to litigate indemnity and contribution claims (depleting the *res*), the released claims related to the Debtors' conduct and the estate, and the releases are needed for the distribution of the *res* and to ensure the fair distribution of any recovery for claimants; (5) the $5.5 to $6 billion contribution by the Sacklers is substantial; (6) support for the plan was overwhelming because, among other things, over 95% of the personal injury classes voted to accept the plan; and (7) the plan provides for fair payment in

relation to the over $40 trillion in claims against the Debtors. *Id.* at 70a-77a (citation omitted).[5]

On July 27, 2023, the Second Circuit denied the Trustee's request to stay issuance of the mandate pending the filing of a petition for a writ of certiorari and disposition of that petition. The mandate issued on July 31, 2023.

E. Pathway To Emergence

Numerous steps must still be completed before the plan can be substantially consummated. First, the Debtors must seek entry of a confirmation order by the district court and an order incorporating the enhancements authorized in March 2022. Even if the district court acts without referring anything to the bankruptcy court, it cannot enter a final order confirming the plan until September—no motion has even been filed yet. *See* Fed. R. Bankr. P. 2002(b) (requiring "not less than 28 days' notice" of confirmation). That order, in turn, would be stayed for an additional 14 days unless the district court orders otherwise. Fed. R. Bankr. P. 3020(e). Accordingly, the Debtors will not obtain the required and unstayed orders confirming the amended plan until late September or October at the earliest.

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[5] Echoing the bankruptcy court and the district court, the Second Circuit also rejected the arguments raised by three *pro se* appellants and a small number of Canadian creditors. *See* App. 34a-35a, 81a-85a. Contrary to the Trustee's characterization (Stay App., Parties to the Proceeding), no class of Canadian municipalities or Canadian First Nations and Metis People has been certified. Moreover, the releases at issue carve out claims based on the conduct of Purdue Canada, and all Canadian provinces—collectively representing virtually all of Canada's population—stipulated that they do not object to the plan. Debtor App. 338a-42a.

And that is just the beginning of the consummation process. Substantial consummation of the plan cannot occur until several months thereafter. Under the plea agreement with the United States, (1) the sentencing hearing cannot be held until at least 75 days after entry of a confirmation order; and (2) the plan cannot become effective until at least seven days after sentencing. Moreover, many State and federal regulatory processes related to the licensing of the post-emergence entity (Knoa Pharma) will need to be completed before consummation. Even in a very optimistic scenario—which assumes that the Debtors can go immediately to the district court and ask it to issue the requisite orders—all of these steps are unlikely to be completed until January 2024 at the earliest.

ARGUMENT

A party seeking certiorari is never entitled to a stay as a matter of right. *See Nken v. Holder*, 556 U.S. 418, 433 (2009). Rather, because a stay represents an "intrusion into the ordinary processes of administration and judicial review," *id.* at 427 (citation omitted), the Trustee must satisfy a rigorous multipart test to show that this is an "extraordinary" case warranting a stay, *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Specifically, he must demonstrate (1) "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) "a likelihood that 'irreparable harm [will] result from the denial of a stay.'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (alteration in original) (quoting *Rostker*, 448 U.S. at 1308). "In close cases the Circuit Justice or the Court

will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). And the Trustee's burden is "particularly heavy" here because "a stay has been denied by the [lower courts]." *New York Times Co. v. Jascalevich*, 439 U.S. 1304, 1305 (1978) (Marshall, J., in chambers) (alteration in original) (citation omitted).

As explained below, the Trustee has utterly failed to meet his heavy burden to show that this is an extraordinary case where a stay would be warranted. But the Court should not only deny the Trustee's stay application—it should deny certiorari as well. The Trustee suggests (at 7) that the Court "may wish to construe [his] application as a petition for a writ of certiorari." The Debtors agree. Accordingly, the Court should treat the Trustee's stay application as a certiorari petition and deny the petition now or, at a minimum, set the Trustee's petition for expedited consideration based on the stay application papers. As explained below, and as the Trustee acknowledges (*id.*), the public interest supports the "prompt resolution of this case." *See id.* at 29 ("The government is sensitive to the fact that continuing to litigate . . . could delay the implementation of the reorganization plan, with its concomitant benefits to States, municipalities, and individual opioid victims.").

I. THERE IS NO REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI

A. There Is No Circuit Split Warranting This Court's Review

The centerpiece of the Trustee's stay application is his claim (at 4) that there is a "sharp[] and intractabl[e]" circuit conflict meriting the Court's review. That is incorrect. The Trustee's cursory discussion of the caselaw in the circuits exaggerates

the position of various circuits and glosses over important distinctions among the cases that destroy the foundation on which he has built his request for relief. Not only do at least five other courts of appeals undisputedly agree with the Second Circuit, but the three courts of appeals ostensibly in conflict have not adopted the categorical rule that the Trustee asserts. Moreover, much of the caselaw on which the Trustee relies addresses a different question from the one he poses, is stale, and would benefit from further percolation, especially in light of the Second Circuit's thorough and well-reasoned decision in this case.

1. There Is No Split On Whether Third-Party Releases Are Categorically Barred In The Circumstances Here

To start, it is widely accepted across the courts of appeals that, in certain limited circumstances, third-party releases may be appropriately incorporated into a reorganization plan when such releases are an indispensable component of the reorganization. As the Trustee recognizes (at 15), the Second Circuit so held almost forty years ago, and the Third, Fourth, Sixth, Seventh, and Eleventh Circuits followed suit when presented with an appropriate case. *See, e.g.*, *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 92-94 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988); *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139-40 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2805 (2020); *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 700-02 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 656-58 (6th Cir.), *cert. denied*, 537 U.S. 816 (2002); *Airadigm Commc'ns, Inc. v. FCC (In re Airadigm Commc'ns, Inc.)*, 519 F.3d 640, 657-58 (7th Cir. 2008); *SE*

Property Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070, 1076-79 (11th Cir.), *cert. denied*, 577 U.S. 823 (2015); *see also* App. 58a-61a. These cases concerned some of the most complex and challenging corporate bankruptcies, including mass torts involving breast implants (*Dow Corning*) and the Dalkon Shield (*A.H. Robins*).

The Trustee's claim of a conflict rests on the proposition that the decisions of three circuits—the Fifth, Ninth, and Tenth Circuits—conflict with this majority rule. But the Trustee's one-paragraph discussion of these decisions (at 14-15) is little more than a conclusory assertion followed by a series of quotes devoid of context. Nor does he meaningfully *analyze* any of the decisions he cites or prove the existence of a conflict. And a careful review of the caselaw shows that the Fifth, Ninth, and Tenth Circuits are neither as categorical nor as monolithic as the Trustee claims.

a. *Fifth Circuit.* The Fifth Circuit has not adopted a blanket rule barring third-party releases. On the contrary, the Fifth Circuit has explicitly left open the possibility of third-party releases in mass tort bankruptcies. The primary case the Trustee cites (at 15) specifically *distinguished* the circumstances present there—which involved a reorganization plan provision exculpating certain parties "from any negligent conduct that occurred during the course of the bankruptcy"—from cases "concern[ing] global settlements of mass claims." *Bank of N.Y. Tr. Co., N.A. v. Official Unsecured Creditors' Comm. (In re Pacific Lumber)*, 584 F.3d 229, 252 (5th Cir. 2009). In fact, *Pacific Lumber* recognized that third-party releases could be "appropriate as a method to channel mass claims toward a specific pool of assets," citing the Second

Circuit's decision in *Johns-Manville*. *Id.* That aspect of the Fifth Circuit's reasoning followed logically from an earlier decision of the court, *see Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 760-61 (5th Cir. 1995) (distinguishing *Johns-Manville* and other cases that "channeled . . . claims to allow recovery from separate assets"), and it eliminates any direct conflict with the decision below.

The Trustee also cites (at 16) a more recent Fifth Circuit case—*Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.)*, 701 F.3d 1031 (5th Cir. 2012), *cert. dismissed*, 569 U.S. 944 (2013). But that case changed nothing. *Vitro* stands for the proposition that *Pacific Lumber* "was consistent with prior rulings from this circuit that 'seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions.'" *Id.* at 1061 (quoting *Pacific Lumber*, 584 F.3d at 252). As discussed above, however, neither *Pacific Lumber* nor the Fifth Circuit's prior rulings absolutely "foreclose[d]" the possibility of third-party releases in mass tort bankruptcies like this one.[6] The Trustee's reliance on *Vitro* is particularly off-base because *Vitro* did not even apply Fifth Circuit caselaw. *Vitro* concerned the enforcement of a foreign bankruptcy plan that contained a third-party release under the comity principles embodied in Chapter 15 of the Bankruptcy Code. *See id.* at 1053-54. The Fifth Circuit recognized that third-party releases were available in

[6] A more recent Fifth Circuit decision—not raised by the Trustee—also did nothing more than apply existing precedent. *See NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P.*, 48 F.4th 419, 435-38 (5th Cir. 2022) (applying *Pacific Lumber*), *cert. pending*, No. 22-631 (U.S. filed Jan. 5, 2023). That case involved an exculpation clause directed to post-petition liabilities—and, like *Zale*, *Pacific Lumber*, and *Vitro*, did not address mass tort bankruptcies such as this one.

other circuits and used precedents from *those circuits* to determine whether there were "extraordinary circumstances that would make enforcement of [the foreign bankruptcy] plan possible in the United States." *Id.* at 1061.

b. *Ninth Circuit.* Like the Fifth Circuit, the Ninth Circuit has distinguished cases involving third-party releases in mass tort bankruptcies without ever closing the door to such releases. The Trustee quotes a single 28-year-old Ninth Circuit case for the proposition that "the bankruptcy court lacked the power to approve the provision which released claims against non-debtors." Stay Appl. 14 (quoting *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401 (9th Cir. 1995), *cert. denied*, 517 U.S. 1243 (1996) (concerning alleged fraud in connection with a tender of stock)). But he neglects to mention other Ninth Circuit decisions showing that the Ninth Circuit's rule is even less categorical than the Fifth Circuit's. In particular, one decision pre-dating *Lowenschuss* (ignored by the Trustee) distinguished the third-party release that the Fourth Circuit had approved in *A.H. Robins* based on the "unusual facts" of that case, thereby leaving open the possibility that the court could approve a third-party release in a similarly "unusual" mass tort bankruptcy. *See American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 626-27 (9th Cir. 1989) (distinguishing *A.H. Robins* because, among other things, the third-party release "was not overwhelmingly approved by creditors," it was not "'essential to the plan,'" and the reorganization did not "'hinge[]' on it"). And while *Lowenschuss* declined to read *American Hardwoods* as authorizing third-party releases—under the circumstances of *A.H. Robins* or

otherwise—it had no reason to because it also was not a mass tort case and otherwise involved no "unusual facts."

More recently, the Ninth Circuit has overtly cut back on the broad language that the Trustee quotes from *Lowenschuss*. *See Blixseth v. Credit Suisse*, 961 F.3d 1074, 1082-85 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1394 (2021). But again, the Trustee just ignores the decision. In *Blixseth*, the Ninth Circuit recognized *Lowenschuss*'s statement that "[t]his court has repeatedly held, without exception, that [11 U.S.C.] § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors." *Id.* at 1083 (quoting *Lowenschuss*, 67 F.3d at 1401); *see infra* at 51 (discussing § 524(e)). But the court then went on to *carve out an exception* for a reorganization plan provision exculpating non-debtors from liability. *See Blixseth*, 961 F.3d at 1083-85. So the Trustee is simply wrong to claim (at 14) that the Ninth Circuit categorically bars third-party releases.

c. *Tenth Circuit.* Citing one decision, the Trustee likewise represents Tenth Circuit caselaw as establishing an absolute prohibition against "extend[ing]" the "benefits" of the Bankruptcy Code "to third-party bystanders." Stay Appl. 15 (quoting *Landsing Diversified Props.-II v. First Nat'l Bank & Tr. Co. of Tulsa (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990) (per curiam), *modified sub nom. Abel v. West*, 932 F.2d 898 (10th Cir. 1991)). But for at least three reasons, there is no reason to read *Western Real Estate* as establishing a categorical ban on third-party releases. *First*, the Tenth Circuit explicitly followed the Ninth Circuit—which (as discussed above) does not have an unbending rule and has bent

the rule the Trustee takes from the superseded *Lowenschuss* decision. *See Western Real Estate*, 922 F.2d at 601 ("[W]e follow the Ninth Circuit's lead in . . . *In re American Hardwoods* . . . ."). *Second*, the Tenth Circuit rested its decision in part on the third-party release at issue not having "any countervailing justification of debtor protection." *Id.* at 602. It neither considered nor decided the question at issue here, and in other cases, where the third-party releases *do* protect the debtor: They are "essential to reorganization" and the Debtors cannot emerge from bankruptcy without them. App. 72a; *see infra* at 46-48. And *third*, lower courts in the Tenth Circuit do not read *Western Real Estate* as the Trustee does. *See, e.g.*, *In re Midway Gold US, Inc.*, 575 B.R. 475, 505 (Bankr. D. Colo. 2017) ("[T]his Court concludes the bar on third-party releases imposed by *Western Real Estate* is not as broad as it has previously been argued and applied in other cases.").

Not surprisingly, courts in circuits not on either side of the Trustee's alleged split also have expressed doubts that the Fifth, Ninth, and Tenth Circuits impose nearly as broad a rule as the Trustee claims. For example, the First Circuit reviewed caselaw across the circuits and identified the Ninth and Tenth Circuits as "not permit[ting] a bankruptcy court permanently to enjoin post-confirmation lawsuits against nondebtors," but recognized that the "[t]he factual circumstances in these cases did not suggest . . . that the grant of injunctive relief was in any sense integral to the success of the chapter 11 reorganization cases." *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 979 (1st Cir. 1995). A bankruptcy court in the Eighth Circuit likewise surveyed precedents on this issue, noted that some circuit cases "are

frequently cited for the proposition that third party releases are never allowed," but "doubt[ed] that is what the cases really stand for." *In re Archdiocese of Saint Paul & Minneapolis*, 578 B.R. 823, 832 (Bankr. D. Minn. 2017). These decisions underscore that the Fifth, Ninth, and Tenth Circuit decisions do not establish the blanket prohibition on third-party releases that the Trustee asserts.

The Trustee thus "read[s] too much into too little." *National Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1155 (2023). Judicial opinions "dispose of discrete cases and controversies and they must be read with a careful eye to context." *Id.* But, in his single paragraph alleging a circuit split, the Trustee omits any discussion (or recognition) of the context of any of the Fifth, Ninth, and Tenth Circuit cases he cites. And, importantly, not a single one of them considered the unique problems associated with complex mass tort bankruptcies, some of which simply cannot be resolved by victims without a third-party release. Accordingly, it is far from clear that, "[h]ad Purdue sought bankruptcy protection in one of those circuits, the Sackler release would not have been approved." Stay Appl. 15.[7]

2. The Question The Trustee Presents Warrants Further Percolation

One thing that is clear, however, is that the question presented by the Trustee would benefit from percolation in the lower courts, for several reasons.

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[7] The Trustee argues that the Second Circuit "acknowledged" that its decision "squarely conflicts with the decisions of several other circuits." Stay Appl. 14 (citing App. 57a; App. 98a (Wesley, J., concurring in the judgment)). That is an overstatement. The court noted decisions in other circuits, *see* App. 57a, but it did not engage in any extended analysis of the decisions in other circuits, nor in the type of analysis required to determine whether there is a direct conflict.

First, the lower courts, including the Fifth, Ninth, and Tenth Circuits, should have the chance to consider the Second Circuit's decision. The Second Circuit's decision comprehensively analyzed the issues attendant to third-party releases in mass tort bankruptcies such as this one—issues that, as explained above, the Fifth, Ninth, and Tenth Circuits have *not* considered. At most, the Fifth, Ninth, and Tenth Circuits have expressed views on third-party releases in cases where such releases would not have been approved under the majority rule. It is premature to assume, as the Trustee does, that these courts would reject third-party releases in the extraordinary circumstances present here—where, among other things, claims against the debtors and the released parties are "factually and legally intertwined," the releases are "essential to reorganization" and limited in scope, and the plan was "overwhelmingly" approved by creditors. App. 70a-77a. These courts should have the chance to consider the Second Circuit's reasoning in a case arising in a context in which it could actually make a difference.

Second, to the extent there is confusion among the courts of appeals, it can be traced to Bankruptcy Code "provisions limiting the discharge of debt under 11 U.S.C. § 524(e)." App. 56a; *see, e.g.*, *Zale*, 62 F.3d at 760; *American Hardwoods*, 885 F.2d at 626; *Western Real Estate*, 922 F.2d at 600-01. Yet that is not the issue on which the Trustee focuses. The Trustee mentions § 524(e) only in passing (at 19-20) as "[i]llustrating the Code's focus on the debtor." He does not take a position on what § 524(e) means or indicate whether he agrees with how certain decisions from the Fifth, Ninth, and Tenth Circuits have read that provision. Likewise, in his separate

opinion, Judge Wesley did not rely on—or even cite—§ 524(e) in arguing that the Bankruptcy Code does not authorize the third-party releases at issue. *See* App. 86a-99a. This makes sense: Section 524(e) simply explains the effect of a plan's discharge of a debtor's debt and its lack of effect on entities co-liable for the same debt. *See* 11 U.S.C. § 524(e) ("[D]ischarge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."). The provision "says nothing about the authority of the bankruptcy court to release a non-debtor from a creditor's claims." *Seaside Eng'g*, 780 F.3d at 1078; *see infra* at 51.

Third, the few cases the Trustee cites invoking § 524(e) are stale and in flux. The Ninth Circuit issued its decision in *American Hardwoods* in 1989 and was followed by the Tenth Circuit's decision in *Western Real Estate* (1990) and the Fifth Circuit's decision in *Zale* (1995)—in other words, *decades* ago. Subsequent cases relying on § 524(e) have reflexively followed these decisions. But much has happened since they came out. Many other decisions have challenged these early cases' interpretation of § 524(e) based on a more careful analysis of the text and purpose of the statute. *See, e.g.*, App. 47a-48a, 56a-58a; *Seaside Eng'g*, 780 F.3d at 1078; *Airadigm*, 519 F.3d at 656; *In re PWS Holding Corp.*, 228 F.3d 224, 245-47 (3d Cir. 2000). And as noted above, the Ninth Circuit—the root cause of any possible confusion over § 524(e)—has reserved the very question presented here and recently held that § 524(e) is not as broad or unexceptionable as it may have suggested in earlier cases. *See Blixseth*, 961 F.3d at 1083-85; *supra* at 26-27.

There is thus ample reason to believe that further consideration of the issues presented by this case could alter the case law in other circuits and alleviate any need for this Court's review. In short, further percolation is warranted.

B. This Case Is A Singularly Poor Vehicle For Review

This case also is an especially unsuitable vehicle for this Court's review. The Trustee is acting as a free agent—and a rogue one at that. He has no concrete stake in the outcome of this case. Moreover, the United States itself settled with Purdue and, to boot, is explicitly carved out of the releases at issue. Debtor App. 387a-90a. Instead, the Trustee has asserted only the broadest and most abstract conceivable interest—an interest in "federal law." CA2 Reply Supp. Mot. to Stay 4. Yet, as this Court has made clear, an abstract interest in a legal rule is not a proper basis for appealing or seeking certiorari review of a bankruptcy judgment. *See Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013). Equally important, tens of thousands of governmental and personal injury victims and two case fiduciaries, who *do* have an actual, concrete, particularized stake in the outcome, overwhelmingly *object* to further review because it is critically important that the Debtors' plan go into effect as soon as possible. The Trustee's bizarre attempt to bring this case to the Court in these circumstances—alone, against the will of the creditors and victims, and to their detriment—is itself a compelling reason for denying certiorari.

1. The Trustee Lacks Statutory And Constitutional Authority To Independently Pursue This Appeal

The Trustee has taken the extraordinary step of seeking to stop the Debtors' reorganization plan even though he lacks *any* particularized interest in it, financial

or otherwise. *See* App. 76a ("[T]he main challenge to this appeal is not by creditors, but by the Trustee—a government entity without a financial stake in the litigation."). No statute authorizes this step, and the Constitution forbids it.

By statute, the Trustee's duties are largely administrative in nature. He can, among other things, "establish, maintain, and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under chapter 7"; "supervise the administration of cases and trustees"; "monitor[]" bankruptcy plans and the progress of bankruptcy cases; "deposit or invest" funds; and make certain reports. 28 U.S.C. § 586(a). The Trustee also "may raise and may appear and be heard on any issue in any case or proceeding under this title." 11 U.S.C. § 307; *see* Stay Appl. 9 (invoking § 307). As a result, he can discharge his duties in bankruptcy court by, for example, "appear[ing]" and filing comments on bankruptcy plans and fee applications. 11 U.S.C. § 307; *see* 28 U.S.C. § 586(a)(3)(A)-(C).

Here, however, the Trustee has hijacked the case and purports to act as a party. Nothing in § 307 authorizes this extraordinary power. Section 307 permits the Trustee to "appear" and make his views known on issues raised in an appeal brought by actual parties with an actual interest. But he has arrogated significantly more power to himself: He is seeking to pursue an issue *independently* of the parties in interest by creating a *new* case in this Court—which would not otherwise be a "case or proceeding" under the Bankruptcy Code. *Id.*; *see Collier on Bankruptcy* ¶ 301.03 (16th ed. June 2023 update) (defining "case" and "proceeding").

The Trustee's gambit flies in the face of the usual rules governing bankruptcy appellate standing. Courts universally limit the ability to appeal in bankruptcy cases to "person[s] aggrieved" by an order. *E.g.*, *Truck Ins. Exchange v. Kaiser Gypsum Co. (In re Kaiser Gypsum Co.)*, 60 F.4th 73, 81-82 & n.5 (4th Cir. 2023) (citation omitted). The "person aggrieved" test typically focuses on whether a bankruptcy court order "diminishes [the person's] property, increases their burdens, or impairs their rights." *PWS Holding*, 228 F.3d at 249 (citation omitted). While this test most often authorizes bankruptcy appellate standing to persons "'adversely affected pecuniarily' by an order of the bankruptcy court," it also may authorize bankruptcy appellate standing to government officers or agencies affected in a particularized way—such as by impacting funding or the ability to fulfill statutory enforcement responsibilities. *Id.*; *cf., e.g.*, *Siegel v. Fitzgerald*, 142 S. Ct. 1770, 1778 (2022) (U.S. Trustee initially appealed in a case that would impact funding for the U.S. Trustee Program); *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 458-60 (1940) (the SEC could intervene and appeal because the debtor filed for bankruptcy under the wrong chapter of the Bankruptcy Code to circumvent SEC supervision). But the Trustee is in no way aggrieved by the third-party releases in the Debtors' plan. He has no claim to be released, the United States (of which the Trustee is an officer) is carved out of the releases, and the legality of the releases does not impact the Trustee's discharge of his duties.

All of this points to an even more fundamental problem: the lack of Article III standing. As this Court has admonished, a party invoking the power of this Court or

any other Article III court must "have suffered a concrete and particularized injury"; "a keen interest in the issue" before the Court "is not enough." *Hollingsworth*, 570 U.S. at 700; *see, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) ("No concrete harm, no standing."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) (a party "claiming only harm to his and every citizen's interest in proper application of the Constitution and laws . . . does not state an Article III case or controversy"); *Muskrat v. United States*, 219 U.S. 346, 361-62 (1911) (rejecting Congress's "attempt to provide for a judicial determination, final in this court" on constitutionality because the Court's jurisdiction is limited to "cases or controversies arising between opposing parties"). Yet all the Trustee has claimed here is a generalized interest in "federal law"—the vaguest possible interest and one that, if accepted, would confer standing on anyone. CA2 Reply Supp. Mot. to Stay 4.

The Trustee may believe that the bankruptcy system would be served by this Court putting the Second Circuit's decision on hold and reviewing it on the merits—but that does not give him Article III standing to pursue that relief by appealing this case. Indeed, the Court has previously rejected an attempt by government officials to resolve a question of federal law because they had "alleged no injury to themselves as individuals"—despite having the explicit statutory authority to sue that the Trustee lacks. *Raines v. Byrd*, 521 U.S. 811, 829 (1997); *see id.* at 820 n.3 ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").

None of this calls into question the Trustee's ability to act as a "bankruptcy watchdog[]." H.R. Rep. No. 95-595, at 4 (1977). He can write reports, comment on plans and other filings in bankruptcy court, and participate in appeals brought by parties in interest. Indeed, government officers and agencies commonly make their views on federal law known, even if they cannot always seek to correct courts' interpretation and application of it. Nobody would doubt, for example, that the EEOC can file an amicus brief in a case between two private parties expressing its interpretation of federal antidiscrimination law. But nobody would expect the EEOC to be able to appeal a court ruling that it believes is wrong even after the parties settle the case. That is, in essence, what the Trustee is doing here. The Constitution forbids him from doing so. And at a bare minimum, the fact that the Trustee is the only party seeking this Court's review presents a novel and challenging issue that makes this far from an ideal candidate for certiorari.[8]

The Trustee's request for a stay here is premised on the notion that allowing the initial steps towards consummation of the plan could require this Court "to address questions about the validity and applicability of [the equitable mootness] doctrine *alongside the important merits question presented here*." Stay Appl. 26

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[8] In prior cases in which a U.S. Trustee acted as a party, the U.S. Trustee had a concrete interest in the case. *See, e.g.*, *Siegel*, 142 S. Ct. at 1781-82 (dispute over fees payable to the U.S. Trustee Program); *Harrington v. Clinton Nurseries, Inc.*, 143 S. Ct. 297 (2022) (mem.) (same); *Bast Amron LLP v. United States Trustee Region 21*, 142 S. Ct. 2862 (2022) (mem.) (same). In *Lamie v. United States Trustee*, 540 U.S. 526 (2004), the U.S. Trustee was a respondent in this Court, in a case in which a fee applicant—with unquestioned standing—was the appellant or cross-appellant all the way up to this Court. Here, the Trustee is acting as a *petitioner*.

(emphasis added). But the Trustee's attempt to bring this case to the Court would raise its own set of far more serious questions—antecedent to the merits question he is seeking to raise in his petition—concerning his statutory and constitutional authority to not just "appear," but appeal a decision by which he has not been aggrieved in any real sense. Even if the Court believed the question presented were cert-worthy, there is no reason to take on this extra baggage.

2. The Public Importance Of The Plan Weighs Against Certiorari

Also strongly cutting against the Trustee's case for certiorari is the compelling public interest in allowing the plan to take effect as soon as possible.

While the Trustee mentions the "public interest" several times (*e.g.*, at 3, 6, 27-31), he does not seriously argue that reversing the decision below would serve the public interest. Unquestionably, it would not. Invalidating the releases would upend the plan, take billions of dollars out of opioid abatement programs that are sorely needed, force the parties to start over in attempting to develop a plan after more than five years of work (and thereby incur hundreds of millions of dollars more in fees), deprive victims of any meaningful recovery, risk destroying Purdue as a valuable ongoing business transformed into a public benefit company dedicated to the American people, and create a value-destructive race to hundreds of courthouses in which all creditors will be worse off by billions of dollars.

And for what? The bankruptcy court found, and the Second Circuit affirmed, that claimants would face major hurdles in trying to recover from the Sacklers. The Sackler family is "large," App. 28a, and far-flung, with many family members "liv[ing]

outside of the territorial jurisdiction of the United States," Debtor App. 227a. Sackler family members "might not have subjected themselves sufficiently to the U.S. for a U.S. court to get personal jurisdiction over them." *Id.* Their assets are "'widely scattered and primarily held'" in entities that are often offshore, "unreachable via bankruptcy proceedings," and ineligible to file for bankruptcy. App. 28a (quoting Debtor App. 227a). As a result, setting aside the plan would cause an avalanche of atomized and uncoordinated litigation in which claimants compete with one another and the bankruptcy estates over assets claimants are unlikely to collect even if they were to prevail. *See* App. 27a-29a. This helps only the Sacklers, whose financial benefit from delay is already in the hundreds of millions of dollars.

It is telling that victims emphatically and decisively rejected such a protracted litigation battle in favor of their plan. Every organized creditor group—and almost 5,000 U.S. governmental creditors, including every single State, federal district, municipality, and Native American tribe—in the United States affirmatively supports or at least does not oppose the plan. *See* App. 40a-41a. These well-represented creditors, who have worked on this case for years, represent both private interests and the public interest far more directly than the Trustee does. *See, e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982). In fact, when *the United States itself* was acting in its sovereign capacity, it represented that it was "in the best interest of the public" to put the funds available under the plan "towards the important and critical work of abatement of this crisis." Debtor App. 305a:9-10, 307a:4-5. That is even truer today with the worsening of the crisis.

The victims of the opioid crisis, in particular, have a compelling need for the plan to take effect as soon as possible. Delaying distribution of funds reduces the value of opioid abatement efforts because "as time passes, the problem only gets worse." *Id.* at 421a:5-6. Dollars spent on abatement today will have a greater impact on the opioid crisis than dollars spent tomorrow because the crisis continues to grow. *See, e.g.*, *id.* at 345a:18-21. As over 1,000 victims wrote to the Attorney General, if this plan does not stand, the victims "will likely get nothing"; "the states would have to wait years to recover money to be used for abating the opioid crisis," even as "drug overdoses" are "occurring at record rates." In the meantime, "there are thousands of victims waiting for desperately needed funds" that could go to "pay[ing] for the rehab of a loved one," "pay[ing] off the debt [family members] incurred when they buried [a] son, daughter, or spouse," or paying for "more Narcan" or "more mental health support." Victims' Ltr. to Att'y Gen. Merrick Garland et al. at 1-2 (Apr. 25, 2022).

The public interest thus weighs heavily against granting certiorari. Other cases—that do not involve national epidemics and American lives—will come along.

C. The Court Has Repeatedly Denied Certiorari On This Issue, And There Is No Pressing Need To Grant Certiorari In This Case

In fact, the Court has already considered—and denied—numerous certiorari petitions raising issues about the validity of third-party releases. *See, e.g.*, *Blixseth v. Credit Suisse*, 141 S. Ct. 1394 (2021) (mem.); *ISL Loan Tr. v. Millennium Lab Holdings II, LLC*, 140 S. Ct. 2805 (2020) (mem.); *Vision-Park Props., LLC v. Seaside Eng'g & Surveying, LLC*, 577 U.S. 823 (2015) (mem.); *National Heritage Found., Inc. v. Highbourne Found.*, 574 U.S. 1076 (2015) (mem.); *Ad Hoc Comm. of Kenton Cnty.*

Bondholders v. Delta Air Lines, Inc., 558 U.S. 1007 (2009) (mem.); *Morley v. Ontos, Inc.*, 552 U.S. 823 (2007) (mem.); *Class Five Nev. Claimants v. Dow Corning Corp.*, 537 U.S. 816 (2002) (mem.); *Lowenschuss v. Resorts Int'l, Inc.*, 517 U.S. 1243 (1996) (mem.). The Trustee's contention (at 16-17) that this issue "arises with some regularity" yet "is rarely presented cleanly for this Court's review" is both internally inconsistent and untrue. The papers in these cases do not reveal any obvious "factual complications" that have interfered with this Court's review, and "complications like equitable mootness" were invoked just once. Stay Appl. 17. The more natural inference is that the Court denied certiorari in these cases because it—correctly—determined that certiorari was not warranted.

The Trustee's position here rings hollow, too, because of the government's litigating positions in other cases. In at least one other recent bankruptcy case, the United States urged the very opposite of what the Trustee claims here—that a third-party release should be approved. *See* Br. of the United States 23-27, *California Dep't of Toxic Substances Control v. Exide Holdings, Inc. (In re Exide Holdings, Inc.)*, No. 20-11157-CSS, 2021 WL 3145612 (D. Del. July 26, 2021) ("U.S. *Exide* Brief"), ECF No. 59.[9] And there have been numerous times when the U.S. Trustee did not appeal third-party releases, including in a different opioid-related bankruptcy. *See In re Mallinckrodt PLC*, 639 B.R. 837, 866-75 (Bankr. D. Del. 2022). The government's

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[9] In fact, in the *Exide* bankruptcy case, the United States not only defended a third-party release, it opposed a stay pending appeal—arguing that a stay would be value-destructive to creditors and increase the risk that the debtors would liquidate. *See Exide* Opp. of the United States to Mot. to Stay 11-16, ECF No. 14.

inconsistent position in prior bankruptcy cases belies the notion that there is an urgent need for this Court to review the question presented.

Finally, the Trustee's assertion (at 16-17) that the Court must act now—in this case—lest the lower courts run wild with third-party releases is nonsense. Numerous cases, including ones cited by the Trustee himself (*id.*), show that the courts of appeals, district courts, and bankruptcy courts take their obligation to scrutinize third-party releases seriously. *See, e.g.*, *National Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 347-52 (4th Cir. 2014), *cert. denied*, 574 U.S. 1076 (2015); *In re Lower Bucks Hosp.*, 571 F. App'x 139, 144 (3d Cir. 2014); *Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 688-91 (E.D. Va. 2022); *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 727-30 (Bankr. S.D.N.Y. 2019). If the question presented is only "rarely" presented to this Court, Stay Appl. 17, it is because the lower courts approve third-party releases only in rare circumstances.

Nor is there any risk that third-party releases will proliferate in the Second Circuit. The decision below heightened the requirements for approving third-party releases—not only through its stringent seven-factor test, but also through its game-changing *Stern* ruling that requires plenary review by *two* federal courts before a third-party release may go into effect. App. 41a-43a, 70a-77a; *see* Edward Neiger & Jennifer Christian, *Despite Its Plan Objections, UST Also Won in Purdue Ch. 11*, Law360 (June 12, 2023), https://www.law360.com/articles/1687439/despite-its-plan-objections-ust-also-won-in-purdue-ch-11 ("Going forward, nonconsensual third-party releases will only be approved in extremely rare circumstances and there is no room

for abuse. . . . [I]t will be nearly impossible for debtors to justify nonconsensual third-party releases, even in the most complex of mass tort cases.”).

Accordingly, there is by no means a “reasonable probability” that this Court will grant certiorari. *Conkright*, 556 U.S. at 1402 (citation omitted).

II. THERE IS NO FAIR PROSPECT OF REVERSAL

Nor is there a “fair prospect that a majority of the Court will conclude that the decision below was erroneous.” *Id.* (citation omitted). The Second Circuit, in the most comprehensive opinion to date on the subject, correctly held that the Bankruptcy Code allows third-party releases in extraordinary circumstances. *See* App. 52a-64a. In challenging that decision, the Trustee largely just erects a strawman, suggesting that the Second Circuit based its decision on “statutory silence.” Stay Appl. 23 (citation omitted). Not so. As the Second Circuit carefully explained, § 105(a) allows bankruptcy courts to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title,” and § 1123(b)(6) allows a reorganization plan to “include any other appropriate provision not inconsistent with the applicable provisions of this title.” *See* App. 53a-55a.[10] As this Court has already held, these broadly worded provisions expressly confer “residual authority” to craft plans that enable successful and value-maximizing reorganizations. *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990). The approval of third-party releases in the sort of rare and limited circumstances recognized by the court below falls comfortably

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[10] References to the bankruptcy courts include the district courts. The Bankruptcy Code confers authority on the district courts, which have, in essence, delegated that authority to the bankruptcy courts. *See* 28 U.S.C. § 157.

within that authority. Indeed, *Energy Resources* involved a de facto third-party release. And, contrary to what the Trustee contends (at 18-22), third-party releases are not inconsistent with any other provision of the Code. If faced with the question presented by the Trustee, the Court would affirm.

A. The Bankruptcy Code Expressly Authorizes Third-Party Releases In Exceptional Circumstances

1. Through the Bankruptcy Reform Act of 1978, Congress conferred broad statutory power and jurisdiction on bankruptcy courts to "deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (citation omitted). This grant was a "distinct departure from the jurisdiction conferred under previous Acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction." *Id.* The Bankruptcy Code confers "jurisdiction over more than simple proceedings involving the property of the debtor or the estate," and "extend[s] more broadly in [reorganizations under Chapter 11] than in [Chapter 7 liquidations]." *Id.* at 308, 310; *cf. id.* at 311 (noting with approval the Second Circuit's endorsement of third-party releases in *Johns-Manville* and the Fourth Circuit's affirmance of third-party releases in *A.H. Robins*). This statutory authority is critical to addressing what Congress well understood were the extraordinarily complex issues that can arise in the context of a reorganization under Chapter 11.

Against this backdrop, the text of the Code provides a broad grant of affirmative authority to modify debtor-creditor relationships as part of a Chapter 11 plan of reorganization. Congress recognized the futility of trying to anticipate all of

the complicated issues that might require treatment in a given Chapter 11 plan. So, to support its grant of specific bankruptcy powers, Congress enacted several provisions giving bankruptcy courts the flexibility to accommodate case-specific needs in plans. Most relevant here are §§ 105(a) and 1123(b)(6). These provisions use exceedingly capacious language: Bankruptcy courts may "issue *any* order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," and may include in a reorganization plan "*any* other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. §§ 105(a), 1123(b)(6) (emphases added). This language—and the use of "any" in particular—demonstrates that Congress explicitly granted bankruptcy courts the broad powers and discretion necessary to meet the challenges presented by each individual case. *See, e.g.*, *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 221 (2008) ("Congress could not have chosen a more all-encompassing phrase than 'any other law enforcement officer' to express [its] intent."); *United States v. Monsanto*, 491 U.S. 600, 609 (1989) (statutory phrase "any property" was "broad," "unambiguous," and "comprehensive").

2. As this Court long ago recognized, together, these provisions expressly grant bankruptcy courts what this Court has called a well of "residual authority." *Energy Resources*, 495 U.S. at 549. The Trustee makes only passing reference to *Energy Resources* (at 22), but, in fact, the decision speaks directly to the question of the authority for third-party releases. At issue in *Energy Resources* were bankruptcy court orders directing the IRS to apply debtor tax payments first to "trust fund" taxes rather than other taxes. *Id.* at 547. These orders had important consequences for

the fisc because the IRS can collect trust fund taxes, but not other taxes, "directly from the officers or employees of the employer who are responsible for collecting the tax." *Id.* By ordering the IRS to apply tax payments in this way, the bankruptcy court orders effectively reduced the liability of the debtors' officers and employees to the IRS and potentially the amount of non-trust fund taxes the IRS could collect. *See id.* at 547-48, 550-51. In fact, these orders were the result of settlements with former officers, who agreed to pay into the bankruptcy plans in exchange for agreements with the debtors that would "forestall personal liability assessed by the IRS." *In re Energy Res. Co.*, 59 B.R. 702, 704 (Bankr. D. Mass. 1986) (affirmed by this Court in *Energy Resources*); *see also In re Newport Offshore, Ltd.*, 75 B.R. 919, 923 (Bankr. D.R.I. 1987) (same). The orders were, in essence, releases of third-party liability.

This Court confirmed that the bankruptcy courts had the authority to issue these orders. The Court recognized that "[t]he Bankruptcy Code does not explicitly authorize the bankruptcy courts to approve reorganization plans designating tax payments as either trust fund or nontrust fund." *Energy Res.*, 495 U.S. at 549. But it went on to determine that § 105(a) and former § 1123(b)(5) (now § 1123(b)(6)) provide "residual authority" to enter orders not specifically mentioned by the Code, "consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *Id.* Thus, because the bankruptcy courts "ha[d] not transgressed any limitation on their broad power" in ordering the IRS to apply the debtors' tax payments in a manner that

essentially released the debtors' officers and employees, their orders were "wholly consistent with [their] authority under the Bankruptcy Code." *Id.* at 551.

Both the result and the reasoning of *Energy Resources* apply fully to third-party releases—and, because *Energy Resources* interprets the Code, it is entitled to "enhanced" *stare decisis* effect. *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015); *see also, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014). As to the result, *Energy Resources* notably involved a species of third-party release: The bankruptcy courts—with this Court's approval—effectively released the debtors' officers and employees from particular tax claims the government otherwise would have had against them. *See Energy Res.*, 495 U.S. at 547-48, 550-51; Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 Emory Bankr. Dev. J. 13, 105, 114-16 (2006). More importantly, the Court gave §§ 105(a) and 1123(b)(6) their natural meaning and affirmed that, by enacting broad provisions, Congress granted bankruptcy courts concomitantly broad power, constrained only by the specific limitations in the Code. Third-party releases are well within this broad power, at least under the exceptional circumstances authorized by the Second Circuit.

The Trustee argues that the authority recognized in *Energy Resources* is limited to the modification of "creditor-debtor relationships." Stay Appl. 22 (emphasis omitted) (quoting *Energy Res.*, 495 U.S. at 549). That argument fails. *First*, in a case like this one, third-party releases bear *directly* on such relationships. As the bankruptcy court found, there is no way to disentangle Purdue-related claims

against the Sacklers from claims against the Debtors given the substantial overlap between them in the years before the bankruptcy and the Sacklers' assertion of indemnification rights against the Debtors. A claim against the Sacklers for Purdue-related conduct will inevitably lead right back to a claim against the Debtors. *See* App. 50a-51a, 70a-72a. Resolving the overlapping claims against the Sacklers is the only possible way to resolve the claims of the same creditors against the Debtors. Indeed, the bankruptcy court tailored the plan specifically to release only claims of this kind—claims that are held by *Purdue's creditors* and for which *Purdue's conduct* or a claim asserted against Purdue was a "legal cause or . . . otherwise a legally relevant factor"—as well as claims (including indemnification claims) between the Debtors and the Sacklers. Debtor App. 382a; *see id.* at 381a-84a; *see also* App. 72a ("The bankruptcy court limited the Releases extensively . . . to ensure that the released claims related to the Debtors' conduct and the Estate."). Approving these narrowed releases thus is at the very heart of bankruptcy courts' recognized power to "modify creditor-debtor relationships." *Energy Res.*, 495 U.S. at 549.

Second, the object of a Chapter 11 case is to "modify creditor-debtor relationships" through a confirmed plan. *Id.* And, as here, third-party releases unlock the only path for a debtor to emerge from Chapter 11. As the bankruptcy court and the Second Circuit stressed, the releases in the Debtors' plan are "essential to reorganization." App. 72a. "[T]he most likely result if the settlements with the shareholder released parties [a]re not approved" is "liquidation." Debtor App. 232a. And the plan itself would "fall apart." *Id.* at 215a. The end result would be that "the

government would recover its $2 billion [criminal forfeiture judgment] first, thereby depleting the *res* completely"—and leaving every other claimant with "an uphill battle of litigation (in which a single claimant might disproportionately recover) without fair distribution." App. 73a. It is precisely for these reasons that creditors view the plan as *their* plan and "voted overwhelmingly to approve [it]." *Id.* at 76a; *see* CA2 Official Comm. Reply Br. 9. Without the releases, there would be no plan for the bankruptcy court to approve.

Other enumerated provisions of the Code underscore that the third-party releases are both "appropriate" and "not inconsistent" with the Code. 11 U.S.C. § 1123(b)(6). Section 1123(b)(3)(A), for example, allows a plan to "provide for . . . the settlement or adjustment of any claim or interest belonging to the debtor or to the estate," and § 1123(a)(5) requires a plan to "provide adequate means for [its] implementation." These provisions fit hand-in-glove with third-party releases in cases like this one: The releases are part of—and, as the bankruptcy court found, are necessary to—a settlement of claims against the Sacklers belonging to the Debtors, and they are critical to implementation of the plan. *See* App. 71a-73a. Where, as here, a bankruptcy court finds, among other things, that it would be impossible for the debtor to effectuate a settlement of the debtor's claims against third parties without channeling creditors' interrelated claims against the same third parties, § 1123(b)(6) grants the authority to do just that.

3. The Trustee's primary counterargument is that third-party releases are not authorized by the Code because Congress has been "silen[t]" on them. Stay

Appl. 23 (citation omitted). But the Trustee is confusing *breadth* with *silence,* two entirely different things. Congress has granted broad authority to bankruptcy courts to fashion case-specific relief; it did not need to include a specific provision authorizing third-party releases that are "appropriate" to the needs of the case. 11 U.S.C. § 1123(b)(6); *see Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020) (rejecting "any such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception"). If accepted, the Trustee's argument would functionally overrule *Energy Resources*. There is, of course, no Bankruptcy Code provision explicitly authorizing bankruptcy courts to tell the IRS how it must apply debtors' tax payments. *See Energy Res.*, 495 U.S. at 550-51. This Court nonetheless affirmed that the broad authority conferred by §§ 105(a) and 1123(b)(6) gave the bankruptcy courts the ability to order that relief in "appropriate" cases.

To the extent the Trustee suggests that some sort of clear statement from Congress was required, he errs in two ways: *first*, because third-party releases do not work any "major departure" from the Code or compromise constitutional rights, as discussed *infra* at 50-58; and *second*, because the breadth of bankruptcy courts' statutory power satisfies a clear-statement rule. Stay Appl. 23-24 (citation omitted); *see, e.g.*, *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211-12 (1998) (breadth of the Americans with Disabilities Act showed that it applied to State prisons despite rule requiring clear statement to alter the balance between States and the federal

government). No wonder that most courts of appeals have found that third-party releases are authorized by the Bankruptcy Code. *See supra* at 23-24.[11]

B. The Trustee's Attempts To Sow Doubt About The Merits Fail

Like his broad-brush attempt to paint a circuit conflict, the Trustee's merits arguments collapse under scrutiny. When used appropriately, as here, third-party releases do not conflict with any other Bankruptcy Code provision, do not implicate constitutional concerns, and do not abuse the bankruptcy process. On the contrary, third-party releases are—and have been used by courts for decades as—critical tools to promote the fair and efficient resolution of the most complex and difficult bankruptcies in the country. And while the Trustee aggressively challenges third-party releases here, the government has vigorously *defended* third-party releases in other cases, including in a reorganization plan that incorporated third-party releases over the objection of a State. *See* U.S. *Exide* Br. 23-27.

1. Third-Party Releases Are Not Inconsistent With Any Provision Of The Bankruptcy Code

The Trustee claims (at 18-20) that third-party releases are inconsistent with the "focus" or "structure" of the Bankruptcy Code. As shown above, that is wrong:

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[11] The Trustee appears to suggest (at 22) that the Second Circuit's decision implicates the "major questions" doctrine, describing the authority at issue as "a vast power" that "dwarfs the powers specifically given courts under the Code." But of course, the question presented does not involve the delegation of legislative power to an agency; it involves the *federal courts'* exercise of *judicial* power over debtors and creditors. Moreover, the authority at issue is hardly "vast"—as discussed, it is qualified by seven different factors that sharply limit the circumstances in which any release may be approved. App. 66a-69a (listing factors). In any event, as explained, the text of the Bankruptcy Code grants the authority at issue.

third-party releases are not only consistent with the Code and its structure, but *expressly authorized by* the Code in appropriate circumstances. *See supra* at 43-50. But, in any event, the Trustee frames his argument at the wrong level of abstraction. Section 1123(b)(6) allows plans to include terms that are "appropriate" and "not inconsistent with the *applicable provisions of this title*." And, try as he might, the Trustee cannot identify a single *provision* of Title 11 of the U.S. Code (the Bankruptcy Code) that actually conflicts with, or forbids, third-party releases.

a. *Section 524(e).* The Trustee first turns (at 19-20) to § 524(e), which states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." But this provision is plainly inapplicable for at least two different reasons. *First*, a third-party release is not the same as a "discharge." As the Second Circuit observed, "the releases at issue on appeal do not constitute a discharge of debt for the Sacklers because the releases neither offer umbrella protection against liability nor extinguish all claims." App. 48a. And, *second*, § 524(e) merely makes clear that a discharge does not *automatically* affect the liability of non-debtors who may also have an obligation to pay the *same debt*. That is, it "does not purport to limit the bankruptcy court's powers to release a non-debtor from a creditor's claims." *Airadigm*, 519 F.3d at 656; *see, e.g.*, *Seaside Eng'g*, 780 F.3d at 1078; *LTV Corp. v. Aetna Cas. & Sur. Co. (In re Chateaugay Corp.)*, 167 B.R. 776, 780 (S.D.N.Y. 1994); *see also Airadigm*, 519 F.3d at 656 (discussing § 524(e) in the context of its statutory history).

b. *Section 524(g).* The Trustee next resorts to a negative inference he draws from § 524(g), alleging (at 19-20) that by setting out a tailored approach to third-party releases in the asbestos context, § 524(g) displaces their use in other contexts. Negative inferences are generally shaky as a matter of statutory interpretation. But that is particularly true here, because Congress specifically forbade the inference that the Trustee asks the Court to draw.

Section 524(g) was enacted as part of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (the "Reform Act"). At the time, courts had begun using their powers under the Code to authorize third-party releases in exceptional asbestos *and* non-asbestos cases. *See, e.g.*, *Johns-Manville*, 837 F.2d at 92-94 (asbestos); *A.H. Robins*, 880 F.2d at 700-02 (Dalkon Shield). The timing is notable in that the Court had recently issued its decision in *Energy Resources* recognizing bankruptcy courts' power under §§ 105(a) and 1123(b)(6) to approve provisions, like third-party releases, that facilitate successful reorganization plans. *See supra* at 44-46.

Against that backdrop, Congress established a relatively complex framework for the unique area of asbestos bankruptcies, including provisions for third-party releases. But the Reform Act did not use the limiting language found elsewhere in the Bankruptcy Code to mandate compliance with § 524(g) to obtain a third-party release. *Cf., e.g.*, 11 U.S.C. § 1129(a) (a plan may be approved "only if" certain

requirements are met).[12] And, more importantly, § 111(b) of the Act provided a "rule of construction" for "subsection (a)," the provision that enacted § 524(g):

> Nothing in subsection (a), or in the amendments made by subsection (a), shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization.

Reform Act § 111(b), 108 Stat. at 4117 (codified at 11 U.S.C. § 524 note). That is, Congress not only declined to cut back on bankruptcy courts' in-use power to authorize third-party releases outside of the asbestos context, but it explicitly forbade the inference the Trustee draws here.

This is something the Trustee might have mentioned. This provision is, after all, part of the very statute enacted by Congress itself, not a passing slice of legislative history. For those who consider legislative history, however, that history sheds additional light on Congress's thinking. The House Judiciary Committee's report "make[s] clear that the special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan of reorganization." 140 Cong. Rec. 27692 (Oct. 4, 1994). Congress was aware that "other debtors in other

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[12] The Trustee notes (at 20) that § 524(g)(4)(A)(ii) states that third-party releases are allowed "[n]otwithstanding the provisions of section 524(e)." But this "notwithstanding" clause does not mean that § 524(e) conflicts with third-party releases, as the Trustee appears to believe. Rather, such a "'notwithstanding' clause . . . just shows which of two or more provisions prevails *in the event of a conflict*." *NLRB v. SW General, Inc.*, 580 U.S. 288, 302 (2017) (emphasis added). Even when Congress uses the word "notwithstanding," "[t]here may be nothing to the contrary anywhere in the document." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 127 (2012).

industries [were] reportedly beginning to experiment with similar mechanisms," *id.*, and declined to draft § 524(g) in a way that would preclude that experimentation—an intent that Congress carried into law in § 111(b) of the Reform Act.

c. *Section 523(a).* The Trustee finally rests (at 20-21) on § 523(a), which states that "[a] discharge . . . does not discharge an individual debtor" from certain kinds of debts. He focuses in particular on fraud and other claims mentioned in § 523(a)(2), (4), and (6). But, as discussed above, a third-party release is not the same as a discharge. The releases in the Debtors' plan, for example, "do not constitute a discharge of debt for the Sacklers because the releases neither offer umbrella protection against liability nor extinguish all claims." App. 48a. Moreover, contrary to what the Trustee says (at 21), § 523(a)(2), (4), and (6) do not "forbid[] the discharge" of anything. By statute, claims under § 523(a)(2), (4), and (6) are automatically extinguished unless a claimant takes affirmative steps to preserve them. *See* 11 U.S.C. § 523(c)(1); *In re Edwards*, 50 B.R. 933, 937 n.3 (Bankr. S.D.N.Y. 1985). There is a reason the Trustee cites no decision finding § 523(a) relevant to this question.

d. *This Court's decisions.* The Trustee's failure to identify any provision of the Code with which third-party releases conflict fundamentally distinguishes this case from *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017), *Law v. Siegel*, 571 U.S. 415 (2014), and *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012), on which the Trustee relies (at 23).

In *Czyzewski*, the bankruptcy court "neither liquidated the debtor under Chapter 7 nor confirmed a Chapter 11 plan." 580 U.S. at 457. Instead, the

bankruptcy court "ordered a structured dismissal" of the case, ordering estate assets to be distributed to creditors by attaching conditions to the dismissal. *Id.* But in doing so, the bankruptcy court "failed to follow [the Code's] ordinary priority rules." *Id.* at 461. This Court held that the bankruptcy court could not authorize "priority-violating final distributions that the Code prohibits in Chapter 7 liquidations and Chapter 11 plans" due to case-specific circumstances. *Id.* at 465.

Law is similar. There, the Code "entitled [the debtor] to exempt $75,000 of equity in his home from the bankruptcy estate" and "made that $75,000 'not liable for payment of any administrative expense.'" *Law*, 571 U.S. at 422 (quoting 11 U.S.C. § 522(k)). Despite this clear provision, the bankruptcy court "granted [the bankruptcy trustee's] motion to 'surcharge' the entirety of [the debtor's] $75,000 homestead exemption, making those funds available to defray [the trustee's] attorney's fees" as a sanction for the debtor's conduct. *Id.* at 420. This Court held that the bankruptcy court could not grant this relief: "[W]hatever other sanctions a bankruptcy court may impose on a dishonest debtor, it may not contravene express provisions of the Bankruptcy Code by ordering that the debtor's exempt property be used to pay debts and expenses for which that property is not liable under the Code." *Id.* at 427-28.

In both *Czyzewski* and *Law*, bankruptcy courts were forbidden from exercising their powers to issue orders that *violated* another "specific" and "express" Code provision. *E.g.*, *Law*, 571 U.S. at 421-22. That is not what occurred here. When used in extraordinary cases like this one, third-party releases do not violate any express

Code provision, as shown above. On the contrary, both § 105(a) and § 1123(b)(6) expressly envision such "appropriate" relief.[13]

RadLAX is even farther afield. There, the Court did not specifically address the bankruptcy court's powers under §§ 105(a) and 1123(b)(6). And ultimately, the Court determined *RadLAX* was an "easy case," 566 U.S. at 649, because the bankruptcy court had correctly *denied* proposed auction procedures for not allowing creditors to "credit-bid"—a deficiency that precluded the proposed auction procedures from "satisfy[ing] the requirements of clause (ii)" of § 1129(b)(2)(A), *id.* at 644. Of course, a bankruptcy court's powers under §§ 105(a) and 1123(b)(6) are discretionary, and if particular relief actually or arguably conflicts with another statute, a bankruptcy court is justified in denying that relief. But where a bankruptcy court authorizes particular relief under §§ 105(a) and 1123(b)(6), like the third-party releases in this extraordinary case, one must demonstrate a clear conflict with a Code provision. This the Trustee has utterly failed to do.

2. There Is No Constitutional Problem To Avoid

The Trustee also argues (at 24) that Congress must provide "clear authorization" for third-party releases because of "serious constitutional questions."

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[13] In *Czyzewski*, the Court also distinguished court orders that arguably departed from the "ordinary priority rules"—such as "'first-day' wage orders" and "'critical vendor' orders"—as serving "significant Code-related objectives." 580 U.S. at 467-68. Courts issuing those orders "usually found that the distributions at issue would 'enable a successful reorganization and make even the disfavored creditors better off.'" *Id.* at 468 (citation omitted). This is an a fortiori case. The third-party releases undoubtedly enable a successful reorganization, make all creditors better off, *and* present no actual or arguable conflict with the Code.

But it is not clear that even the Trustee takes these questions seriously. For starters, as the Trustee notes (at 19-20), Congress passed a statute—§ 524(g)—expressly delineating how third-party releases work in the asbestos context. If the Trustee truly believed that third-party releases were unconstitutional, he would be arguing that § 524(g) is constitutionally invalid—not invoking it in his favor. Tellingly, that is not his position. Nor has the Solicitor General, which represents the Trustee, advised Congress that the Office of the Solicitor General has reached the conclusion that § 524(g) is unconstitutional. *See* 28 U.S.C. § 530D(a)(1). It isn't.

The Trustee also fails to back up his "serious constitutional questions" with any serious constitutional analysis. Due process in this context requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" and an "opportunity to present . . . objections." *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *see, e.g.*, *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) ("[W]here a special remedial scheme exists . . . , as for example *in bankruptcy* or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process." (emphasis added)). As the Second Circuit recognized, claimants were given both: "[N]otice of the confirmation hearing was widespread through a variety of media and . . . direct notice was provided to any creditors of the Debtors (potential claimants here). . . . Moreover,

the bankruptcy court gave process—*i.e.*, meaningful opportunity to be heard—at the confirmation hearing, which lasted for six days." App. 79a-80a.[14]

To the extent the Trustee analogizes to class actions and suggests (at 25) that due process required the plan to allow claimants to "remove [themselves] from the class," he evidently forgets that this is a bankruptcy case. Stay Appl. 25 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). The Bankruptcy Clause is an independent source of constitutional authority, and other constitutional provisions like the Due Process Clause must be read with it in mind. U.S. Const. art. I, § 8, cl. 4; *cf., e.g.*, *Central Va. Comm. Coll. v. Katz*, 546 U.S. 356, 370-78 (2006); *Katchen v. Landy*, 382 U.S. 323, 336-38 (1966). Bankruptcy would not work if claimants always retained the ability to opt out. Indeed, a reorganization plan can even be "crammed down" on nonconsenting creditors. *See, e.g.*, *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 North LaSalle St. P'ship*, 526 U.S. 434, 441-42 (1999).

The Trustee's argument about the jury trial right, framed in statutory rather than constitutional terms, fares no better. *See* Stay Appl. 21-22 (citing 28 U.S.C. § 1411). The Trustee failed to raise this argument during the last four years of litigation, and so has forfeited it here. *See, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989). In any event, this argument again proves too much.

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[14] As the bankruptcy court found, the Debtors' notice of the bar date "reached roughly 98 percent of the adult population of the United States," "approximately 86 percent of Canadian adults," and dozens of other countries "throughout the world where the Debtors' products might have caused harm." Debtor App. 147a. Notice of the confirmation hearing "reached an estimated 87 percent of all U.S. adults," "an estimated 82 percent of all Canadian adults," and dozens of other countries. *Id.*

Section 524(g), for example, also allows third-party releases without jury trials, yet the Trustee sees no problem with that—because there is no problem. In bankruptcy, there is no absolute right to a jury trial. *See Langenkamp v. Culp*, 498 U.S. 42, 45 (1990) (per curiam). And 28 U.S.C. § 1411, the "notoriously ambiguous" statute upon which the Trustee relies, *Granfinanciera*, 492 U.S. at 40 n.3, confers no such right. It is a "strictly procedural" *venue* provision that "come[s] into play only when a right to trial is established," and does nothing more than assign jury trials on personal injury or wrongful death tort claims to district courts rather than bankruptcy courts. *In re Dow Corning Corp.*, 215 B.R. 346, 360 (Bankr. E.D. Mich. 1997); *see In re Clay*, 35 F.3d 190, 197 (5th Cir. 1994). It does not speak to—or eliminate—the substantive power granted by §§ 105(a) and 1123(b)(6) to approve third-party releases in extraordinary cases. This twelfth-hour argument thus fails too.

3. The Trustee's Policy Argument Fails

Finally, the Trustee's attempt (*e.g.*, at 3) to paint the third-party releases here and in other cases as "an abuse of the bankruptcy system" is another strawman. There is no evidence of the sort of rampant abuse about which the Trustee speculates. For several decades, courts have occasionally approved and often rejected third-party releases. The Trustee's hyperbolic concern about bankruptcy courts freeing people from jail and relieving them of criminal liability if they pay enough into a reorganization plan, *see, e.g.*, Stay Appl. 22, 29, has no basis in reality. In the *one* case the Trustee cites (at 29, but, tellingly, without a pincite), the bankruptcy court carefully reviewed and tailored the third-party releases. *See In re Voyager Digital Holdings, Inc.*, 649 B.R. 111, 130-31 (Bankr. S.D.N.Y. 2023), *appeal pending*,

No. 1:23-cv-02171-JHR (S.D.N.Y. filed Mar. 14, 2023). The *Voyager* court also castigated the Trustee and the government for their "unreasonable," "wrong," and "absurd" position on a proposed exculpation clause: They wanted to reserve the right to civilly and criminally prosecute officers of the debtor, a cryptocurrency company, for taking steps to implement the court-approved reorganization plan—even though the available "evidence" showed that the steps were "perfectly legal" and the Trustee and the government refused the court's request to take a position on whether any step was actually unlawful. *Id.* at 134-35, 137. And the bankruptcy court's order did narrow the plan's exculpation clause to make clear that it did not "by any means prevent[] the enforcement of any law or regulation." *Id.* at 138.

Moreover, the rigorous and exacting seven-factor test outlined by the Second Circuit is expressly "informed by th[e] risk" of the "'potential for abuse' posed by" third-party releases. App. 65a. Preventing any such abuse is thus baked into the requirements for approving third-party releases in the Second Circuit. In fact, the Second Circuit's test directly addresses the key concern evidently animating the Trustee—that wealthy individuals will use the Second Circuit's opinion "as a blueprint for . . . obtain[ing] third-party releases in the face of a tsunami of litigation." *Id.* at 73a. The court of appeals recognized, among other things, that this concern was not implicated here because the indemnity agreements between the Sacklers and the Debtors "were entered into by the end of 2004—well before the contemplation of bankruptcy"—and not "'in contemplation of bankruptcy.'" *Id.* (quoting *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 240 (2010)). And multiple

components of the Second Circuit's test also guard against the Trustee's concern (at 3) that "bargaining power" would be "redistribut[ed] . . . to tortfeasors"—*e.g.*, by requiring "overwhelming" support of each class of creditors subject to a release and a "fair resolution of the enjoined claims." *Id.* at 68a-69a.

In addition to the protections against abuse the seven demanding Second Circuit factors provide, any release also must be viewed "against a backdrop of equity." *Id.* at 69a. Equity is flexible and considers all the circumstances, including the conduct of the parties and the public interest. *See, e.g.*, *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001); *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). Under the Second Circuit's decision, moreover, third-party releases cannot become final until they have undergone plenary review by an Article III district court, providing a mandatory and constitutionally tested check on the approval of any such releases. *See* App. 41a-43a.

The Trustee's attack on third-party releases is also deeply unfair to bankruptcy practice and at odds with real-world experience—which shows that courts guard against the possibility of abuse in the bankruptcy system. Courts routinely scrutinize—and reject—measures proposed by parties. *See, e.g.*, *LTL Management, LLC v. Those Parties Listed on Appendix A to Complaint (In re LTL Management, LLC)*, 64 F.4th 84, 93 (3d Cir. 2023) (dismissing Chapter 11 cases filed to resolve mass tort liability related to Johnson & Johnson's products containing talcum powder because the company was not actually in financial distress); *In re Aearo Techs. LLC*, No. 22-02890-JJG-11, 2023 WL 3938436, at *22 (Bankr. S.D. Ind. June 9, 2023)

(similarly dismissing Chapter 11 cases filed to manage mass tort liability arising from 3M's manufacture and sale of hearing protection devices). Contrary to what the Trustee implies (at 16-17), courts do not just rubber-stamp every third-party release put in front of them. In fact, courts frequently reject third-party releases. *See, e.g.*, *National Heritage Found.*, 760 F.3d at 351; *Dow Corning*, 280 F.3d at 658. And there is every reason to believe that, under the Second Circuit's well-reasoned decision, third-party releases will be even more heavily scrutinized.

In short, the Trustee's policy objections to third-party releases are no more convincing than his unfounded legal objections.

III. THE TRUSTEE HAS NOT SHOWN IRREPARABLE HARM, AND THE EQUITIES STRONGLY DISFAVOR A STAY

The equities weigh decisively against a stay—which is enough to deny a stay, even if there were a cert-worthy question and fair prospect of reversal (there isn't). *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) ("An applicant's likelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay."); *Whalen v. Roe*, 423 U.S. 1313, 1317-18 (1975) (Marshall, J., in chambers) (same). The Trustee will suffer *no* harm, let alone an irreparable harm, if a stay is denied. And here, the balance of equities tips decidedly against the Trustee, who seeks to block a plan that is uniformly supported by every represented party in the United States and provides billions of dollars of lifesaving benefits to opioid victims, State, local, and tribal governments, and the public at large.

A. The Trustee Cannot Demonstrate Irreparable Harm

The Trustee claims to face irreparable harm because "potential disputes" over the applicability and consequences of the equitable mootness doctrine might interfere with this Court's consideration of the Trustee's petition for certiorari and review of the merits. This cannot suffice for a stay, for several reasons.

First, the Trustee's arguments rest on a false premise. As the Trustee concedes (at 6), there is no immediate risk that the plan will be substantially consummated. The earliest the plan could be substantially consummated is January 2024. The Debtors must seek entry of a confirmation order from the district court. Even if the district court acts without referring anything to the bankruptcy court, it cannot enter a final order confirming the plan until, at best, September. *See* Fed. R. Bankr. P. 2002(b) (requiring "not less than 28 days' notice" of confirmation). That order, in turn, would generally be stayed for an additional 14 days. Fed. R. Bankr. P. 3020(e). Accordingly, the Debtors are unlikely to obtain unstayed orders confirming the amended plan until late September or October at the earliest.

It will take several months thereafter for the Debtors to substantially consummate the plan. Under the plea agreement with the United States, (1) the sentencing hearing cannot be held until at least 75 days after entry of a confirmation order; and (2) the plan cannot become effective until at least seven days after sentencing. Moreover, many State and federal regulatory processes (such as State licensure for the post-emergence public benefit company) will need to be completed before consummation. Under the most optimistic scenarios, these will not be completed until January 2024 at the earliest. Even if this Court does not treat the

Trustee's stay application as a petition for certiorari, the Court would have ample time to act on a certiorari petition before then.[15]

Second, the alleged harm the Trustee asserts is not personal to him. It is elementary that "[a]n applicant for a stay 'must meet a heavy burden of showing . . . that *the applicant will suffer irreparable injury* if the judgment is not stayed pending his appeal." *Monsanto*, 463 U.S. at 1316 (emphasis added). The Trustee's only interest in this case is in seeing his view of the law vindicated; he has no interest in the plan or the third-party releases. This kind of generalized grievance is not a cognizable injury, *see supra* at 32-37, and is clearly not an irreparable one. And although the Trustee purports to care about potential harm to individual tort victims, he assuredly does not speak for them—and there is no serious dispute that these claimants have been zealously represented by their *own* counsel, overwhelmingly *support* the plan, and have opposed the Trustee at every turn. There is no basis to grant a stay on the Trustee's own view that the governmental and private victims and their representatives do not know what is best for themselves.

Third, the Trustee's desire (at 26) to avoid "questions about the validity and applicability of [the equitable mootness] doctrine" is no harm at all. As the Trustee himself concedes, this Court has not yet considered the propriety of the equitable mootness doctrine, and there is nothing to stop the Trustee from challenging its

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[15] The Trustee repeatedly complains (at 5-6) that the absence of a stay would result in the "piecemeal" implementation of the plan. But the steps necessary for consummation can only occur one after another—*i.e.*, *piecemeal*. There is no magic switch that the Debtors can flip to instantaneously achieve substantial consummation.

validity and applicability in this case. In fact, he has indicated (at 26) that he would do so. The Trustee's attempt to forestall a "vehicle" issue for his petition falls woefully short of demonstrating the type of serious irreparable harm that the Court has routinely required before granting a stay. *See, e.g.*, *Conkright*, 556 U.S. at 1402 ("[R]elief is granted only in 'extraordinary cases.'" (citation omitted)). The Trustee does not cite a single authority even remotely suggesting otherwise.

Fourth, it is not clear that equitable mootness would be a "vehicle" problem, even if it did arise. Equitable mootness is not constitutional mootness—and is "not jurisdictional." *E.g.*, *Alberta Energy Partners v. Blast Energy Servs., Inc. (In re Blast Energy Servs., Inc.)*, 593 F.3d 418, 424 (5th Cir. 2010). The Court thus would not be *required* to address equitable mootness in any event. It could decide the merits without saying anything about equitable mootness, or it could decide the merits and also find the case equitably moot. *See, e.g.*, *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143-45 (2d Cir. 2005) (holding that there were insufficient findings to support a third-party release but finding the appeal equitably moot). So equitable mootness would not necessarily be an obstacle to the Trustee's pursuit of his abstract interest in a legal ruling from the Court.

Finally, as the Trustee himself admits (at 16), the question he presents "arises with some regularity." There have been—and will be—other opportunities for this Court to address the validity of third-party releases, cases in which the delay in consummating the plan as a result of this Court's review may be measured in dollars

instead of lives or grave harms to victims awaiting relief. And, as explained, the issue would benefit from further percolation in any event. *See supra* at 29-32.

The absence of irreparable harm—indeed, of *any* harm whatsoever—is fatal.

B. The Balance Of Equities Strongly Weighs Against A Stay

Even if exposing the Trustee to a hypothetical risk of potential mootness at some point many months in the future could qualify as a cognizable harm at all—and it cannot—imposing a stay would compound the vastly greater harms that victims have already suffered and will continue to suffer, if a stay is entered.

The extensive uncontroverted evidence is that delaying implementation of the Plan will visit tangible and immediate harm on the Debtors, their creditors, and victims. In previously denying a stay, the bankruptcy court found that delaying consummation worked numerous separate categories of harm on victims—which have been exacerbated by the nearly two-year delay caused by the Trustee's appeals.

First, continued delays have eroded the value of the Sackler settlement payments by hundreds of millions of lifesaving dollars. Evidence that the bankruptcy court credited showed that a two-year delay would erode the value of the settlement payments by approximately $205.6 million. Debtor App. 402a-03a (¶ 26). But that that was a significant underestimate. *Id.* at 448a-49a (¶¶ 19-20). The settlement enhancements authorized in March 2022 increased the settlement value, concomitantly increasing the cost of delay. *Id.* at 449a-50a (¶ 21). Illustratively, an additional one-year delay is currently estimated to cause victims to suffer over $200 million more in net present value losses, plus additional professional fees. *Id.* The Sacklers are the only beneficiaries of further delay, and are hundreds of millions of

dollars wealthier because of it. This is reason alone to deny a stay—every conceivable dollar available under the settlement should be going to victims as soon as possible.

The Trustee has never challenged any of this evidence, and does not do so now. Instead, the Trustee blithely posits (at 30)—without a peppercorn of support in the record—that "Purdue and the Sacklers could compensate for any additional period of this Court's review by agreeing to an accelerated payment schedule." This is untrue and unsupportable. Contrary to the Trustee's assertion (*id.*) the settlement will not have to be renegotiated. Delay of the effective date is specifically addressed in the shareholder settlement, and the settlement pushes out certain payments from the Sacklers while accelerating others. *Id.* at 360a-61a. It does not compensate victims for the delay in not having received the $1.225 billion in Sackler payments that would already have been distributed but for the Trustee's obstructionism. *Id.* at 441a-42a (¶ 10). Nor does it compensate for the delayed distribution of hundreds of millions of dollars from the Debtors. *Id.* at 446a-48a, 451a (¶¶ 18, 22). Nor has the Trustee offered any evidence that the Sacklers will compensate victims and creditors for past or further delay. This argument, in other words, is pure speculation.

Second, delaying the distribution of funds reduces the value of opioid abatement efforts because "as time passes, the problem only gets worse." *Id.* at 421a:5-6. Dollars spent on abatement today will have greater impact on the opioid crisis than dollars spent tomorrow because the crisis continues to grow. *See, e.g.*, *id.* at 345a:18-21. This erosion in the value and efficacy of abatement due to the ongoing growth of the opioid crisis will be compounded by yet further delay—a tragedy.

Third, a stay would impose material risks to Purdue's viability as a valuable ongoing business—a business that is now 100% dedicated to the public good. *Id.* at 455a-57a (¶¶ 29-32). For example, employee attrition has been a serious challenge during the Debtors' 45-plus months in Chapter 11—and will only continue, if not worsen, during the pendency of any stay. *Id.* at 455a-56a (¶ 30).

Fourth, innocent victims bear all of the actual costs of delay. Personal injury creditors bear the brunt of the harm from the delay because those creditors "bargained for a rapid payout, which is reflected not only in their bargaining for a fixed, upfront sum of several hundred million dollars, but also the procedures they've adopted for consistent with due process and the burden of proof a streamlined option to liquidate one's proof of claim." *Id.* at 419a:18-23. The incremental costs and expenses resulting from the delay from December 2021 to the present have been well in excess of prior estimates. *Id.* at 453a (¶¶ 25-26). Additional delay will only worsen this harm. For example, an additional one-year delay will impose an incremental $60 million in costs and expenses on victims (in addition to hundreds of millions of present value losses and all the other risks and costs). *Id.* at 449a, 454a (¶¶ 21, 27).

Any delay also imposes serious, immeasurable, and irreparable non-economic costs. As the bankruptcy court found, "there is almost immeasurable harm in not getting the plan distributions to [personal injury] claimants and to the state and governmental entities for the purpose of abatement, and the other entities, the Indian tribes and the hospitals and the like." *Id.* at 417a:1-5. "[E]very day" of delay in "the process of liquidating personal injury claims and making distributions on them and

making the initial distributions for abatement purposes seriously causes harm to the creditors." *Id.* at 419a:13-17. Indeed, the bankruptcy court found it indisputable that "at some point, a stay can lead to additional deaths if it results in a meaningful delay of funds." *Id.* at 412a:2-3.

In short, the only actual harm is the harm, potentially grievous, that will be inflicted on hundreds of thousands of Americans if a stay is granted.[16]

IV. THE COURT SHOULD TREAT THE STAY APPLICATION AS A PETITION FOR CERTIORARI AND DENY IT

For the foregoing reasons, the Trustee's application for a stay should be denied. But the Trustee also observes (at 7) that, "[i]n light of the benefits of a prompt resolution of this case, the Court may wish to construe this application as a petition for a writ of certiorari presenting the [third-party release question]." The Debtors agree. All parties—and certainly the victims who stand to gain crucially needed relief from the multi-billion dollar settlement effectuated by this plan—would benefit from a prompt decision from this Court on whether to grant certiorari. *See* Stay Appl. 29 ("The government is sensitive to the fact that continuing to litigate . . . could delay the implementation of the reorganization plan, with its concomitant benefits to States, municipalities, and individual opioid victims."). The prompt denial of

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[16] The Trustee's complaint that the steps that could be taken between now and when this Court could act on the certiorari petition in the fall could "potentially be wasteful"—requiring the expenditure of resources—is bitterly ironic. The Trustee's quixotic campaign against the releases has forced the expenditure of significant resources and, worse, delayed the implementation of the plan *by years*. Whatever small expenditures would be required to take these steps pale in comparison to the potential benefits of consummating the plan months earlier than otherwise would be possible if a stay were granted and the petition eventually denied.

certiorari would allow the parties to proceed with the steps necessary to consummate the plan as soon as possible, without awaiting the outcome of further proceedings regarding the validity of the releases. As discussed above, eliminating needless delay would be immensely beneficial to victims and possibly save lives.

The Trustee has himself asked the Court to treat his stay application as a petition for certiorari. And the responses to that application address why certiorari is not warranted. Meantime, deferring a decision on certiorari would undermine the overwhelming public interest in the consummation of the plan as soon as possible. Thousands of governmental entities from across the United States—including States, municipalities, and Native American tribes—have called for the prompt execution of the plan so that the billions of dollars in opioid abatement relief can begin flowing to States and individual victims as soon as possible. There is no basis for this Court to accept the Trustee's misguided attempt to derail or delay that urgently needed relief.

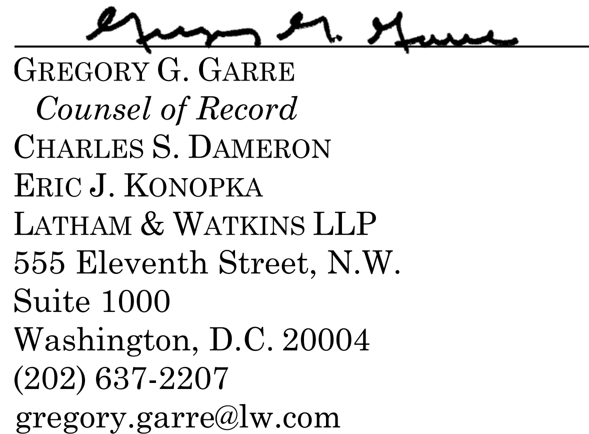
Alternatively, the Court should deny the stay application and set this case for expedited consideration on whether to grant certiorari based on the stay papers, so that the Court may decide that issue as soon as possible. In the context of the three-factor test for evaluating a stay application, this opposition fully articulates the reasons why certiorari should be denied. There is no need to restart the clock, and engage in a full round of duplicative certiorari briefing, on this question. The public interest strongly supports a decision by this Court as soon as possible.

CONCLUSION

The Trustee's stay application should be denied. In addition, the Court should construe the Trustee's application as a petition for a writ of certiorari and deny it.

August 4, 2023

Respectfully submitted,



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DEBTORS' APPENDIX

TABLE OF CONTENTS

Page

Additional Opinions Below

Decision and Order on Appeal, *In re Purdue Pharma, L.P.*, No. 21 cv 7532 (CM) (S.D.N.Y. Dec. 16, 2021), ECF No. 279 .... 1a

Modified Bench Ruling on Request for Confirmation of Eleventh Amended Joint Chapter 11 Plan, *In re Purdue Pharma L.P.*, No. 19-23649 (RDD) (Bankr. S.D.N.Y. Sept. 17, 2021), ECF No. 3786 .... 143a

Other Materials Filed in the United States Bankruptcy Court for the Southern District of New York (Docket No. 19-23649)

Transcript of November 17, 2020 Hearing (Excerpts), ECF No. 2073 .... 302a

Final Declaration of Christina Pullo of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors (Aug. 2, 2021) (Excerpts), ECF No. 3372 .... 313a

Declaration of Richard A. Collura (Aug. 5, 2021) (Excerpts), ECF No. 3410........ 325a

Stipulation and Agreed Order by and Among the Debtors and the Canadian Governmental Claimants Pursuant to Section 105 of the Bankruptcy Code and Bankruptcy Rules 3006 and 9019 (Aug. 10, 2021) (Excerpts), ECF No. 3520 .... 338a

Transcript of August 17, 2021 Confirmation Hearing (Excerpts), ECF No. 3599 .... 343a

Transcript of August 23, 2021 Confirmation Hearing (Excerpts), ECF No. 3659 .... 347a

Notice of Filing of Seventeenth Plan Supplement Pursuant to the Eleventh Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors (Aug. 31, 2021) (Excerpts), ECF No. 3711 .... 357a

Twelfth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors (Sept. 2, 2021) (Excerpts), ECF No. 3726 .... 371a

Declaration of Jesse DelConte (Oct. 22, 2021), ECF No. 4015 .... 391a

TABLE OF CONTENTS—Continued

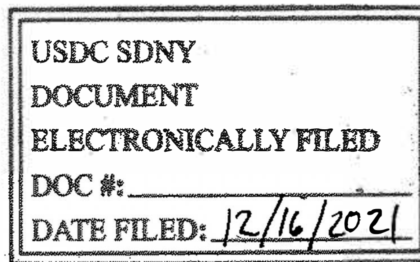
Page

Transcript of November 9, 2021 Hearing (Excerpts), ECF No. 4158 .... 409a

Notice of Hearing Regarding Motion of Debtors Pursuant to 11 U.S.C. § 105(a) and 363(b) for Entry of an Order Authorizing and Approving Settlement Term Sheet (Mar. 3, 2022) (Excerpts), ECF No. 4410 .... 422a

Other Materials Filed in the United States Court of Appeals for the Second Circuit (Docket No. 22-110)

Declaration of Jesse DelConte, Exhibit A to Debtors-Appellants' Opposition to U.S. Trustee's Motion to Stay Mandate (July 17, 2023), ECF No. 1019 .... 434a



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
x

In re: PURDUE PHARMA, L.P.

x

This Filing Relates to

x

ALL MATTERS

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21 cv 7532 (CM) [Master Case]

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21 cv 8034 (CM)
21 cv 8042 (CM)
21 cv 8049 (CM)
21 cv 8055 (CM)
21 cv 8139 (CM)
21 cv 8258 (CM)
21 cv 8271 (CM)
21 cv 8548 (CM)
21 cv 8557 (CM)
21 cv 8566 (CM)]

DECISION AND ORDER ON APPEAL

McMahon, J.:

This is an appeal from an order of the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court") (Drain, B.J.), announced from the bench on September 1, 2021, and filed on September 17, 2021, confirming the Plan of Reorganization proposed by Debtors Purdue Pharma L.P. ("Purdue Pharma") and certain associated companies[1] (the "Confirmation Order"). Appeal is also taken from two merged and related orders of the Bankruptcy Court: the June 3, 2021, order approving Purdue's disclosure statement and solicitation materials (the "Disclosure Order") and the September 15, 2021, order authorizing the implementation of

[1] Purdue Pharma Inc. ("PPI"), Purdue Transdermal Technologies L.P., Purdue Pharma Manufacturing L.P., Purdue Pharmaceuticals L.P., Imbrium Therapeutics L.P., Adlon Therapeutics L.P., Greenfield BioVentures L.P., Seven Seas Hill Corp., Ophir Green Corp., Purdue Pharma of Puerto Rico, Avrio Health L.P., Purdue Pharmaceutical Products L.P., Purdue Neuroscience Company, Nayatt Cove Lifescience Inc., Button Land L.P., Rhodes Associates L.P., Paul Land Inc., Quidnick Land L.P., Rhodes Pharmaceuticals L.P., Rhodes Technologies, UDF LP, SVC Pharma LP, and SVC Pharma Inc. (together, the "Debtors" or "Purdue").

certain preliminary aspects of the Plan (the "Advance Order").

Purdue's bankruptcy was occasioned by a health crisis that was, in significant part, of its own making: an explosion of opioid addiction in the United States over the past two decades, which can be traced largely to the over-prescription of highly addictive medications, including, specifically and principally, Purdue's proprietary, OxyContin.

Despite a 2007 Plea Agreement with the United States – in which Purdue admitted that it had falsely marketed OxyContin as non-addictive and had submitted false claims to the federal government for reimbursement of medically unnecessary opioid prescriptions ("2007 Plea Agreement") – Purdue's profits after 2007 were driven almost exclusively by its aggressive marketing of OxyContin. (*See* JX-2094.0047-88; JX-2481). But by 2019, Purdue was facing thousands of lawsuits brought by persons who had become addicted to OxyContin and by the estates of addicts who had overdosed – either on OxyContin itself or on the street drugs (heroin, fentanyl) for which Purdue's product served as a feeder. It also faced new federal, state and local Medicare reimbursement claims and a number of new false marketing claims brought under various state consumer protection laws. Finally, in November 2020, Purdue pled guilty to a criminal Information filed by the Department of Justice ("DOJ") in the United States District Court for the District of New Jersey; in its plea agreement, the company (though not the people through whom the company acted) admitted to substantial deliberate wrongful conduct ("2020 Plea Agreement"). *See USA v. Purdue Pharma L.P.*, No. 2:20-cr-01028.

Engulfed in a veritable tsunami of litigation, Purdue filed for chapter 11 bankruptcy in September 2019. The intent was for a "*Manville*-style" bankruptcy that would resolve both existing and future claims against the company arising from the prescription of OxyContin. The automatic stay brought a stop to civil litigation against Purdue; and a court-ordered stay halted litigation

against certain non-debtors affiliated with the company – principally members of the Sackler family (the "Sacklers" or "Sackler family"),[2] which had long owned the privately-held company – to buy time to craft a resolution. For two years, committees of various classes of creditors – individuals, state and local governments, indigenous North American tribes, even representatives of unborn children who were destined to suffer from opioid addiction – negotiated with Purdue and the Sacklers under the watchful eye of the experienced Bankruptcy Judge, with the assistance of two of this country's finest and most experienced mediators (Layn Phillips and Kenneth Feinberg), as well as a second Bankruptcy Judge (The Hon. Shelley Chapman).

Eventually, the parties crafted a plan of reorganization for Purdue that would, if implemented, afford billions of dollars for the resolution of both private and public claims, while funding opioid relief and education programs that could provide tremendous benefit to the consuming public at large (the "Plan").[3] That Plan was approved by supermajority of the votes cast by the members of each class of creditors.[4] It was confirmed by Judge Drain, who had invested so much of himself in the effort to find a workable solution to a seemingly intractable problem.

But not everyone voted yes. Eight states and the District of Columbia ("D.C."), as well as certain Canadian municipalities and Canadian indigenous tribes, the City of Seattle (alone among all voting municipalities in the United States), as well as some 2,683 individual personal injury claimants, voted against the adoption of the Plan. The same states, municipalities and tribes, together with three of those individual claimants (representing themselves), filed formal objections

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[2] The Sacklers or Sackler family in this opinion means the Mortimer D. Sackler Family (also known as "Side A" of the Sackler family) and the Raymond R. Sackler Family (also known as "Side B" of the Sackler family).

[3] The Plan refers to confirmed chapter 11 bankruptcy plan of reorganization at Bankruptcy Docket Number 3726. (*See* Dkt. No. 91-3, at App.1070-1227).

[4] It is true that many members of some creditor classes did not cast a vote, but the law provides that a plan must be approved, not by a supermajority of all eligible voters, but by a supermajority of all actual voters. 11 U.S.C. § 1126. That being so, there is no merit to Appellants' argument that the court should not deem the Plan approved by a supermajority of the affected creditor classes.

to the Plan and have appealed from its confirmation.[5] The United States Trustee (the "U.S. Trustee") in Bankruptcy[6] and the U.S. Attorney's Office for this District on behalf of the United States of America join in their objections.

All Appellants assign the same reason for their opposition: the Plan provides broad releases, not just of derivative, but of particularized or direct claims – including claims predicated on fraud, misrepresentation, and willful misconduct under various state consumer protection statutes – to the members of the Sackler family (none of whom is a debtor in the bankruptcy case) and to their affiliates and related entities. As the opioid crisis continued and worsened in the wake of Purdue's 2007 Plea Agreement, the Sacklers – or at least those members of the family who were actively involved in the day to day management of Purdue[7] – were well aware that they were exposed to personal liability over OxyContin. Concerned about how their personal financial situation might be affected, the family began what one member described as an "aggressive[]" program of withdrawing money from Purdue almost as soon as the ink was dry on the 2007 papers. The Sacklers upstreaming some $10.4 billion out of the company between 2008 and 2017, which, according to their own expert, substantially reduced Purdue's "solvency cushion." Over half of that money was either invested in offshore companies owned by the Sacklers or deposited into spendthrift trusts that could not be reached in bankruptcy and off-shore entities located in places like the Bailiwick of Jersey.

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[5] While the City of Seattle objected to the Plan before the Bankruptcy Court, it did not appeal.

[6] The U.S. Trustee "is a DOJ official appointed by the Attorney General to supervise the administration of bankruptcy cases" and has standing under 11 U.S.C. § 307 to appear in bankruptcy cases and "comment on proposed disclosure statements and chapter 11 plans." (Dkt. No. 91, at 8 (citing 28 U.S.C. §§ 581-589 and 28 U.S.C. § 586(a)(3)(B)).

[7] Ilene Sackler Lefcourt, Kathe Sackler, Mortimer D.A. Sackler, Theresa Sackler, Richard Sackler, Jonathan Sackler, and David Sackler were at some or all relevant times directors of Purdue and its related enterprises. Mortimer D. Sackler and Raymond Sackler had management roles at the company as co-chief executive officers; Richard Sackler also served as president; and Mortimer D.A. Sackler, Ilene Sackler Lefcourt, and Kathe Sackler held officer roles as vice presidents. Mariana Sackler worked at Purdue in research and development.

When the family fortune was secure, the Sackler family members withdrew from Purdue's Board and management. Bankruptcy discussions commenced the following year. As part of those pre-filing discussions, the Sacklers offered to contribute toward a settlement, but if – and only if – every member of the family could "achieve global peace" from all civil (not criminal) litigation, including litigation by Purdue to claw back the money that had been taken out of the corporation. The Plan confirmed by the Bankruptcy Court extinguishes all civil claims against the Sacklers that relate in any way to the operations of Purdue – including claims on which certain members of the Sackler family could be held personally liable to entities other than Purdue (principally the various states). These claims could not be released if the Sacklers were themselves debtors in bankruptcy.

Appellants attack the legality of the Plan's non-consensual release of third-party claims against non-debtors on a number of grounds. They argue that the release (referred to in this opinion as the "Section 10.7 Shareholder Release") is both constitutionally defective and not statutorily authorized; that the Bankruptcy Court lacks constitutional authority and subject matter jurisdiction to approve the release or to carry out certain "gatekeeping" aspects of the Plan that relate to it; and that granting a release to the non-debtor Sacklers is unwarranted as a matter of fact and would constitute an abuse of the bankruptcy process.

Debtors and those who voted in favor of the Plan – buttressed by Judge Drain's comprehensive Confirmation Order – argue that the Bankruptcy Court had undoubted jurisdiction to impose these broad third-party releases; insist that they are a necessary feature of the Plan; point out the tremendous public benefit that will be realized by implementing the Plan's many forward-looking provisions; and urge that the alternative – Purdue's liquidation – will inevitably yield far less benefit to all creditors and victims, in light of the cost and extraordinary hurdles that would have to be surmounted in order to claw back the billions of dollars that the Sacklers have taken out

of Purdue.

Two of the questions raised by appellants are easily answered. The Bankruptcy Court had undoubted subject matter jurisdiction to enter the challenged releases. And while it may have lacked constitutional authority to give them final approval under the rule of *Stern v. Marshall*, 546 U.S. 462 (2011), that matters little in the great scheme of things; it changes the level of deference this court should give to Judge Drain's findings of fact, but those findings are essentially unchallenged.

The great unsettled question in this case is whether the Bankruptcy Court – or any court – is statutorily authorized to grant such releases. This issue has split the federal Circuits for decades. While the Circuits that say no are united in their reasoning, the Circuits that say yes offer various justifications for their conclusions. And – crucially for this case – although the Second Circuit identified the question as open back in 2005, it has not yet had occasion to analyze the issue. Its only guidance to the lower courts, uttered in that 2005 opinion, is this: because statutory authority is questionable and such releases can be abused, they should be granted sparingly and only in "unique" cases.

This will no longer do. Either statutory authority exists or it does not. There is no principled basis for acting on questionable authority in "rare" or "unique" cases, especially as the United States Supreme Court has recently held that there is no "rare case" rule in bankruptcy that allows a court to trump the Bankruptcy Code. *See Czyzewski v. Jevic Holdings Corp.*, 137 S. Ct. 973, 986 (2017).

Moreover, the lower courts desperately need a clear answer. As one of my colleagues on the Bankruptcy Court recently noted, plans releasing non-debtors from third party claims are no rarity: "Unfortunately, in actual practice the parties . . . often seek to impose involuntary releases

based solely on the contention that anybody who makes a contribution to the case has earned a third-party release. *Almost every proposed Chapter 11 Plan that I receive includes proposed releases*." *In re Aegean Marine Petroleum Network Inc*., 599 B.R. 717, 726 (S.D.N.Y. 2019) (Wiles, B.J.) (emphasis added). When every case is unique, none is unique. Given the frequency with which this issue arises, the time has come for a comprehensive analysis of whether authority for such releases can be found in the Bankruptcy Code – that "comprehensive scheme" devised by Congress for resolving debtor-creditor relations. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

Aided by superb briefing and argument on both sides of the question, and by extended ruminations on the subject by several esteemed bankruptcy judges of our own District – Judge Drain not the least – this Court concludes that the Bankruptcy Code does not authorize such non-consensual non-debtor releases: not in its express text (which is conceded); not in its silence (which is disputed); and not in any section or sections of the Bankruptcy Code that, read singly or together, purport to confer generalized or "residual" powers on a court sitting in bankruptcy. For that reason, the Confirmation Order (and the Advance Order that flows from it) must be vacated.

Because I conclude that the Bankruptcy Court lacked statutory authority to impose the Section 10.7 Shareholder Release, I need not and do not reach the constitutional questions that have been raised by the parties. Nor do I need to decide whether this is a case in which such releases should be imposed if my statutory analysis is incorrect. Those issues may need to be addressed some day, but they do not need to be addressed in order to dispose of this appeal.

This opinion will not be the last word on the subject, nor should it be. This issue has hovered over bankruptcy law for thirty-five years – ever since Congress added §§ 524(g) and (h)

to the Bankruptcy Code. It must be put to rest sometime; at least in this Circuit, it should be put to rest now.

PARTIES[8]

The Appellants in this case are the U.S. Trustee William K. Harrington; the States of California, Connecticut, Delaware, Maryland, Oregon, Rhode Island, Vermont, Washington, and D.C. (together, the "State Appellants"); the City of Grande Prairie as Representative for a Class Consisting of All Canadian Municipalities, the Cities of Brantford, Grand Prairie, Lethbridge, and Wetaskiwin; the Peter Ballantyne Cree Nation on behalf of All Canadian First Nations and Metis People; the Peter Ballantyne Cree Nation on behalf itself, and the Lac La Ronge Indian Band (together, the "Canadian Appellants"); and *pro se* Appellants Ronald Bass, Marie Ecke, Andrew Ecke, Richard Ecke, and Ellen Isaacs on Behalf of Patrick Ryan Wroblewski (together, the "Pro Se Appellants").

The Appellees are the Purdue Debtors, as well as the Official Committee of Unsecured Creditors of Purdue Pharma L.P., et al. (the "UCC"),[9] the Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants ("AHC"),[10] the Ad Hoc Group of Individual Victims of Purdue Pharma, L.P. ("PI Ad Hoc Group"), the Multi-State Governmental Entities Group ("MSGE"), the Mortimer-side Initial Covered Sackler Persons ("Side A"), and the Raymond Sackler Family ("Side B").

The Ad Hoc Committee of NAS Children ("NAS Children") appears as *amicus curiae* and

[8] In this decision, docket numbers abbreviated "Dkt. No." refer to the consolidated docketed appeals at 7:21-cv-7532; docket numbers abbreviated "Bankr. Dkt. No." refer to the underlying bankruptcy docket at 19-23649.

[9] The UCC is also referred to in court filings and the appellate record as the "Creditors' Committee." The Court uses the terminology "UCC" consistent with the language provided in the glossary at Docket Number 115-1.

[10] The AHC is also referred to in court filings and the appellate record as the "Ad Hoc Committee." The Court uses the terminology "AHC" consistent with the language provided in the glossary at Docket Number 115-1.

has filed an *amicus* brief. (Dkt. No. 158). The U.S. Attorney's Office for this District also appears on behalf of the United States of America as *amicus curiae* and has filed a statement of interest in this case. (Dkt. No. 94).

BACKGROUND

The following facts are derived from the appellate record as designated by the parties to this appeal, unless indicated otherwise. (*See* Dkt. Nos. 78-1, 105, 255). The Court judicially notices certain public court records and other matters that are subject to judicial notice. *See* Fed. R. Evid. 201(b)-(d).[11]

I. Purdue Pharma, L.P.

Purdue – originally known as "Purdue Frederick Company" – was founded by John Purdue Gray and George Frederick Bingham in 1892. The company was sold to brothers Arthur, Mortimer and Raymond Sackler in 1952. (*See* JX-2148; JX-1985, at 33:12-13).

Purdue Pharma, the Debtors' main operating entity, is a Delaware limited partnership headquartered in Stamford, Connecticut. (Dkt. No. 91-4, at App.1244). Purdue Pharma's general partner is Purdue Pharma Inc. ("PPI"), a New York corporation, also headquartered in Stamford, Connecticut. (*Id.*, JX-1221). The board of directors of PPI manages Purdue Pharma (the "Board"). (Dkt. No. 91-4, at App.1250). Purdue Pharma has 22 wholly owned subsidiaries in the United States and the British Virgin Islands. (*Id.* at App.1244).

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[11] *See Garber v. Legg Mason Inc.*, 347 F. App'x 665, 669 (2d Cir. 2009) ("'[a] court may take judicial notice, whether requested or not.'") (quoting Fed. R. Evid. 201(c)); *Hotel Emps. & Rest. Emps. Union, Local 100 of New York, N.Y. & Vicinity, AFL-CIO v. City of NY Dep't of Parks & Recreation*, 311 F.3d 534, 540 n.1 (2d Cir. 2002) ("'Judicial notice may be taken at any stage of the proceeding.'") (quoting Fed. R. Evid. 201(d)); *Schenk v. Citibank/Citigroup/Citicorp*, No. 10-CV-5056 (SAS), 2010 WL 5094360, at *2 (S.D.N.Y. Dec. 9, 2010) (citing *Anderson v. Rochester–Genesee Reg'l Transp. Auth.*, 337 F.3d 201, 205 n.4 (2d Cir. 2003)) ("Judicial notice may encompass the status of other lawsuits in other courts and the substance of papers filed in those actions"); *Giraldo v. Kessler*, 694 F.3d 161, 163 (2d Cir. 2012) (courts may "take judicial notice of relevant matters of public record.").

Purdue Pharma is wholly owned by Pharmaceutical Research Associates, L.P. ("PRA"), a Delaware limited partnership that is not a debtor in this case. (*Id.* at App.1252). PRA is 99.5% owned, in equal parts, by non-debtors Beacon Company ("Beacon"), a Delaware general partnership, and Rosebay Medical Company L.P. ("Rosebay"), a Delaware limited partnership, which are in turn owned by certain trusts established for the benefit of the Sackler Families. (*Id.*). Beacon is the partnership of Side A of the Sackler family; Rosebay is the partnership of Side B of the Sackler family. (*See* JX-1987, at 42:10-23; JX-3298 at 160:8-10).[12]

Purdue Pharma operates Purdue's branded prescription pharmaceutical business, which includes both opioid and non-opioid products. (Dkt. No. 91-4, at App.1244). OxyContin is one of Purdue Pharma's three principal branded opioid medications. (*Id.*). The other two are Hysingla and Butrans. (*Id.*). Purdue generated approximately $34 billion in revenue total between 1996-2019, most of which came from OxyContin sales (*See e.g.*, JX-2481); prior to bankruptcy, OxyContin accounted for some 91% of Purdue's U.S. revenue. (*See* JX-1984, at 40:24-41:5; JX-3275, at 338:6-9; JX-0999).

Purdue Pharma manufactures OxyContin for itself and, in limited quantities, for certain foreign independent associated companies ("IAC"), which are ultimately owned by the Sackler family. (Dkt. No. 91-4, at App.1245). Purdue Pharma receives royalties from IACs' sales for OxyContin abroad. (*Id.*). The IACs are not debtors in this case.

Until early 2019, members of the Sackler family served as directors of Purdue; the last Sackler's resignation from the Board became effective in the beginning of that year, although many family members stepped down during 2018.

[12] In this opinion, unless otherwise specified, where reference is made to the "Sackler entities" this means Rosebay and Beacon, as well as other Sackler family affiliated trusts and entities relevant to this appeal, including those in Exhibit X to the Settlement Agreement, incorporated into the Plan. (*See* Dkt. No. 91-3, at App. 1112, App.1041-1069).

II. The Sackler Family

Since Purdue was sold to brothers Arthur, Mortimer and Raymond Sackler in 1952 (*see* JX-1985, at 33:12-13),[13] the company has been closely held and closely run by members of the Sackler family, many of whom took on an active role in the company comparable to that of senior management prior to 2018. *See In re Purdue Pharma L.P.*, No. 19-23649, 2021 WL 4240974, at *33 (Bankr. S.D.N.Y. Sept. 17, 2021). In large part due to the success of their pharmaceutical business, the Sackler family have long been ranked on Forbes' list of America's Richest Families, becoming one of the top twenty wealthiest families in America in 2015, with a reported net worth of $14 billion dollars. (*See* JX-1985, at 40:24-42:10).

Mortimer Sackler's side of the family is known as "Side A," and Raymond Sackler's side is known as "Side B." (Dkt. No. 91-4, at App.1250). From approximately 1993 until 2018, there were always at least six or seven members of the Sackler family on the Board; independent directors never equaled or outnumbered the number of Sackler family directors on the Board. (*See* Confr. Hr'g Tr., Aug. 19, 2021, at 159:17-25, 22:5-9; Dkt. No. 91-4, at App.1345).

In addition to Purdue, certain members of the Sackler family served as directors of an entity called "MNP," later "MNC" ("MNP/MNC"), which operated as an advisory board for IACs worldwide, including for "specific pharmaceutical manufacturer IACs" and "corporations throughout the world that [the Sackler] family owns and that are in the . . . pharmaceutical business." (*See* Confr. Hr'g Tr., Aug. 18, 2021, at 31:8-18; Confr. Hr'g Tr., Aug. 19, 2021, at 24:12-23). MNP/MNC's recommendations were typically followed by the IACs. (Confr. Hr'g Tr., Aug. 19, 2021, at 23:9-17).

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[13] The Arthur Sackler family sold its interest in Purdue to the other two branches of the family prior to the invention of OxyContin and has no involvement in the company or in this bankruptcy.

A. Side A

Mortimer D. Sackler, who died in 2010, served as the co-chief executive officer of Purdue with his brother Raymond until the end of his life. (JX-3275.0168-69; Dkt. No. 91-5, at App.2089).

Three of his seven children – Ilene Sackler Lefcourt, Kathe Sackler, and Mortimer David Alfons Sackler ("Mortimer D.A. Sackler") – sat on the Board of Purdue for nearly 30 years, until 2018. (Confr. Hr'g Tr., Aug. 19, 2021, at 19:13-20, 158:6-15; JX-3298.0037; Dkt. No. 91-5, at App.2089). They also served as officers of Purdue, with Mortimer D.A. and Ilene holding the title of vice president and Kathe the title of senior vice president. (Confr. Hr'g Tr., Aug. 19, 2021, at 19:21-25, 22:18-23:4, 158:16-21; JX-3298.0075; JX3275.0169).

Mortimer Sackler's wife Theresa Sackler also served on the Board of Purdue from 1993 until 2018, explaining that her "husband asked me to join . . . it was a family company and he felt that family members should be on the board." (JX-3275.0034, 36; Dkt. No. 91-4, at App.1345).

All four – Ilene, Kathe, Theresa, and Mortimer D.A. Sackler – served as directors on the board of MNP/MNC for many years. (Confr. Hr'g Tr., Aug. 19, 2021, at 19:21-25, 22:18-23:4, 161:2-11; JX-3298.0080; JX-3275.0059).

B. Side B

Raymond Sackler, who died in 2017, served as co-chief executive officer of Purdue with his brother Mortimer D. Sackler. (*See* JX-3275.0168-69).

Raymond Sackler's wife and two sons served as Board members of Purdue. (*See* Dkt. No. 91-4, at App.1345). His sons, Jonathan and Richard Sackler, served from 1990 until 2018, and his wife Beverly Sackler from approximately 1993 until 2017. (*See id.*; Confr. Hr'g Tr., Aug. 18, 2021, at 30:6-8).

In addition to his role as director, Richard Sackler also served as president of Purdue from

2000-2003, co-chair of the Board from 2003-2007, and chair of the Board from approximately 2008 until 2010 or 2011. (Confr. Hr'g Tr., Aug. 18, 2021, at 30:6-22, 44:20-21). He served as a director of MNP/MNC until 2018 and has served as director of at least one IAC. (*Id.* at 31:23-32:19).

Richard Sackler's son David Sacker also served on the Board from 2012 until 2018 and as a director of MNP/MNC. (Confr. Hr'g Tr., Aug. 17, 2021, at 43:12-14, 44:6-13).

Finally, Mariana Sackler, Richard Sackler's daughter, held several roles within the "family business" (JX-1991, at 58:19-25), including working as a consultant in the "research and development department" of Purdue on OxyContin projects and a "PR" role at Mundipharma Italy, an IAC, advancing "information around topics about pain in Italy" and "marketing and selling OxyContin" there. (*Id.* at 30:4-18; 32:12-33:3; 58:19-64:25). Marianna has never been an officer or director of Purdue.

III. OxyContin

OxyContin is a synthetic opioid analgesic – a powerful narcotic substance designed to relieve pain. (*See* JX-2181; JX-2195.0048; JX-2195.0059). Opioid analgesics have been available for several decades to treat moderate to severe pain. (JX-2181; Dkt. No. 91-4, at App.1259). But until the early 1980's they were limited to immediate-release dosage forms. (JX-2181; *see* JX-2199). Immediate-release pain killers are less than ideal because they control pain for only 4-6 hours at a time; by contrast, a controlled-release pain killer can provide relief from serious pain for up to 12 hours at a time. (*See* Dkt. No. 91-4, at App.1259; JX-2181; JX-2199; JX-2185-0010).

In the early 1980's, Purdue developed its first controlled-release morphine drug which it marketed as "MS Contin" (also called "MSContin" and "MS-Contin"). (JX-2181; *see* JX-2199; JX-2180-0030, 0084). MS Contin solved many of the difficulties associated with immediate-

release opioids, and it was marketed, largely without abuse, throughout the 1980's and 1990's. (JX-2180-0015, 0078; Dkt. No. 91-4, at App.1262). However, morphine's stigma as an addictive narcotic caused patients and physicians alike to avoid it. (*See* JX-2180-0030).

So Purdue concentrated on the research, development, and testing of a non-morphine drug: its controlled-release semisynthetic opioid analgesic named "OxyContin." (*See* JX-2181; JX-2199; Dkt. No. 91-4, at App.1261-62). In December 1995, the Food and Drug Administration ("FDA") approved OxyContin for use. (*Id.*). OxyContin's formulations were labeled as "extended release" or "time release" doses because the active ingredients continuously enter into a patient's system over time; a single dose could provide relief from serious pain for up to 12 hours. (*See* JX-2181). A 2000 *Time* Magazine article explains that OxyContin was quickly "hailed as a miracle" after its introduction in 1995, because "it eases chronic pain because its dissolvable coating allows a measured does of the opiate oxycodone to be released into the bloodstream." (JX-2147).

For years, Purdue contended that OxyContin, due to its "time release" formulation, posed virtually no threat of either abuse or addiction – as opposed to other pain relief drugs, such as Percocet or Vicodin, which are not controlled-release painkillers. *See the Purdue Frederick Company, Inc.*, No. 1:07-cr-00029, Dkt. No. 5-1, at ¶¶20-27 ("Agreed Statement"); (Dkt. No. 91-4, at App.1268-1269). Purdue delivered that message to prescribing physicians and patients alike.

But time-release OxyContin proved to have an efficacy and safety profile similar to that of immediate-release opioid pain relievers. (*See* JX-2195.0027, 48-49, 59). Indeed, in 2001, the FDA required that Purdue remove from its drug label the claim that OxyContin had a very low risk of iatrogenic addiction; Purdue was ordered to add instead the highest level of safety warning that the FDA can place on an approved drug product. (*See* JX-2181; JX-2199; JX-2220).

IV. Purdue's Deceptive Marketing of OxyContin

To promote its new product OxyContin, Purdue launched an aggressive marketing campaign. (*See* JX-2153). That campaign was multi-fold, aiming in part to combat concerns about the abuse potential of opioids and to encourage doctors to prescribe OxyContin for more and different types of pain. (*See* Dkt. No. 91-4, at App.1268-1269; Agreed Statement, at ¶20; JX-2181.0002).

Before OxyContin, opioid pain relievers were usually prescribed for cancer patients and patients with chronic diseases whose pain was "undertreated." (*See* JX-2181.0002). But Purdue pushed OxyContin as a treatment for many types of pain patients, including those with "noncancer pain" and other "nonmalignant" pain. (*Id.*; *see id.* at 0023, 0044). Purdue repeatedly published advertisements claiming, for example, that OxyContin can be an effective "first-line therapy for the treatment of arthritis" and safely used for "osteoarthritis pain" (JX-2218) and in many cases "mak[ing] unsubstantiated efficacy claims promoting the use of OxyContin for pain relief," "promoting OxyContin for a much broader range of patients with pain than are appropriate for the drug," "overstat[ing] the safety profile of OxyContin," and repeatedly omitting OxyContin's "abuse liability" (JX-2221) – all of which was contemporaneously documented in FDA warning letters to the company throughout the early 2000's. (*See, e.g.*, JX-2218; JX-2221).

By its marketing campaign, Purdue sought to eliminate concerns regarding "OxyContin's addictive potential." (*See* Agreed Statement, at ¶¶19-20; Dkt. No. 91-4, at App.1268-1269). To do this, Purdue needed to encourage doctors and patients to overcome their reservations about the use of opioids. For this purpose, Purdue created a website called "*In The Face of Pain*," which promoted OxyContin pain treatment and urged patients to "overcome" their "concerns about addiction." *See* Petition, *State of Kansas, ex rel. Derek Schmidt, Attorney General v. Purdue*

Pharma L.P., et al., Case No. 2019-cv-000369, at ¶89 (Shawnee Cnty. Dist. Ct. May 16, 2019). Testimonials on the website were allegedly presented as personal stories of OxyContin patients who had overcome life-long struggles with debilitating pain, although they were allegedly written by Purdue consultants who were paid to promote the drug. *Id.*

Purdue also allegedly distributed pamphlets to doctors. *Id.* at ¶33. In one such pamphlet, *Providing Relief, Preventing Abuse: A Reference Guide To Controlled Substance Prescribing Practices*, Purdue wrote that addiction "is not caused by drugs." *Id.* In another, the "Resource Guide for People with Pain," Purdue explained, "Many people living with pain and even some healthcare providers believe that opioid medications are addictive. The truth is that when properly prescribed by a healthcare professional and taken as directed, these medications give relief – not a 'high.'" *Id.* at ¶35.

Purdue's marketing campaign proved successful. OxyContin was widely prescribed; bonuses to Purdue sales representatives for the sale of OxyContin increased from $1 million in 1996 to $40 million by 2001; and by 2001, annual sales of OxyContin reached $1 billion. (JX-2181.0007; JX-2151). By 2001, OxyContin was "the most prescribed brand-name narcotic medication" in the U.S. (JX-2181.0002, 0007).

V. The Opioid Crisis

But OxyContin's popularity as a pain reliever coincided with the scourge of widespread abuse of the drug around the country. (*See, e.g.*, JX-2147; JX-2148; JX-2149; JX-2180-0078; JX-2181). Many individuals who had been prescribed OxyContin by their doctors for legitimate pain conditions became addicted to the drug. (*See* JX-2181). And hundreds of thousands of seasoned addicts and novice drug abusers, including teenagers, quickly discovered that crushing an OxyContin tablet and then snorting or injecting it resulted in a quick "morphine-like high." (*See*

JX-2148; JX-2149; JX-2183; JX-2195.0059).

By the early 2000's, rates of opioid addiction in connection with OxyContin use were skyrocketing throughout the country. (*See* JX-2147; JX-2148; JX-2149). In the early years, "remote, rural areas" were particularly hard hit, due in part to the fact that these areas are

> home to large populations of disabled and chronically ill people who are in need of pain relief; they're marked by high unemployment and a lack of economic opportunity; they're remote, far from the network of Interstates and metropolises through which heroin and cocaine travel; and they're areas where prescription drugs have been abused—though in much smaller numbers—in the past.

Foister v. Purdue Pharma, L.P., 295 F. Supp. 2d 693, 696 (E.D. Ky. 2003) (quotation and internal citation omitted).

However, the crisis was not limited to one type of community or part of the country. (*See* JX-2147). Pill mills opened in urban areas, as unscrupulous physicians began writing prescriptions for OxyContin to stooge purchasers (often drug addicts themselves), who were recruited to obtain and fill prescriptions, turning over the pills to drug dealers, who resold them on the street, making astronomical profits. (*See* JX-2175; JX-2176). This Court presided over the criminal trial of a doctor who ran such a pill mill in Hamilton Heights on the Upper West Side of Manhattan, through which he garnered millions of dollars in ill-gotten gains at the expense of desperate people who were addicted to OxyContin. *See United States v. Mirilashvili*, No. 14-cr-0810 (CM), Dkt. No. 1 (S.D.N.Y. Dec. 9, 2014).

Prosecutions like the one of Dr. Mirilashvili, coupled with enhanced regulatory oversight over both prescribers of opioids and pharmacies that had filled suspiciously high numbers of prescriptions, reduced the number of illicit prescriptions of OxyContin. But drying up the source. did not end the problem of addiction. Individuals who had been feeding an OxyContin habit turned to alternative sources to get their fix – including street drugs like heroin and its even stronger and more lethal cousin, fentanyl, which is fast acting and 100 times more potent than morphine. (*See*

JX-2195.0050-52). The recent increase in overdose deaths in this country is driven in significant part by the increasingly widespread use of fentanyl. (*See* Dkt. No. 91-4, at App.1271).

In 2017, the U.S. Department of Health and Human Services ("DHHS") declared the opioid epidemic to be a national public health emergency.[14] According to the Centers for Disease Control and Prevention, from 1999 to 2019, nearly 247,000 people died in the United States from overdoses involving prescription opioids.[15] DHHS estimates the "economic burden" of prescription opioid misuse in the United States is between $53-72 billion a year, including medical costs, lost work productivity, addiction treatment, and criminal justice costs.[16]

Today, it is estimated that between 21-29% of patients who are prescribed opioids for chronic pain misuse them.[17] Between 8-12% of people who are using an opioid for chronic pain develop an opioid use disorder. *Id*. An estimated 4-6% of those who misuse prescription opioids transition to using heroin. *Id*. About 80% of people who use heroin first misused prescription opioids. *Id*. OxyContin, it seems, is the ultimate "gateway" drug.

VI. Pre-Bankruptcy Litigation Involving Purdue and Members of the Sackler Family

With the swelling opioid crisis, Purdue began to face inquiries about and investigations into OxyContin.

In 2000, the U.S. Attorney of Maine alerted the company to widespread abuse of the drug in rural Maine. (*See* JX-2151; JX-2180-0078; JX-2181). In 2001, the Attorney General of Virginia

[14] *HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis*, DHHS (Oct. 26, 2017), https://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html.

[15] *Drug Overdose: Overview*, Centers for Disease Control and Prevention (Mar. 17, 2021), https://www.cdc.gov/drugoverdose/deaths/prescription/overview.html.

[16] DHHS, "Addressing Prescription Drug Abuse in the United States," *available at* https://www.cdc.gov/drugoverdose/pdf/hhs_prescription_drug_abuse_report_09.2013.pdf.

[17] *Opioid Overdose Crisis*, National Institute on Drug Abuse (Mar. 11, 2021), https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis.

Mark Earley requested a meeting with company officials regarding widespread abuse of the drug in Virginia. (*See* JX-2151). By 2002, the then-Purdue spokesman Tim Bannon confirmed that there were federal investigations into Purdue's marketing of OxyContin. (*Id.*).

Two decades of litigation, both civil and criminal, ensued.

A. The First Round of Lawsuit: 2001-2007

By 2001, plaintiffs across the country had begun to file individual and class actions against Purdue in state and federal courts, including in the U.S. District Court for the Southern District of New York and in the Supreme Court of the State of New York. (*See e.g.*, JX-2181; Dkt. No. 91-5, at App.2037-2038).[18] Members of the Sackler family were not named as defendants in these lawsuits. (*See* Dkt. No. 91-5, at App.2040).

Plaintiffs in early cases plead a variety of theories of liability pursuant to which Purdue could be held liable as a result of its development, testing, manufacturing, distributing and marketing of OxyContin, including: negligence, strict product liability, failure to warn, breach of express and/or implied warranty, violation of state consumer protection statutes, conspiracy, fraud, and unjust enrichment. *See e.g.*, *Wethington v. Purdue Pharma LP*, 218 F.R.D. 577, 581 n. 1 (S.D. Ohio 2003).

Many of the early cases filed were class actions that sought certification of classes of people who had been prescribed OxyContin and suffered harm as a result. *See e.g.*, *Hurtado v. Purdue*

[18] *See Hurtado, et al. v. The Purdue Pharma Co.*, No. 12648/03 (Richmond Cnty., filed 2003); *Sara v. The Purdue Pharma Co.*, No. 13699/03 (Richmond Cnty., filed 2003); *Serafin v. Purdue Pharma, L.P.*, No. 103031/04 (New York Cnty., filed 2004); *Washington v. Purdue Pharma L.P.*, No. 107841/04 (New York Cnty., filed 2004); *Machey v. The Purdue Pharma Co.*, No. 1:04-cv-02098 (S.D.N.Y., filed 2004); *Pratt v. The Purdue Pharma Co.,* No. 1:04-cv-02100 (S.D.N.Y., filed 2004); *Wilson v. The Purdue Pharma Co.*, No. 1:04-cv-02103 (S.D.N.Y., filed 2004); *Ruth v. The Purdue Pharma Co.*, No. 1:04-cv-02101 (S.D.N.Y., filed 2004); *Terry v. The Purdue Pharma Co.*, No. 1:04-cv-02102 (S.D.N.Y., filed 2004); *Foister v. Purdue Pharma L.P.*, No. 6:01-cv-00268 (E.D. Ky., removed 2001); *Gevedon v. Purdue Pharma*, No. 7:02-cv-00008 (E.D. Ky., removed 2002); *Campbell v. Purdue Pharma, L.P.*, No. 1:02-cv-00163 TCM (ED Mo. removed 2002); *Howland et al. v. Purdue Pharma, L.P. et al.*, No. CV01 07 1651 (Butler Cnty. Ohio, filed 2001); *see also In re OxyContin Products Liability Litigation*, 268 F.Supp.2d 1380, 1380 (J.P.M.L 2003) (stating 20 actions then pending in five federal districts in South Carolina, Mississippi, Alabama, and Louisiana).

Pharma Co., No. 12648/03, 2005 WL 192351, at **9-14 (Sup. Ct. Richmond Cnty. Jan. 24, 2005) (discussing cases). But given the stringent requirements for class certification, class certification motions in these cases were often denied. For example, in *Foister v. Purdue Pharma L.P.*, plaintiffs in the Eastern District of Kentucky sought unsuccessfully to certify class of "all persons who have been harmed due to the addictive nature of OxyContin." No. Civ.A. 01–268–DCR, 2002 WL 1008608, at *1 (E.D. Ky. Feb. 26, 2002); *see also Gevedon v. Purdue Pharma*, 212 F.R.D. 333, 336 (E.D. Ky. Oct. 17, 2002) (denying class certification); *Campbell v. Purdue Pharma, L.P.*, No. 1:02 CV 00163 TCM, 2004 WL 5840206, at *1 (ED Mo. June 25, 2004) (denying class certification). Class certification was generally deemed inappropriate because courts concluded that individual questions predominated ("addiction to the drug is an individualized question of fact"), thus precluding a finding of commonality. *See Howland et al. v. Purdue Pharma, L.P. et al.*, 821 N.E.2d 141, 146-147 (Oh. Sup. Ct. Dec. 15, 2004). When such motions were granted, the decisions were often reversed. *See id.*

Absent class certification, the sheer number of individual cases that were filed meant that cases had to be sent to judicial coordinating panels. In New York, for example, five state cases were transferred to the New York Litigation Coordinating Panel in 2005 – after which 1,117 additional lawsuits were filed and coordinated. *See Hurtado*, 2005 WL 192351, at *15; *Matter of OxyContin*, 15 Misc.3d 388, 390 (Sup. Ct. Richmond Cnty. 2007). Within these coordinated cases, after much discovery, settlements were pursued. *See e.g.*, *Matter of OxyContin II*, 23 Misc.3d 974, 975 (Sup. Ct. Richmond Cnty. 2009) (discussing efforts in 2006-2007 to reach a "universal settlement" of the thousands of New York cases).

Discovery in these lawsuits proved useful to state and federal regulatory agencies that were also investigating Purdue's role in the opioid crisis. Attorney Jayne Conroy, who testified at the

Confirmation Hearing on behalf of the AHC, explained that the discovery taken by her firm in hundreds of New York cases against Purdue was later subpoenaed by the Justice Department as part of the federal government's 2006-2007 investigation into Purdue. (Dkt. No. 91-5, at App.2038-2039).

B. The 2007 Settlement and 2007 Plea Agreement

1. Purdue's 2007 Settlements with 26 States and the District of Columbia

In 2007, twenty-six states[19] and D.C. settled investigations into Purdue's promotional and marketing practices regarding OxyContin for $19.5 million ("2007 Settlement").[20] (Dkt. No. 91-4, at App.1269-70; *see* JX-2152). As part of the 2007 Settlement, Purdue entered into a consent judgment with each government party. (Dkt. No. 91-4, at App.1270); *see, e.g.*, Consent Judgement, *Washington v. Purdue Pharma L.P.*, Cause No. 07-2-00917-2 (Sup. Ct. Wash. Thurston Cnty. May 9, 2007), at Section I(M), ¶25 ("Consent Judgment").

Pursuant to the Consent Judgment, Purdue agreed to "establish, implement and follow an OxyContin abuse and diversion detection" ("ADD") program which "consist[ed] of internal procedures designed to identify potential abuse or diversion of OxyContin" for a minimum of ten years. (*See* Dkt. No. 91-4, at App.1270; Consent Judgment, ¶¶13-14). Purdue also agreed to submit "annual compliance certifications to a multistate group of attorneys general for three years." (Dkt. No. 91-4, at App.1270).

In exchange for Purdue's payment and compliance, the settling States agreed to:

[19] Settling states were Arizona, Arkansas, California, Connecticut, Idaho, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, and Wisconsin. This includes all State Appellants except Delaware and Rhode Island.

[20] Purdue is defined in the Consent Judgment as Purdue Pharma, PPI, The Purdue Frederick Company, and all of their United States affiliates, subsidiaries, predecessors, successors, parents and assigns, who manufacture, sell, distribute and/or promote OxyContin.

> release[] and forever discharge[], to the fullest extent permitted by law, *Purdue and its past and present officers, directors, shareholders,* employees, co-promoters, affiliates, parents, subsidiaries, predecessors, assigns, and successors (collectively, the "Releasees"), of and from any and all civil causes of action, claims, damages, costs, attorney's fees, or penalties that the Attorney General could have asserted against the Releasees under the State Consumer Protection Law by reason· of any conduct that has occurred at any time up to and including the Effective Date of this Judgment relating to or based upon the Subject Matter of this Judgment ("Released Claims").

(Consent Judgement, Section VI) (emphasis added). According to Judge Drain, these 2007 releases covered about seventy-seven members of the Sackler family. *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *31. The release covered only claims that could have been asserted by the Attorneys General of the settling states; among the claims that were not released were: (1) private rights of action by consumers, (2) claims relating to best price, average wholesale price or wholesale acquisition cost reporting practices or Medicaid fraud or abuse; (3) claims asserting antitrust, environmental or tax liability; (4) claims for property damage; (5) claims to enforce the terms and conditions of the judgment; and (6) any state or federal criminal liability that any person or entity, including Releasees, has or may have to the settling state.

Some of the states did not participate in this 2007 Settlement. Several had already entered into individual settlements with Purdue, while others entered into separate settlements subsequently. (*See* Dkt. No. 91-4, at App.1270). For example, in 2002, Florida settled an investigation into Purdue for $500,000 (*id.*); in 2004, West Virginia settled an action against Purdue for $10 million (*id.*); in 2006, Mississippi settled its investigation into Purdue for $250,000 (*id.*). In 2015, New York signed an assurance of discontinuance of its investigation in exchange for Purdue's payment of a $75,000 penalty and certain promises, including ongoing implementation of the ADD program in New York and submission to annual reviews and monitoring by the Attorney General. *Id.*; *In the Matter of Purdue Pharma L.P.*, Attorney General

of the State of New York Assurance No. 15-151, at ¶¶8, 28, 38, 40, 49 (Aug. 19, 2015). In 2016, Kentucky settled an action against Purdue for $24 million. (Dkt. No. 91-4, at App.1270). And in March 2019, Purdue agreed to pay the State of Oklahoma $270 million to settle that state's opioid claims. (*Id.* at App.1278); *see* Consent Judgment, *Oklahoma v. Purdue Pharma et al.*, No. CJ-2017-816, § 4.1 (Dist. Ct. Cleveland Cnty. Mar. 26, 2019).

The releases in these separate cases generally extinguished the claims of the respective state against Purdue for opioid-related misconduct. For example, the West Virginia settlement released "any and all claims and demands" of the Attorney General of West Virginia (on behalf of the state and state agencies) against Purdue and its affiliates, shareholders, officers, directors, and others[21] that were "sustained or incurred as a result of the manufacture, marketing and sale of OxyContin" in West Virginia. (*See* JX-2225). Similarly, the Oklahoma settlement released "any and all claims of any nature" of the Attorney General (the state and its subdivisions) against Purdue, its officers, directors, shareholders, direct and indirect owners, beneficiaries of the owners, and enumerated others, arising out of the conduct alleged in the complaint, including conduct related to the marketing and sale of opioids in Oklahoma. *See* Consent Judgment, *Oklahoma v. Purdue Pharma et al.*, No. CJ-2017-816, §§ 1.1, 5.1, 5.2 (Dist. Ct. Cleveland Cnty. Mar. 26, 2019).

2. Purdue Frederick Company, Inc.'s 2007 Plea Agreement and Related Civil Settlements

Also in 2007, Purdue Frederick Company[22] pled guilty to one felony count of misbranding OxyContin, with the intent to defraud or mislead, in violation of 21 U.S.C. §§ 331(a), 333(a)(2). (Dkt. No. 91-4, at App.1268-69; *see* JX-2153–JX-2168); *see* JX-1899. Purdue Frederick's

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[21] "all . . . present, former, or future masters, insurers, principals, agents, assigns, officers, directors, shareholders, owners, employees, attorneys, representatives. subsidiaries, divisions, affiliates, associated companies, holding companies, partnerships, and joint ventures . . . " (JX-2225).

[22] Purdue Frederick Company is an affiliate of Purdue that manufactures and distributes OxyContin. (Dkt. No. 91-4, at App.1268).

President and CEO Michael Friedman, its Executive Vice President and Chief Legal Officer Howard R. Udell, and its Chief Scientific Officer Paul D. Goldenheim, in their capacity as corporate officers, each pled guilty to a misdemeanor charge of misbranding. (Dkt. No. 91-4, at App.1268); *see The Purdue Frederick Company, Inc.,* No. 1:07-cr-00029, at Dkt. Nos. 7-9.

As part of the Agreed Statement of Facts, the Purdue Frederick Company admitted that:

> [b]eginning on or about December 12, 1995, and continuing until on or about June 30, 2001, certain PURDUE supervisors and employees, with the 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 . . .

(Agreed Statement, at ¶20; *see* Dkt. No. 91-4, at App.1268-1269).

As part of the 2007 Plea Agreement, Purdue Frederick agreed to pay over $600 million dollars in fines and various other payments.[23] (Dkt. No. 91-4, at App.1269; JX-1899, at § 3). This included $160 million to the United States and the states to settle various civil claims that had been asserted by governments – over $100 million to the United States and over $59 million to "Each state that elects to participate in this settlement . . ." (JX-1899, at § 3(b)). In the federal government's settlement agreement, the United States and its various departments agreed to release "*Purdue and its current and former directors, officers, employees, affiliates, owners,* predecessors, successors and assigns from any civil or administrative monetary claim the United States has or may have" under federal statutes creating causes of action for civil damages or penalties, as well as from administrative actions under various federal departments and programs.

[23] The fine and payments include: approximately $276.1 million forfeited to the United States; approximately $160 million paid to federal and state government agencies to resolve liability for false claims made to Medicaid and other government healthcare programs; approximately $130 million set aside to resolve private civil claims; approximately $5.3 million paid to the Virginia Attorney General's Medicaid Fraud Control Unit; approximately $20 million paid to fund the Virginia Prescription Monitoring Program; approximately $3 million to Federal and State Medicaid programs for improperly calculated Medicaid rebates; approximately $5 million in monitoring costs; and a $500,000 maximum statutory fine.

(*See id.* at Dkt. No. 5-4, at § IIII). The participating states' settlement agreement and release were limited to Medicaid fraud claims:

> release and forever discharge [the] Company *and its current and former directors, officers, employees, affiliates, owners,* predecessors, successors and assigns from any civil or administrative monetary claim that the State has or may have for any claim submitted or caused to be submitted to the State Medicaid Program for the Covered Conduct . . .

See The Purdue Frederick Company, Inc., et al., No. 1:07-cr-00029, Dkt. No. 5-14, at §III(2)) (emphasis added).

All states except Kentucky opted into the federal settlement. *See id.* at Dkt. No. 141, at 5.

An additional $130 million was set aside to settle private civil liability claims related to OxyContin. (*Id.* at § 3(d)). Ms. Conroy of the AHC testified in the Confirmation Hearing that her approximately 5,000 clients received a total of $75 million out of this settlement fund. (Dkt. No. 91-5, at App.2039).

As part of the resolution of the criminal case, Purdue agreed to a five-year corporate integrity program with the DHHS, pursuant to which DHHS was to monitor Purdue's compliance with federal healthcare law. This monitoring period expired on July 30, 2012. (Dkt. No. 91-4, at App.1269); *see The Purdue Frederick Company, Inc.*, No. 1:07-cr-00029, at Dkt. No. 5-5. In 2013, Purdue completed the corporate integrity program with no significant adverse findings. (Dkt. No. 91-4, at App.1269).

The Honorable James P. Jones approved the 2007 Plea Agreement in July of that year. *See The Purdue Frederick Company, Inc.*, No. 1:07-cr-00029, at Dkt. No. 77.

C. The Second Round of Lawsuits: 2014-2019

The 2007 Settlement and Plea Agreement were intended to resolve for all time issues relating to Purdue's misrepresentations about OxyContin. (Dkt. No. 91-5, at App.2039). The

corporate integrity agreement with DHHS meant ongoing monitoring (*see The Purdue Frederick Company, Inc.*, No. 1:07-cr-00029, at Dkt. No. 5-5), and the ADD program agreed to with the 26 states and D.C. was meant to create internal procedures that would identify and interrupt abuse or diversion related to OxyContin. (Consent Judgment, ¶14). Purdue, for its part, insisted in its Informational Brief before the Bankruptcy Court that it "accepted responsibility for the misconduct in 2007 and has since then strived never to repeat it." (Dkt. No. 91-4, at App.1268).

However, if Purdue's admissions in its 2020 Plea Agreement are believed, this purported acceptance of responsibility was a charade, and the oversight mechanisms built into the settlements were a conspicuous failure. Judge Drain found that the Sacklers had an "evident desire to continue to drive profits from the products' sale," *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *33, and as they did so, the opioid crisis not only continued, it worsened. (*See* Dkt. No. 91-5, at App.2039-2040; JX-2185). As Mortimer D.A. Sackler testified in the Confirmation Hearing, "overdose deaths . . . continued to rise . . . The overdose deaths kept going up and up." (Confr. Hr'g Tr. Aug. 19, 2021, at 52:7-12).

Starting in about 2014, new lawsuits began to be filed against Purdue concerning its promotion and marketing of OxyContin. (*See e.g.*, JX-2411). But this time, members of the Sackler family were named as defendants. (*See, e.g.*, Confr. Hr'g Tr. Aug. 16, 2021, at 69: 4-15).

1. The Federal Multi-District Litigation in the Northern District of Ohio

At the end of 2017, sixty-four federal cases that had been brought in nine districts across the country by various government entities (state, cities, and counties) against Purdue and other defendants – including pharmacies (like Rite Aid), pharmaceutical companies (like Johnson & Johnson), and pharmaceutical distributors (like McKesson Corporation) – were sent to coordinated multi-district litigation in the Northern District of Ohio ("Opioid MDL"). *See IN RE: National*

Prescription Opiate Litigation, MDL-2804, Dkt. No. 1, at Schedule A. The cases in the Opioid MDL asserted a variety of claims against Purdue and others for their role in the opioid crisis, under theories of liability including: (1) public nuisance, (2) false representations, (3) unjust enrichment, (4) common law *parens patriae*, (5) negligence, (6) gross negligence, and (7) consumer protection act claims. (Dkt. No. 91-4, at App.1276); *see e.g.*, Complaint, *County of San Joaquin, et al. v. Purdue Pharma L.P., et al.*, No. 2:17-cv-01485, Dkt. No. 1, Ex. 1 (E.D. Ca. May 24, 2017); Complaint, *Everett v. Purdue Pharma LP et al.*, No. 2:17-00209, Dkt. No. 1-1 (W.D. Wa. Jan. 18, 2017).

The Opioid MDL was assigned to The Honorable Dan A. Polster. At the time of Purdue's filing for bankruptcy, approximately 2,200 actions against Purdue related to the opioid crisis were pending before Judge Polster. (*See* Dkt. No. 91-4, at App.1273).

Judge Polster put the cases before him on a settlement track and litigation track and assigned a Special Master to assist in their management. (*See* MDL Dkt. No. 2676, at 3). Given "the immense scope of the opioid crisis" Judge Polster was "very active from the outset of [the] MDL in encouraging all sides to consider settlement." (MDL Dkt. No. 2676, at 11).

Within the litigation track, Judge Polster designated attorneys to coordinate discovery in related state and federal cases (MDL Dkt. No. 616) and issued a case management order meant to "facilitate, to the maximum extent possible, coordination with parallel state court cases." (MDL Dkt. No. 876, at ¶I(b)). Judge Polster ordered the establishment of a joint database of all prescription opiate cases filed in state and federal courts, so that information and documents could be tracked and discovery cross-noticed. (*Id.* at ¶¶III-V). Over 450 depositions were taken under the Opioid MDL umbrella, and over 160 million pages of documents were produced. (MDL Dkt. No. 2676, at 5; *see* Dkt. No. 91-4, at App.1276).

The extensive discovery in the Opioid MDL, and the discovery coordination it facilitated, revealed for the first time the involvement of certain members of the Sackler family in acts that Purdue had agreed not to commit as part of the 2007 Plea Agreement. Schedule A to the 2020 Plea Agreement – to which facts the corporation has stipulated, so they are deemed proved[24] – chronicles Purdue's extensive violation of the 2007 Plea Agreement, which began almost from the time the ink was dry on the papers. (*See* JX-2094.0006, 0015-18). Unable to deny what was apparent from the Opioid MDL discovery, the corporation admitted that Purdue had engaged in aggressive efforts to boost opioid sales, including: offering payments to induce health care providers to write more prescriptions of Purdue opioid products, offering "prescription savings cards" for health care providers to give patients to encourage them to fill prescriptions for opioids, and failing to maintain effective controls against diversion, which included failing to inform the United States Drug Enforcement Administration that health care providers flagged for abuse filled over 1.4 million OxyContin prescriptions. (*Id.*).

Evidence produced in discovery also "subjected the Sacklers to increasing scrutiny and pointed towards culpability of certain members of the family . . ." (Dkt. No. 91-5, at App.2040). This evidence demonstrated that members of the Sackler family were heavily involved in decisions on how to market and sell opioids (*see* JX-2944-45, JX-2952, JX-3013-14, JX-1652). Certain Sacklers, notably Richard, Mortimer D.A., and Theresa, aggressively set and pushed sales targets for OxyContin that were higher than those recommended by Purdue executives (*see* Confr. Hr'g Tr., Aug. 18, 2021, at 84:2-6; Dkt. No. 91-4, at App.1350-51); accompanied sales representatives on "ride along" visits to health care providers to promote "the sale of Purdue's opioids" (Confr. Hr'g Tr., Aug. 18, 2021, at 70:2-7); approved countless settlements related to Purdue's culpable

[24] The Sacklers do not concede the truth of Purdue's admissions.

conduct (*id.* at 126:2-18); and oversaw sales and marketing budgets and corresponding upward trends in OxyContin prescribing. (Confr. Hr'g Tr., Aug. 19, 2021, at 106:15-109:6).

As discovery turned up evidence of the involvement of members of the Sackler family in Purdue's misconduct, those family members were added as defendants in a number of cases pending against Purdue. For example, attorney Jayne Conroy testified that, as a result of information disclosed during the Opioid MDL discovery, she added the Sacklers as defendants in the lawsuits her firm was pursuing against Purdue in New York State Supreme Court. (Confr. Hr'g Tr. Aug. 16, 2021, at 70:16-25; *see also* Dkt. No. 91-5, at App.2040). Peter Weinberger, another attorney with AHC, similarly acknowledged to the Bankruptcy Court that, "State complaints naming Sackler family members relied on MDL documents extensively." (Bankr. Dkt. No. 3449, at ¶¶ 36-37, 40).

2. State Multi-District Litigations

In addition to the Opioid MDL, over 390 parallel actions against Purdue proliferated in state courts, as well as in local courts in D.C., Puerto Rico, and Guam. (Dkt. No. 91-4, at App.1273). The causes of actions asserted in these various litigations included: (1) violations of state false claims acts; (2) violations of state consumer protection laws; (3) public nuisance; (4) fraud; (5) negligence; (6) unjust enrichment; (7) civil conspiracy; (8) violations of state controlled-substances acts; (9) fraudulent transfer; (10) strict products liability; and (11) wrongful death and loss of consortium. (*Id.*, at App.1276).

In some states, these lawsuits were consolidated in coordinated state proceedings. (*Id.* at App.1273-1274; *see e.g.*, Dkt. No. 91-5, at App.2039-2040). Such coordination occurred in Connecticut, Illinois, New York, Pennsylvania, Texas, and South Carolina. (Dkt. No. 91-4, at App.1273). In New York, cases brought by 58 counties and two dozen cities against Purdue were

transferred to and coordinated in Suffolk County. (Dkt. No. 91-5, at App.2040).

While members of the Sackler family were not originally named as defendants in these state court coordinated actions, once their role in the marketing of OxyContin post-2007 was revealed in the Opioid MDL discovery, complaints in many state litigations were amended to name members of the Sackler family as defendants. (*See, e.g.*, Dkt. No. 91-5, at App.2040; *see* Bankr. Dkt. No. 3449, at ¶¶ 36-37, 40). Specifically, Richard Sackler, Jonathan Sackler, Mortimer D.A. Sackler, Kathy Sackler, Ilene Sackler Lefcourt, Beverly Sackler, Theresa Sackler, Mariana Sackler, and David Sackler were named as defendants in various lawsuits. (*See e.g.*, Dkt. No. 91-7, at App.2402-2597). In at least three of these cases, state courts denied the Sackler defendants' motions to dismiss the claims against them. (*See* Dkt. No. 94, at 5; Dkt. No. 91-5, At App.2041); *see e.g.*, Order, *In re Opioid Litigation*, No. 400000/2017, Dkt. No. 1191 (Sup. Ct. Suffolk Cnty. June 21, 2019).

Thus, when Purdue filed for bankruptcy in September 2019, ". . . the threat of liability for at least some members of the [Sackler] family was real and [] without the protections of bankruptcy, individual family members were at risk of substantial judgments against them." (*See* Dkt. No. 91-5, at App.2040). As explained by the UCC in the Confirmation Hearing, it was estimated that ". . . litigating against the Sacklers could eventually lead to a judgment or multiple judgments greater than $4.275 billion." (Bankr. Dkt. No. 3460, at 33; *see also* Bankr. Dkt. No. 3449, at ¶ 10).

3. <u>The Renewed Lawsuits Against Purdue and Members of the Sackler Family by the Individual States</u>

But private litigation was far from the only game in town. By the middle of 2019, forty-nine states' Attorneys General had filed new or amended lawsuits against Purdue, all of which named specific members of the Sackler family and/or Sackler-related entities. (*See* App.1274); *see*

e.g., Amended Complaint, *New York v. Purdue Pharma L.P., et al.*, No. 400016/2018 (Sup. Ct. Suffolk Cnty. Mar. 28, 2019). For example, in March 2019, the New York Attorney General amended its earlier complaint against Purdue to add claims against the same eight members of the Sackler family and various Sackler entities.[25] *Id.* at ¶¶814-900. The newly-asserted claims included claims for public nuisance, fraud, gross negligence, willful misconduct, unjust enrichment, fraudulent conveyances, violations of state finance laws and social services laws, and "repeated and persistent" fraud and illegality in violation of Executive Law § 63(12). *Id.* Against the "Sackler entities," the complaint asserted claims for unjust enrichment and fraudulent conveyance. *Id.*

The Attorneys General of all but one of the State Appellants – California, Connecticut, Delaware, Maryland, Oregon, Rhode Island, Vermont, and D.C. – filed or amended complaints that include a range of charges against both Purdue and members of the Sackler family. (*See, e.g.*, Dkt. No. 103-7, at A-1553; Dkt. No. 95-1, at A0008; Dkt. No. 91-7, at App.2598; Dkt. No. 91-8, at App.2661; Dkt. No. 91-9, at App.3153; Dkt. No. 121-2, at MDA-008; JX-1647; JX-0946). The State of Washington did not assert claims against members of the Sackler family specifically but asserted claims against "Does 1 through 99" and "Doe Corporations 1 through 99" who – although not yet named – allegedly acted with Purdue "in committing all acts" in their complaint. (*See* Dkt No. 103-3, at App-630; JX-0944). This left open the possibility of naming members of the Sackler family and Sackler family entities.

The State Appellants' asserted claims included:

- fraudulent transfer (*see e.g.*, Dkt. No. 91-7, at App. 2649; Dkt. No. 91-9, at App.3194);
- fraud and fraudulent misrepresentation (*see e.g.*, Dkt. No. 91-9, at App.3184);

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[25] The entities were described as those "known and unknown entities" that the Sacklers allegedly "used as vehicles to transfer funds from Purdue directly or indirectly to themselves," including Rosebay and Beacon. *Id.* at ¶¶49-54.

- unjust enrichment (*see e.g.*, Dkt. No. 91-9, at App.3192; Dkt. No. 103-7, at A-1752; JX-1647.0199);
- negligence (*see e.g.*, Dkt. No. 91-8, at App.2766; Dkt. No. 91-9, at App.3187; JX-0944.0123);
- public nuisance (*see e.g.*, Dkt. No. 91-8, at App.2768-69; Dkt. No. 91-9, at App.3175; Dkt. No. 103-7, at A-1749; Dkt. No. 95-1, at A0068; JX-1647.0197; JX-0944.0120); and
- violation of state consumer protection statutes by deceptive and unfair acts and practices. (*see e.g.*, Dkt. No. 91-7, at App.2642-2648; Dkt. No. 91-8, at App.2764; Dkt. No. 103-7, at A-1746-47; Dkt. No. 95-1, at A0066-67; Dkt. No. 121-2, at MDA-110; JX-1647.0194; JX-0944.0118).

For example, California asserted two claims for violations of its False Advertising Law (Cal. Bus. & Prof. Code § 17500 *et seq.*), and Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*), as well as a public nuisance claim (Cal. Civ. Code §3494 *et seq.*), against Purdue and nine individual members of the Sackler family, including Mariana Sackler.[26] (Dkt. No. 95-1, at A0066-68; JX-0947). California sought, *inter alia*, the assessment of civil penalties against each defendant and an order directing Purdue and the Sacklers to abate the public nuisance.

Connecticut – the state where Purdue's headquarters are located – asserted four claims for violations of its Unfair Trade Practices Act (Conn. Gen. Stat. §42-110a *et seq.*) and one claim for fraudulent transfer against Purdue and eight individual members of the Sackler family. (Dkt. No. 91-7, at App.2642-49; JX-0840). Connecticut sought, *inter alia*, civil penalties, restitution, and disgorgement from all defendants, including the Sacklers.

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[26] A California court recently issued a "tentative decision" rejecting the public nuisance theory of liability against Johnson & Johnson and other pharmaceutical companies, including Teva, Allergan, Endo and Janssen. *See* Tentative Decision, *California v. Purdue Pharma, L.P., et al.*, No. 30-2014-00725287-CU-BT-CXC, Dkt. No. 7939 (Cal. Sup. Ct. Nov. 1, 2021). The same theory of liability was thrown out by the Oklahoma Supreme Court in a case against Johnson & Johnson. *See State ex rel. Hunter v. Johnson & Johnson*, --- P.3d ----, 2021 WL 5191372 (Okla. Sup. Ct. Nov. 9, 2021). However, also last month, an Ohio jury found three major pharmacy chains liable for damages on the theory that their filling of pill mill prescriptions for opioids created a public nuisance. *See Ohio jury holds CVS, Walgreens and Walmart liable for opioid crisis*, NPR (Nov. 23, 2021), *available at* https://www.npr.org/2021/11/23/1058539458/a-jury-in-ohio-says-americas-big-pharmacy-chains-are-liable-for-the-opioid-epide.

Delaware – where Purdue Pharma's limited partnership was formed – asserted three claims for violations of Delaware's Consumer Fraud Act (6 Del. C. §2511 *et seq.*) as well as claims for negligence and public nuisance against seven individual members of the Sackler family.[27] (Dkt. No. 91-8, at App.2764-2768; JX-0945; JX-1646). Delaware sought, *inter alia*, civil penalties and abatement.

Maryland asserted a claim for violation of the state's consumer protection laws (Md. Code Ann., Com. Law §§13-301 *et seq.*) against the same seven individual members of the Sackler family. (*See* Dkt. No. 121-2, at MDA-008). Maryland, like the other opposing states, sought civil penalties against the Sackler defendants, among other relief.

Oregon asserted three claims against Purdue and eight individual members of the Sackler family – the first seeking a declaratory judgment that Purdue and related entities are the alter egos of the Sacklers and that the state may pierce the corporate veil; the other two asserting claims for fraudulent conveyance. (*See* JX-1647). Oregon sought, *inter alia*, a judgment restraining the Sackler defendants from disposing of property and ordering a return of the conveyed funds.

Rhode Island asserted six claims against Purdue and the eight individual members of the Sackler family for public nuisance, fraud and fraudulent misrepresentation, fraudulent and voidable transfers, violations of Rhode Island's State False Claims Act (R.I. Gen. Laws §9-1.1-1 *et seq.*), negligence, and unjust enrichment. (Dkt. No. 91-9, at App.3175-94; JX-1648; JX-2214). Rhode Island sought, *inter alia*, civil penalties, treble damages, disgorgement, and restitution.

Vermont asserted four claims against the eight individual members of the Sackler family: two violations of the Vermont Consumer Protection Act (9 V.S.A. §2451 *et seq.*), unjust

[27] Beverly Sackler was not sued in Delaware or Maryland. Mariana Sackler was only sued in California.

enrichment, and public nuisance. (Dkt. No. 103-7, at A-1746-52; JX-1649). Vermont also sought civil penalties, among other relief.

Washington State brought an action against Purdue, "Does 1 through 99," and "Doe Corporations 1 through 99" for violating the Washington's Consumer Protection Act (Wash. Rev. Code §19.86), for causing a public nuisance, and for breaching Washington's common law of negligence. (JX-0944). The Complaint sought abatement, restitution, and statutory penalties, among other relief.

D.C. brought two claims against Purdue and Richard Sackler for violations of its consumer protection statutes (D.C. Code §28-3904(f)). (*See* JX-0946). D.C. sought, like the others and among other relief, statutory civil penalties against each defendant.

Each State Appellant filed its claims before Purdue filed for bankruptcy in September 2019. None of the cases had been litigated to judgment.[28] (*See* Dkt. 91-4, at App.1278). These cases were not subject to the automatic stay that stopped private litigation in its tracks once Purdue filed, (11 USCA § 362(b)), but the Bankruptcy Court preliminarily enjoined all litigation against Purdue and the Sacklers; that order was affirmed by this court, *In re Purdue Pharms. L.P.*, 619 B.R. 38 (S.D.N.Y. 2020). As a result, no activity has taken place in any of these lawsuits since shortly after Purdue's filing.

4. Lawsuits in Canada

In Canada, a number of class actions were filed against certain of the Debtors with allegations similar to those made in the U.S. (*See* Dkt. No. 91-4, at App.1273, 1477; *see e.g.*, Dkt No. 98-1, at 13–102, 113–202). Prior to Purdue's Chapter 11 filing, the lead plaintiffs in ten of the

[28] Prior to bankruptcy, the lawsuit brought by North Dakota was litigated to judgment, and that judgment was in favor of Purdue. (*See* Dkt. No. 91-4, at App.1278).

Canadian class actions settled their claims for $20 million, and Purdue Pharma (Canada) ("Purdue Canada")[29] placed that amount in trust pending approval of the settlement by the Ontario Superior Court of Justice, the Superior Court of Quebec, the Supreme Court of Nova Scotia and the Saskatchewan Court of Queen's Bench (the "Canadian Settlement"). (Dkt. No. 91-4, at App.1477-1478). The Canadian Settlement, once approved and after funds are disbursed, "completely and unconditionally released, forever discharged, and acquitted [the Debtors] from any and all Settled Patient Claims against the Debtors and from any other Proof of Claim or portion thereof in respect of any Settled Patient Claim filed against any Debtor." (*Id.*). Under the Canadian Settlement, no member of the Canadian classes party to that settlement can recover from any source other than the Canadian Settlement trust, and every class member in a settling class bears the burden of proving in the U.S. bankruptcy that its claim was not released and discharged by the Canadian Settlement. (*Id.*).

However, the Canadian Settlement did not cover the claims of the Canadian Appellants, which are Canadian municipalities and indigenous tribes. The Canadian Appellants' lawsuits concerned sales and distribution of OxyContin in Canada, affecting Canadian communities, by Purdue Canada, which the Canadian Appellants assert was controlled by Sackler family members. (Dkt. 98, at 5; Bank. Dkt. No. 3421, at 89-92). The Canadian Appellants' lawsuits against Purdue Canada assert, *inter alia*, claims for conspiracy, public nuisance, negligence, fraud, and unjust enrichment. (Dkt No. 98-1, at 18-19). The Canadian Appellants also stated at oral argument that that they "were barred by the imposition of the stay and the stay-related orders" – the preliminary injunction described above – "from actually naming [certain] Competition Act claim[s] against the

[29] Purdue Canada is an IAC. It is not a Debtor in this case. Purdue Canada as defined in the Shareholder Settlement Agreement, means Bard Pharmaceuticals Inc., Elvium Life Sciences GP Inc., Elvium Life Sciences Limited Partnership, Elvium ULC, Purdue Frederick Inc. (Canada), Purdue Pharma (Canada), Purdue Pharma Inc. (Canada), and Purdue Pharma ULC. (JX-1625.0027).

Sacklers and the [Shareholder Released Parties]," which they would assert if given the opportunity. (Oral Arg. Tr., Nov. 30, 2021, at 80:11-16).

The Canadian Appellants do not include the Canadian federal government or any Canadian province – all of whom seem to be content with the fact that the Plan excludes claims against Purdue Canada. (*See* Plan, at 10). Indeed, the ten Canadian provinces for their part seem to believe their claims are excluded and have decided to pursue their claims in Canada instead. For example, in press on the topic, Reidar Mogerman, counsel for the British Columbia government, explained that the provinces gave up their claims (worth US$67.4 billion) before the Bankruptcy Court in the U.S. to protect lawsuits they filed against Purdue's Canadian entities.[30] "We didn't want to get swallowed in competition with the U.S. claims and lose our Canadian claims," he explained to the press. *Id.* To date, in Canada, the various Canadian provinces have asked the Ontario Superior Court of Justice to continue to pursue their separate class actions against Purdue Canada. *Id.*

VII. Members of The Sackler Family Insulate Themselves Against Creditors

As Judge Drain found, the evidence indicates members of the Sackler family distributed significant sums of Purdue money to themselves in the years 2008-2016, during which time those Sackler family members were closely involved in the operations of Purdue and aware of the opioid crisis and the litigation risk. *See In re Purdue Pharma L.P.*, 2021 WL 4240974, at *32. As detailed below, this "aggressive[]" (to use Richard Sackler's word, *see* JX-1703) pattern of distribution of earnings to shareholders represented a sharp departure from prior practice in two ways.

First, during the period 1996-2007, Purdue up-streamed on average 9% of its revenue per year to the Sacklers; but during the period 2008-2016, Purdue up-streamed on average 53%, and

[30] *Provinces plan legal push against Purdue Pharma in wake of U.S. opioid deal*, The Globe and Mail (Sept. 3, 2021), https://www.theglobeandmail.com/canada/article-provinces-plan-legal-push-against-purdue-pharma-in-wake-of-us-opioid.

as much as 70%, of its revenue to the Sacklers. (*See* JX-2481).

Second, during the earlier period (1996-2007), the Sacklers kept less than 10% of the money that was distributed by Purdue for themselves, while using over 90% of those distributions to pay taxes on Purdue's earnings; but during the years between 2008-2016, the Sacklers retained, in one form or another, 56% of those distributed earnings, while using just 44% to pay taxes. (Bankr. Dkt. 3410-2).

The 2008-2016 distributions to shareholders also contrasted with the practices of Purdue's peer pharmaceutical companies. (*See* JX 1703).

According to the Sacklers' own expert, this pattern of upstreaming corporate earnings substantially depleted Purdue's treasury during that eight-year period. (JX-0431, p. 77, Fig. 10).

A. The Sacklers Cause the Transfer of Billions of Dollars from Purdue to Themselves

In March 2007, Richard, Jonathan, Kathe, and Mortimer Sackler exchanged emails noting that the "future course [for the business] is uncertain" (JX-2976) and identified the "emergence of numerous new lawsuits" as a "risk[] . . . we're not really braced for." (JX-2957). Just a few months later, in May, shortly after the 2007 guilty plea and settlement, David Sackler emailed Jonathan Sackler, Richard Sackler, and their financial advisor, expressing concern about the family's personal liability for the opioid crisis: "what do you think is going on in all of these courtrooms right now? We're rich? For how long? Until suits get through to the family?" (JX-2237; *see also* JX-2096, at ¶ 161). In his deposition, David Sackler agreed that his May 17, 2007, email reflects "concern[] that the family would be sued in connection with Purdue's sale of OxyContin." (JX-1989, at 183:14-184:20, 187:18-188:20). Less than a week after David Sackler sent his email, Richard and Jonathan Sackler met with a bankruptcy attorney, though Purdue was not in debt and not at risk of bankruptcy. (*See* JX-2985; JX-2986).

Thereafter, on July 26, 2007, a family financial advisor sent a confidential memorandum to Jonathan Sackler, in which he advised that Purdue faced "[u]ncapped liabilities" that posed "a huge valuation question" for Purdue at that very moment – the moment when the Plea and settlements were ostensibly ending any illegal behavior and putting further corporate liability – and potential shareholder liability – in the rear view mirror. (JX-1660, at 2-3). He added, "I presume the family has taken most of the appropriate defensive measures." (*Id.* at 3; *see also* JX-2241). One such measure, proposed in a separate memorandum, was "to distribute more free cash flow so [the owners] can purchase diversifying assets." (JX-2254; *see also* JX-2096, at ¶ 162).

By January 2008, the anxiety over impending lawsuits was apparent; Richard Sackler emailed Mortimer Sackler that, "I've been told by Silbert that I will be [sued] and probably soon." (JX-3001). Mortimer Sackler lamented in a later email in February 2008 that he wished to get out of the pharmaceutical business altogether "given the horrible risks, outlooks, difficulties, etc." (Bankr. Dkt. No. 2161, at Ex. 67). In this vein, in April 18, 2008, Richard Sackler warned in a memo that the business posed a "dangerous concentration of risk" and proposed that the family either sell the company or "distribute more free cash flow" to themselves. (JX-2214, ¶ 86; JX-3004; JX-3104). The family chose the latter course.

Beginning in 2008, Purdue began to make significant cash distributions to and for the benefit of the Sacklers. (JX-1988, at 226:13-19 (deposition of Richard Sackler); Confr. Hr'g Tr., Aug. 19, 2021, at 149:6-14 (testimony of Mortimer D.A. Sackler); Confr. Hr'g Tr., Aug. 18, 2021, at 65:8-17 (testimony of Richard Sackler); *see also* Dkt. No. 91-4, at App.1544). As noted above, about 44% of the money distributed went to pay taxes; a small fraction was invested in the IACs, which were owned by the Sacklers; and the rest went to Rosebay and Beacon, the Side A and B

Sackler family trusts. (*See* JX-1987, at 156:8-158:4; Confr. Hr'g Tr., Aug. 19, 2021, at 27:7-28:1-12).

In the years leading up to the 2007 Plea Agreement and Settlement, the Sackler family had been content to leave most of Purdue's earnings in the company, except insofar as was necessary to pay taxes. In response to a question from this Court, Debtors acknowledged that, between January 1, 1995 and December 31, 2007, distributions to the Sacklers totaled $1.322 billion, of which $1.192 billion (or 90.2%) was used to pay taxes. (Dkt. No. 177; *see* JX-3050.0042; JX-2481; Bankr. Dkt. 3410-2). In the twelve years prior to 2008, the Sacklers took personal distributions from Purdue that averaged 9% of Purdue's revenue. (*See* JX-2481).

After 2007, Purdue went from distributing less than 15% of its revenue to distributing as much as 70% of revenue.[31] (*Id.*). It also jumped from distributing approximately 38% of its free cash flow in 2006 to distributing 167.4% of free cash flow in 2007 and continued to distribute free cash flow in the 90% range for the next decade. (*Id.*). These distributions totaled approximately $10.4 Billion. (*See* Dkt. No. 91-4, at App.1544; Bankr. Dkt. No. 3410-1, at ¶ 12; Confr. Hr'g Tr., Aug. 18, 2021, at 65:8-17 (testimony of Richard Sackler); Confr. Hr'g Tr., Aug. 19, 2021, at 27:7-28:1-12, 149:6-14 (testimony of Mortimer D.A. Sackler)).

Approximately $4.6 billion of that amount was used to pay pass through taxes (*see* Bankr. Dkt. 3410-2), which attests to the tremendous profitability of Purdue's OxyContin business during that same eleven-year period. In fact, the vast majority of Purdue's earnings between 2008-2017 came from OxyContin sales. (*See* JX-1984, at 40:24-41:5; JX-3275, at 338:6-9; JX-0999).

[31] The absolute amount of these distributions dwarfed distributions for the 1995-2007 period because concerns about the validity of Purdue's OxyContin patent capped its earnings until 2008, when it was definitively held that the patent was valid. (*See* Dkt. No. 241, at 6). After that, Purdue's earnings soared – as did both the amount owed in taxes and the amount that ended up in the Sackler family trusts.

According to the Sacklers' own expert, the change in distribution pattern drained Purdue's total assets by 75% and Purdue's "solvency cushion" by 82% between 2008 and 2016. (JX-0431, p 77, Fig. 10). Richard Sackler later acknowledged in an email in 2014 that, "in the years when the business was producing massive amounts of cash, the shareholders departed from the practice of our industry peers and took the money out of the business." (JX 1703). In at least one email in 2014, Jonathan Sackler referred to this distributing of cash flow from OxyContin as a "milking" program. (JX-2974).

The obvious implication of this evidence was recognized by Judge Drain in his bankruptcy decision, discussed *infra* in Background Section XII. *See In re Purdue Pharma L.P.*, 2021 WL 4240974, at *27, 31, 32–33. In particular, Judge Drain noted, "I do have an extensive report and trial declarations as to the nature of the assertedly over $11 billion of avoidable transfers, when they occurred, what they comprised, and who they were made to," *id.* at 31; and found, "The record suggest[s] that at least some of the Sacklers were very aware of the risk of opioid-related litigation claims against Purdue and sought to shield themselves from the economic effect of such claims by causing Purdue to make billions of dollars of transfers to them and to shield their own assets, as well, from collection." *Id.* at 32. While he made no finding that these distributions qualified as fraudulent conveyances, or that they could be recouped by Purdue, Judge Drain also acknowledged that the estate had potential claims of "over $11 billon of assertedly avoidable transfers." *Id.* at 27.

As Judge Drain also acknowledged, the distribution of Purdue money to the Sackler family occurred during a time when members of the Sackler family, including those named in many pending cases, were closely involved in the operations of Purdue and well aware of the opioid crisis and the litigation risk. He said, "The testimony that I heard from the Sacklers tended to show, that as a closely held company Purdue was run differently than a public company and that its Board

and shareholders took a major role in corporate decision-making, including Purdue's practices regarding its opioid products that was more akin to the role of senior management.” *Id.* at 33. As Richard Sackler acknowledged in the Confirmation Hearing, he oversaw as director “many settlements,” stating, “I was director, and I cannot count up all the settlements that the company entered into while I was a director. But there were many settlements, both private and public.” (Confr. Hr’g Tr., Aug. 18, 2021, at 126:2-18). For example, as part of the Board, he approved the settlement of $24 million to the State of Kentucky to resolve unlawful and unfair deceptive trade practice allegations against Purdue in 2015. (*Id.* at 124:16-125:1).

The Sacklers vehemently deny any suggestion that any of these transfers would qualify as fraudulent conveyances. (*See* JX-2096, at ¶G). However, in Addendum A to the 2020 “Settlement Agreement” with the DOJ, the Government asserted its confidence that it could prove that: “From approximately 2008 to 2018, at the Named Sacklers’ request, billions of dollars were transferred out of Purdue as cash distributions of profits and transfers of assets into Sackler family holding companies and trusts. Certain of these distributions and transfers were made with the intent to hinder future creditors and/or were otherwise voidable as fraudulent transfers.” (*Id.* at Addendum A, ¶6; *see also id.* at ¶¶158-159)

The fact of these extensive transfers of money out of Purdue and into the family coffers is not contested. For example, during the Confirmation Hearing, when Richard Sackler was asked if it were “true that during that time period generally [2008-2018] . . . the Purdue Board of Directors transferred out billions of dollars to Sackler family trusts or holding companies,” he answered, “Yes . . . yes, that we did.” (Confr. Hr’g Tr., Aug. 18, 2021, at 65:8-17). Only whether those transfers (or any of them) would qualify as fraudulent conveyances is in dispute. But while that presents an important and interesting question, I agree with Judge Drain that it was not one he

needed to resolve in order to rule on the confirmability of the Plan. But at some point – certainly by 2018 – Purdue itself was in a precarious financial position in face of the lawsuits. At the time of the bankruptcy filing, Purdue represented that, while it had "no funded debt and no material past due trade obligations" – or even any "judgment creditors" – "the onslaught of lawsuits has proved unmanageable" and "will result only in the financial and operational destruction of the Debtors and the immense value they could otherwise provide . . . " (Dkt. No. 91-4, at App.1237).

B. A Pre-Petition Settlement Framework Is Proposed That Would Release the Sackler Family From Liability.

In the months before Purdue filed for bankruptcy, Purdue, the Sackler family (now no longer represented on Purdue's Board) and Sackler entities were engaged in discussions about a potential framework for settlement of all claims against Purdue and the Sacklers with "the various parties in the MDL litigation" and certain "subgroups" of creditors and potential creditors. (*See* Confr. Hr'g Tr., Aug. 12, 2021, at 152:23-153:22). John Dubel testified in the Confirmation Hearing[32] that the pre-petition settlement framework discussions involved the concept of third-party releases *and* the concept of using the bankruptcy process to release all claims against the Sacklers in exchange for their contribution of funding to the settlement. (*Id.* at 154:1-5). Mr. Dubel explained:

> [I]t was very clear from the . . . Sacklers that if they were going to post up X amount of dollars – and I believe at the time, the settlement framework was somewhere around $3 billion or so – that they were going to seek broad third party releases, and releases from the Debtors, releases of all the estate claims, etc., so that they could be able to put all of that – all of the litigation behind them . . . *it was something that was a prerequisite or a condition to them posting the amount of money that was in the settlement framework* and then ultimately what is in the plan of organization we were seeking approval of.

[32] Mr. Dubel served as the Chairman of the Special Committee of the Board. He was appointed to the Board in July 2019 and chaired the Special Committee investigating the potential claims of Purdue or its estates against the Sacklers. (*See* Bankr. Dkt. No. 3433, at ¶1).

(*Id.* at 155:25-156:1-12; *see id.* at 209:1-4, 214:8-19) (emphasis added).

So the Sacklers made it clear well before the Debtors filed for chapter 11 bankruptcy that they would contribute toward Purdue's bankruptcy estate only if they received blanket releases that would put "all of the litigation behind them." (*Id.* at 155:25-156:1-12). This was reported heavily in the press at the time of the bankruptcy filing.[33]

This pre-petition settlement framework was then imported into the bankruptcy process. As Mr. Dubel testified, once a pre-petition settlement framework was created, the plan was to "Us[e] the Chapter 11 process to enable us to then organize all of the various claimants into one group under . . . the auspices of the Chapter 11 bankruptcy process." (*Id.* at 154:14-18). He further explained that, "It was the framework that would help us continue to bring all of the various creditor groups towards a decision as to whether it was better to litigate against the Sacklers or attempt to come up with a settlement that would be fair and equitable for all the creditors of the Debtor's estates." (*Id.* at 155:2-9). He testified that some 24 states "were supportive of us moving forward in the process of filing a Chapter 11 and using this [bankruptcy] as a means of coalescing all the parties into one organized spot to address the potential claims that the estates would have against the Sacklers." (*Id.* at 157:4-9).

Purdue's bankruptcy was thus a critical part of a strategy to secure for the Sacklers a release from any liability for past and even future opioid-related litigation without having to pursue personal bankruptcy. David Sackler acknowledged as much in his testimony, "I don't know of

[33] *See e.g.*, *Purdue Pharma's bankruptcy plan includes special protection for the Sackler family fortune*, The Washington Post (Sept. 19, 2019), https://www.washingtonpost.com/business/2019/09/18/purdue-pharmas-bankruptcy-plan-includes-special-protection-sackler-family-fortune; *Where did the Sacklers move cash from their opioid maker?*, ABC News (Sept. 5, 2019), https://abcnews.go.com/US/wireStory/sacklers-move-cash-opioid-maker-65407504.

another forum that would allow this kind of global solution, this kind of equitable solution for all parties." (Confr. Hr'g Tr., Aug. 17, 2021, at 35:4-6).

VIII. The Underlying Bankruptcy

Facing the mounting lawsuits against both Purdue and members of the Sackler family in the U.S. and abroad, certain U.S. based Purdue entities (Debtors) filed for bankruptcy relief on September 15, 2019. (Bankr. Dkt. No. 1). Members of the Sackler family and the Sackler entities – such as Rosebay and Beacon – did not file for bankruptcy, despite having been named as defendants in opioid-related lawsuits.

A. Pending Actions Against Purdue and Members of the Sackler Family Are Halted

Purdue quickly moved on September 18, 2019, before the Bankruptcy Court for an injunction halting all actions against Purdue as well as "against their current and former owners (including any trusts and their respective trustees and beneficiaries), officers, directors, employees, and associated entities." (Dkt. No. 91-4, at App.1471, 1562). This meant enjoining over 2,900 actions against Purdue and at least 400 civil suits against the Sacklers. (*Id.*, at App.1562).

Purdue argued that enjoining all litigation was necessary to facilitate the parties' work towards a global settlement in a single forum – the Bankruptcy Court. After an evidentiary hearing, on October 11, 2019, the Bankruptcy Court temporarily halted all such litigation until November 6, 2019 (*Id.* at App.1472), at which point it granted Purdue's motion enjoining all plaintiffs from continuing or commencing any judicial, administrative, or investigative actions, as well as any other enforcement proceeding, against Purdue or the non-debtor related parties, including against members of the Sackler family. (*Id.*; *see* Bankr. Dkt., No. 2983, at 171). This Court affirmed the Bankruptcy Court's grant of the preliminary injunction. *Dunaway v. Purdue Pharma. L.P. (In re Purdue Pharma. L.P.)*, 619 B.R. 38 (S.D.N.Y. 2020). The expiration date of the preliminary

injunction has been extended 18 times, during which period the parties negotiated to come up with the Plan. (*See* Dkt. No. 91-4, at App.1402, 1429, 1472-73; Bankr. Dkt. Nos. 2897, 2488).

B. The Creditor Constituencies in the Bankruptcy

On September 27, 2019, the U.S. Trustee appointed nine creditors to the UCC, an independent fiduciary to represent the interests of all unsecured creditors in the Purdue bankruptcy. (Dkt. No. 91-1, at App.7).[34] The UCC's appointees are Blue Cross and Blue Shield Association; CVS Caremark Part D Services L.L.C. and CaremarkPCS Health, L.L.C.; Cheryl Juaire; LTS Lohmann Therapy Systems, Corp.; Pension Benefit Guaranty Corporation; Walter Lee Salmons; Kara Trainor; and West Boca Medical Center. (Bankr. Dkt. No. 1294; *see* Dkt. No. 115-1, at 5). The UCC also has several ex-officio, non-voting representatives: (i) Cameron County, Texas, on behalf of the MSGE; (ii) the Cheyenne and Arapaho Tribes, on behalf of certain Native American Tribes and Native American-affiliated creditors; and (iii) Thornton Township High School District 205, on behalf of certain public school districts. (*See* Bankr. Dkt. No. 1294).

Between September and November 2019, various other creditor groups were formed to represent creditor constituencies in the bankruptcy, including as follows:

- The AHC was formed in September 2019 and is comprised of ten States, six counties, cites, parishes, or municipalities, one federally recognized American Indian Tribe (the Muscogee (Creek) Nation, as well as the court-appointed Co-Lead Counsel on behalf of the Plaintiffs' Executive Committee in the Opioid MDL (*see* Bankr. Dkt. No. 279);
- NAS Children was formed in September 2019 and is comprised of around 3,500 children, who born with "neonatal abstinence syndrome" due to exposure to opioids in utero, and/or their guardians (*see* Bankr. Dkt. No. 1582; Dkt. No. 115-1, at 3);
- The PI Ad Hoc Group was formed in October 2019 and is comprised of 60,761 personal injury claimants, each holding "one or more unsecured, unliquidated, opioid-related personal injury claims against one or more of the Debtors" (*see* Bankr. Dkt. Nos. 3939, 348);

[34] See Official Committee of Unsecured Creditors of Purdue Pharma L.P. and Affiliated Debtors: General Information, KKC, available at http://www.kccllc.net/PurdueCreditors.

- MSGE was formed in October 2019 and is comprised of 1,317 entities: 1,245 cities, counties and other governmental entities, 9 tribal nations, 13 hospital districts, 16 independent public school districts, 32 medical groups, and 2 funds across 38 states and territories (*see* Bankr. Dkt. No. 1794);

- The Ad Hoc Group of Non-Consenting States ("NCSG") was formed in October 2019 and is comprised of 25 states that did not reach a pre-petition agreement with Purdue or the Sacklers regarding "the general contours of a potential chapter 11 plan" to settle their claims – California, Colorado, Connecticut, Delaware, D.C., Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin (*see* Bankr. Dkt. No. 296);

- The Ratepayer Mediation Participants ("Ratepayers") was formed in October 2019 and is comprised of "proposed representatives of classes of privately insured parties who are plaintiffs and proposed class representatives in their individual and representative capacities in suits brought against [Purdue]" in 25 actions in 25 states (*see* Bankr. Dkt. No. 333; Dkt. No. 91-3, at App.1108); and

- The Ad Hoc Group of Hospitals ("Hospitals") was formed in November 2019 and is comprised of hundreds of hospitals that have treated and treat patients for conditions related to the use of opiates manufactured by Purdue (*see* Bankr. Dkt. 1536).

Other groups that formed during the pendency of the bankruptcy proceedings include:

- The Third-Party Payor Group ("TPP Group"), comprised of certain holders of third-party payor claims (*see* Dkt. No. 91-3, at App.1114);

- The Native American Tribes Group ("Tribes Group"), comprised of the Muscogee (Creek) Nation, the Cheyenne & Arapaho Tribes, an ex officio member of the Creditors' Committee, and other Tribes represented by various counsel from the Tribal Leadership Committee and the Opioid MDL Plaintiffs' Executive Committee (*see id.* at App.1096); and

- The Public School District Claimants ("Public Schools"), comprised of over 60 public school districts in the United States (*see id.* at App.1106; Bankr. Dkt. Nos. 2707, 2304).

Each of these groups was representative of certain creditor constituencies, whose "members" (there was no certified class) held similar types of claims against Purdue.

C. The Court Sets A Bar Date for Filing of Proof of Claims

On January 3, 2020, Purdue filed a "Motion for Entry of an Order (I) Establishing Deadlines for Filing Proofs of Claim and Procedures Relating Thereto, (II) Approving the Proof

of Claim Forms, and (III) Approving the Form and Manner of Notice Thereof" (the "Bar Date Motion")." (*See* Dkt. No. 91-4, at App.1475). On February 3, 2020, the Bankruptcy Court approved the Bar Date Motion, setting June 30, 2020 as the deadline for all persons and entities holding a prepetition claim against Purdue, as defined in section 101(5) of the Bankruptcy Code (a "Claim"), to file a proof of claim. (*Id.*). On June 3, 2020, the Bankruptcy Court entered an order extending the Bar Date to July 30, 2020. (*Id.*; *see id.* at App.1298).

During the five months while the window for filing proofs of claims was open, over 614,000 claimants did so. Just 10% of the claims so filed would give rise to over $140 trillion in aggregate liability – more than the whole world's gross domestic product. (Dkt. No. 91-4, at App.1421; *see* Dkt. No. 91-1, at App.28).[35] The claimants included the federal government, states and political subdivisions, Native American Tribes, hospitals, third-party payors, ratepayers, public schools, NAS monitoring claims,[36] more than 130,000 personal injury victims, and others. (*See* Dkt. No. 91-4, at App.1425-1429; *see* Dkt. No. 91-1, at App.28).

D. The Court Approves Mediation and Appoints Mediators to Facilitate Resolution

On February 20, 2020, Purdue filed an unopposed "Motion for Entry of an Order Appointing Mediators," seeking the appointment of mediators and mandating that the various creditor constituencies participate in mediation. (Dkt. No. 91-4, at App.1486). On March 2, 2020, the Bankruptcy Court approved Purdue's motion and appointed The Honorable Layn Phillips (ret.) and Mr. Kenneth Feinberg as co-mediators (*Id.*; Bankr. Dkt. No. 895). Both are among the most experienced and respected mediators in the country.

[35] As of October 21, 2021, 628,389 claims have been filed. *See* Bankruptcy Claim Report, *available at* https://restructuring.primeclerk.com/purduepharma/Home-DownloadPDF?id1=MTMwMjM2Mw%3D%3D&id2=0.

[36] NAS monitoring claims are those of legal guardians of children born with neonatal abstinence syndrome due to exposure to opioids in utero. (Dkt. No. 91-4, at App.1404; *see* Dkt. No. 115-1 at 3).

IX. The Negotiation of the Bankruptcy Plan

Through mediation, Purdue and stakeholders worked to negotiate a complex settlement framework that would ultimately direct the Debtors' assets and $4.275 billion from the Sackler families toward abating the opioid crisis and restoring victims of the crisis. (*See* Dkt. No.91-4, at App.1402, 1429; *see* Bankr. Dkt. 2488).

The parties involved in the negotiations included the Debtors and non-debtor related parties (*i.e.*, members of the Sackler family) and the various creditor constituencies. Together, as defined in the court's mediation order, the participating "Mediation Parties" were the Debtors, the UCC, the AHC, the NCSG, the MSGE, the PI Ad Hoc Group, NAS Children, the Hospitals, the TPP group, and the Ratepayers. (Dkt. No. 91-4, at App.1486). The Tribes Group, the Public Schools, the National Association for the Advancement of Colored People, and others also participated in mediation, although not as official Mediation Parties. (*Id.*; *see* Bankr. Dkt. No. 2548).

The mediation progressed in three phases (*id.* at App.1404), as follows:

A. Phase 1: March 2020-September 2020

Phase one of the mediation addressed "the allocation of value/proceeds available from the Debtors' Estates" as disputed between the "Non-Federal Public Claimants" (the states, federal districts and U.S. territories, political subdivisions, and Native American tribes) and "Private Claimants" (hospitals, private health insurance carriers and third-party payors, and individuals and estates asserting personal injury, including NAS Children). (Dkt. No. 91-4, at App.1487; Bankr. Dkt. No. 855, at 6-7). It proceeded with a "series of rigorous formal mediation sessions during the period from March 6, 2020 to September 11, 2020." (Dkt. No. 91-4, at App.1487).

The mediation resulted in certain resolutions (*see generally* Bankr. Dkt. 1716), the most critical of which included value allocation between and among the various parties, such as:

> First, the Non-Federal Public Claimants agreed that all value received by them through the Chapter 11 Cases would be exclusively dedicated to programs designed to abate the opioid crisis . . .
>
> Second, the Non-Federal Public Claimants addressed and resolved . . . value allocation for all Native American Tribes . . . and a default mechanism that, in the absence of a stand-alone agreement between a State or territory and its political subdivisions, provides a structure and process for applying funds to abate the opioid crisis . . .
>
> Third, agreement was reached on written term sheets with certain individual Private Claimant groups that addressed allocation of estate value to each Private Claimant group. These agreements provided, among other things, that each class of Private Claimants will receive fixed cash distributions over time, the values and time periods varying for each class. Moreover, the Ad Hoc Group of Hospitals, the Third-Party Payors, and the NAS Committee (with regard to medical monitoring) each agreed to dedicate substantially all the distributions from their respective Private Creditor Trusts to abate the opioid crisis.

(*See* Dkt. No. 91-4, at App.1487). Ultimately, all participants except "the public school districts and the NAS children physical injury group" were able to achieve "agreement *inter se* as to their respective allocations as a result of the mediation process." (Bankr. Dkt. 2548, at 8).

Each of the term sheets with the private plaintiffs was conditioned on the confirmation of a plan of reorganization that includes participation by the Sackler Families in the plan of reorganization. (Bankr. Dkt. 1716, at 5).

However, not all issues were resolved. On September 23, 2020, while phase one of the mediation had reached "substantial completion" (Bankr. Dkt. 2548), the mediators' report indicated that "there remain terms to be negotiated by the parties with respect to each of the term sheets in order to reach final agreements . . ." (Bankr. Dkt. 1716, at 5-6). With several open terms and the estate claims still to be negotiated, on September 30, the Bankruptcy Court entered a Supplemental Mediation Order, authorizing further mediation to resolve the open issues and to mediate the estate claims (phase 2). (Dkt. No. 91-4, at App.1551; Bankr. Dkt. Nos. 1756).

B. Phase 2: October 2020-January 31, 2021

The Bankruptcy Court's Supplemental Mediation Order authorized the mediators "to mediate any and all potential claims or causes of action that may be asserted by the estate or any of the Non-Federal Public Claimants" against the Sackler families and entities "or that may otherwise become the subject of releases potentially granted to" members of the Sackler families and entities (defined as the "Shareholder Claims"). (*See* Bankr. Dkt. Nos. 1756, at 2; 2584, at 1; 518, at 4). This Order also "narrowed the number of mediating parties on the Shareholder Claims aspect of the mediation" to the Debtors, the UCC, the "Consenting Ad Hoc Committee,"[37] the NCSG, the MSGE, and representatives of the Sacklers. (Bankr. Dkt. Nos. 2584, at 1; 2548, at 2).

In phase two, the mediators received presentations from the parties on their positions regarding the estate claims, including a presentation by the UCC of its "views and findings on its investigation of estate causes of action." (Dkt. No. 91-4, at at App.1551-52; Bankr. Dkt. No. 2584).[38] After the presentations, "numerical negotiation began," with offers and counteroffers proposed. However, no "mutually agreed resolution" was reached among all constituencies before the end of the phase two on January 31, 2021. (Bankr. Dkt. No. 2584).

C. Phase 2 Negotiations Continue with the Sackler families: January 2021 to March 2021

Although court-ordered mediation formally ended on January 31, 2021, settlement negotiations continued among the Sackler families and entities, the Debtors, the NCSG, the UCC,

[37] The Bankruptcy Court did not define what the "Consenting Ad Hoc Committee" was, but the mediators' March 23, 2021 report lists "the Consenting States and the Ad Hoc Committee" as consisting of the AHC plus the various consenting states listed there – notably Texas, Tennessee, and Florida. (*See* Bankr. Dkt. No. 2548, at 2). The Court assumes this is what is meant by the "Consenting Ad Hoc Committee."

[38] Occurring contemporaneously with the mediation was a Special Committee's "comprehensive investigation into potential claims that the Debtors may have against the Sackler Families and Sackler Entities," led by attorneys from Davis Polk, who represent the Debtors in the bankruptcy. (Dkt. No. 91-4, at App.1537-1553). Throughout the mediation, the Special Committee was kept apprised of the "offers and counteroffers that had been communicated through the Mediators by the NCSG, on the one hand, and the Sackler Families, on the other hand." (*Id.* at App.1552).

the ACH, and the MSGE regarding the "Sackler contribution" to the Debtors' estate. (*See* Bankr. Dkt. No. 2584, at 9; Dkt. No. 91-4, at App.1552-53). Eight more offers and counteroffers were exchanged between the end of January 2021 and February 18, 2021. (Dkt. No. 91-4, at App.1553).

Ultimately, the Sackler families and entities, the Debtors, the AHC, the "Consenting Ad Hoc Committee," and the MSGE reached an agreement in principle, which settled on a guaranteed amount that the Sackler families would be required to contribute to the Debtors' estate –$4.275 billion over nine years (or ten years if certain amounts were paid ahead of schedule in the first six years). (*Id.* at App.1552-53; *see* Bankr. Dkt. Nos. 2488, 2879). The principal consideration for this payment was the "Shareholder Release" that was to be included in the Debtors' plan of reorganization. (*See* Bankr. Dkt. 2487, at § 10.8). That plan, along with the Debtors' "Disclosure Statement" containing the "Sackler Settlement Agreement Term Sheet" reached in negotiation, were filed with the Bankruptcy Court on March 15, 2021. (*See* Bankr. Dkt. Nos. 2487, 2488).

D. Phase 3: May 7, 2021-June 29, 2021

Phase three of the mediation involved a final push to resolve the dispute of the NCSG[39] over the terms of the agreement reached in phase two of the mediation between and among the Sackler families and entities, the Debtors, the AHC, the "Consenting Ad Hoc Committee," and the MSGE. (Bankr. Dkt. Nos. 2820, 2879). To that end, on May 7, 2021, the Bankruptcy Court asked his colleague, the Honorable Shelley C. Chapman, to preside over a mediation between the NCSG and the Sackler Families with respect to the terms of the settlement. (Bankr. Dkt. No. 2820). Between May 7 and June 29, 2021, Judge Chapman conducted 145 telephone meetings and several

[39] At that time, the non-consenting states included Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin.

in-person sessions between the NCSG and the Sackler families and entities. (*See* Bankr. Dkt. No. 3119).

The result of the mediation was a modified shareholder settlement with the Sackler families and entities, which was agreed to in principle by a fifteen of the twenty-five non-consenting states – specifically, Colorado, Hawaii, Idaho, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New York, North Carolina, Pennsylvania, Virginia, and Wisconsin. (*Id.* at 2). Those states that reached agreement in principle also agreed to support and/or not object to the Plan.

The remaining non-consenting states – most of which are parties to this appeal – did not agree to the revised settlement. (*Id.*).

The new terms of the settlement included additional payments of $50 million by the Sackler families, and the acceleration of another $50 million in previously agreed settlement payments, resulting in total payments of $4.325 billion. In addition to the money, Judge Chapman induced the parties to agree to several non-monetary terms; specifically, a "material expansion of the scope of the public document repository" to be established under the Plan, and certain prohibitions on Sackler family demands for naming rights in exchange for charitable contributions, together with a few other, minor concessions. (*See* Bankr. Dkt. No. 3119).[40] The Shareholder Release was unchanged. (*See id.*).

On July 7, 2021, Purdue filed the mediator's report in the bankruptcy proceeding, informing Judge Drain of the result of the mediation.

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[40] The value of the "naming rights" concession is dubious, since institution after institution, both here and abroad, is taking the Sacklers' name off various endowed facilities, including the Louvre and the Metropolitan Museum of Art. *See Louvre Removes Sackler Family Name From Its Walls*, The N.Y. Times (Jul. 17, 2019), https://www.nytimes.com/2019/07/17/arts/design/sackler-family-louvre.html; *Met Museum Removes Sackler Name From Wing Over Opioid Ties*, The N.Y. Times (Dec. 9, 2021), https://www.nytimes.com/2021/12/09/arts/design/met-museum-sackler-wing.html

X. Confirmation of the Plan: Summary of the Order on Appeal

Purdue filed the first version of the Plan on March 15, 2021. (Bankr. Dkt. No. 2487). It has subsequently filed twelve amendments to the Plan, the last of which was dictated by Judge Drain as a condition of confirmation. (*See* Bankr. Dkt. No. 3787).

On August 9, 2021, the Confirmation Hearing began before the Bankruptcy Court (Dkt. No. 91-3, at App.651), a six-day event during which 41 witnesses testified (by declaration or otherwise), after which the parties engaged in extensive oral argument. *See In re Purdue Pharma L.P.*, 2021 WL 4240974, at *2.

On September 1, 2021, the Bankruptcy Court rendered an oral ruling, stating it would confirm the proposed plan provided certain changes were made to it, the most relevant of which for purposes of this appeal was a modification of the Section 10.7 Shareholder Release:

> I . . . require that the shareholder releases in paragraph 10.7(b) [the release of third-party claims against the shareholder released parties], by the releasing parties, be further qualified than they now are. To apply [only] where . . . a debtor's conduct or the claims asserted against it [are] a legal cause or a legally relevant factor to the cause of action against the shareholder released party.

(Confr. Hr'g Tr., Sept. 1, 2021, at 134:18-135:2); *see also In re Purdue Pharma L.P.*, 2021 WL 4240974, at *45; *see* Plan, at § 10.7(b) (modifying the Plan in accordance with Judge Drain's instructions). Purdue filed the final version of the Plan the next day (Bankr. Dkt., No. 3726), and on September 17, 2021, Judge Drain issued his edited written decision confirming the Plan.

The salient features of the Plan are as follows:

<u>Trusts to Administer Abatement and Distribution</u>. Under the Plan, the majority of Purdue's current value will be distributed among nine "creditor trusts" that will fund opioid abatement efforts and compensate personal injury claimants, including the National Opioid Abatement Trust ("NOAT"), which will make distributions to qualified governmental entities. (Bankr. Dkt. No. 3456, at ¶¶ 5-6). Most of the creditor trusts are abatement trusts and may only make distributions

for the purpose of opioid abatement or to pay attorneys' fees and associated costs. (*Id.* ¶¶ 5-6). Two trusts – the "PI Trust" and "PI Futures Trust" – are the only exceptions: those creditor trusts will make distributions to qualifying personal injury claimants. (*Id.*)

<u>The Public Document Repository</u>. Under the Plan the Debtors are required to create a public document repository of Purdue material available for public review. (Bankr. Dkt. No. 3440, at ¶ 7.) The AHC testified at the Confirmation Hearing that the establishment of this public document repository was among their highest priorities. (Confr. Hr'g Tr., Aug. 13, 2021, at 151:17-152:9 ("[O]f all the aspects of . . . the injunctive relief part of [the Plan], [the public document repository] . . . is extremely important from the standpoint of, not only what it is that we developed in terms of evidence, [but also] lessons to be learned from the conduct that was uncovered and revealed."); Confr. Hr'g Tr., Aug. 16, 2021, at 83:20-22, 84:12-23 ("[I]t could be that the document repository is actually the most valuable piece of this settlement.")). The public document repository will be hosted by an academic institution or library and will include more than 13,000,000 documents (consisting of more than 100,000,000 pages) produced in the chapter 11 case and tens of millions of additional documents, including certain documents currently subject to the attorney client privilege that would not have been produced in litigation. (Bankr. Dkt. No. 3440, at ¶ 7.) The Plan ensures that scholars and the public can have access to all of these materials.

<u>Purdue Pharma Will Cease to Exist</u>. Under the Plan, Purdue Pharma will cease to exist. Its current business operating assets will be transferred to and operated by a new entity, known as "NewCo" in the Plan (Plan, at 28), but to be named KNOA. (Oral Arg. Tr., Nov. 30, 2021, at 158:1-17). NewCo will be governed by a board of five or seven disinterested and independent managers initially selected by the AHC and the MSGE, in consultation with the Debtors and UCC,

subject to a right of observation by the DOJ. (Plan, at §5.4). NewCo will manufacture products, including Betadine, Denokot, Colace, magnesium products, opioids and opioid-abatement medications, and oncology therapies. (*See* Oral Arg. Tr., Nov. 30, 2021, at 157:19-159:23). Additionally, NewCo will continue the Debtors' development of opioid overdose reversal and addiction treatment medications, and it must deliver millions of doses of those medications at low or no cost when development is complete (these will be distributed to groups or entities to be determined post-emergence). (*Id.* at 159:19-160:7). NewCo will be subject to an "Operating Injunction" that prohibits it from, among other things, promoting opioid products and providing financial incentives to its sales and marketing employees that are "directly" (but not indirectly) based on sales volumes or sales quotas for opioid products. (Bankr. Dkt. No. 3456, at ¶10). It also is subject to "Governance Covenants" that ensure that NewCo provides all its products in a "safe manner," complies with settlement obligations, pursues public health initiatives, and follows pharmaceutical best practices. (*Id.* at ¶11). The Plan provides for the appointment of a monitor to ensure that NewCo complies with the Operating Injunction and Governance Covenants; the monitor will provide the public with regular updates and seek relief from the Bankruptcy Court to the extent necessary to carry out the monitor's obligations. (*Id.* at ¶13). Above all, NewCo is not intended to operate indefinitely: The Plan instruct the managers to use reasonable best efforts to sell the assets of NewCo by December 21, 2024. (*Id.* at ¶15).

Shareholder Settlement Agreement. The Plan incorporates the "Shareholder Settlement Agreement" and the transactions contemplated therein whereby, in exchange for the release of third-party claims against over 1,000 individuals and entities related to the Sackler family ("Shareholder Released Parties"), the Sackler family will give $4.275 billion toward the Purdue estate. (Plan, at 37; Dkt. No. 91-3, at App.1042, 1045-1046, 1050).

Section 10.7(b) of the Plan sets out the terms of the release that the Sacklers, from the inception of the bankruptcy and earlier, insisted on in exchange for contributing funds to Purdue's estate. The Plan "releases and discharges" certain claims that third parties (including states and personal injury claimants) have asserted or might in the future assert against the Shareholder Released Parties. The release of claims against the Shareholder Released Parties permanently enjoins third parties from pursuing their current claims against the Shareholder Released Parties and precludes the commencement of future litigation against any of the Sacklers and their related entities, as long as (i) those claims are "based on or related to the Debtors, their estates, or the chapter 11 cases," and (ii) the "conduct, omission or liability of any Debtor or any Estate is the legal cause or is otherwise a legally relevant factor." (Plan § 10.7(b)). The third-party releases under the Plan are non-consensual; they bind the objecting parties as well as the parties who consented. All present and potential claims connected with OxyContin and other opioids would be covered by the Section 10.7 Shareholder Release.

Channeling Injunction. Under the Plan, all enjoined claims against the Debtors and those against the Shareholder Released Parties are to be channeled to the nine creditor trusts for treatment according to the trust documents of each respective trust ("Channeling Injunction"). (Plan, at p. 10 and § 10.8). However – as the U.S. Trustee points out, and the Debtors do not contest (*see* Dkt. No. 91, at 19-20; Dkt. No. 151, at 23-24) – the claims against the Shareholder Released Parties are effectively being extinguished for nothing, even though they are described as being "channeled." (*See e.g.*, Oral Arg. Tr., Nov. 30, 2021, at 37:9-14; 29:16-17). The U.S. Trustee explains that the Plan documents expressly prohibit value being paid based on causes of action (whether pre-or post-petition) against the Sackler family or other non-debtors for opioid-related claims. (Dkt. No. 91, at 19-20; *see, e.g.*, Dkt. No. 91-2, at App.333 ("Distributions hereunder are determined only

with consideration to a Non-NAS PI Claim held against the Debtors, *and not to any associated Non-NAS PI Channeled Claim against a non-Debtor party*.") (emphasis added); *id.* at App.392 ("Distributions hereunder are determined only with consideration to an NAS PI Claim held against the Debtors, *and not to any associated NAS PI Channeled Claim against a non-Debtor party*.") (emphasis added); *id.* at App.433 ("A Future PI Claimant may not pursue litigation against the PI Futures Trust for any Future PI Channeled Claim *formerly held or that would have been held against a non-Debtor party*.") (emphasis added)). And to assert any third-party claim against the trust, the claimant must have filed a proof of claim in the bankruptcy prior to the bar dates, but each of the bar dates passed by the time anyone was notified of the claims' extinguishment. (Dkt. No. 91, at 20). And to get an exception for an untimely filing, a party must proceed through multiple steps, after which the Bankruptcy Court – which serves as a gatekeeper – determines, in its discretion, that the untimely claim qualified under the Plan and granted leave to assert the claim. (*Id.*).

Debtors sidestepped the Plan's effective extinguishment of purportedly channeled third-party claims in its brief by not addressing the U.S. Trustee's points; they made no effort to clarify this in oral argument for the Court. (*See* Dkt. No. 151, at 23-27).

XI. Objections to the Plan

On June 3, 2021, the Bankruptcy Court approved Purdue's disclosure statement. (*See* Bankr. Dkt., No. 2988).

On July 19, 2021, the U.S. Trustee objected to confirmation of the Plan, arguing that the Section 10.7 Shareholder Release was unconstitutional, violates the Bankruptcy Code, and is inconsistent with Second Circuit law. (*See* Bankr. Dkt. No. 3256). Eight states – California, Connecticut, Delaware, Maryland, Oregon, Rhode Island, Washington, Vermont – and D.C. all

filed objections, as did the City of Seattle, four Canadian municipalities, two Canadian First Nations and three *pro se* plaintiffs. (Bankr. Dkt. No. 3787, at 28; *see also* Bankr. Dkt. No. 3594). The U.S. Attorney's Office for this District on behalf of the United States of America filed a statement of interest supporting these objections to the Section 10.7 Shareholder Release. (*See* Bankr. Dkt. No. 3268).

The objectors argued, *inter alia* and as applicable to them, that the Section 10.7 Shareholder Release (1) violates the third-party claimants' rights to due process, (2) violates the objecting states' sovereignty and police power, (3) is not permitted under the Bankruptcy Code, and (4) the Bankruptcy Court lacks constitutional, statutory, and equitable authority to approve the Section 10.7 Shareholder Release.

XII. Judge Drain's Decision to Confirm the Plan

Judge Drain's opinion is a judicial *tour de force* – delivered from the bench only days after the end of a lengthy trial, it included extensive findings of fact and addressed every conceivable legal argument in great detail. Sixteen days later, on September 17, the learned bankruptcy judge filed a written version of that oral decision, running to 54 pages on Westlaw, which is the version summarized here. *See In re Purdue Pharma L.P.*, –- B.R. —, 2021 WL 4240974 (Bankr. S.D.N.Y. Sept. 17, 2021).

Judge Drain began by describing the highly unusual and complex nature of the situation before him – a "massive public health crisis," with a potential creditor body that included "every person in the range of the Debtors' opioid products sold throughout the United States" – individuals, local, state and territorial governments, Indian tribes, hospitals, first responders, and the United States itself. *Id.* at *1. He noted that over 618,000 claims, in an amount exceeding two trillion dollars, had been filed in the bankruptcy. And he commended the parties for working in "unique and trailblazing ways to address the public health crisis that underlies those claims." *Id.*

In his opening remarks, Judge Drain also addressed the elephant in the room:

> These cases are complex also because the Debtors' assets include enormous claims against their controlling shareholders, and in some instances directors and officers, who are members of the Sackler family, whose aggregate net worth, though greater than the Debtors', also may well be insufficient to satisfy the Debtors' claims against them and other very closely related claims that are separately asserted by third parties who are also creditors of the Debtors.

Id.

Judge Drain then announced the ultimate result:

First, he concluded that there existed no other reasonably conceivable means to achieve the result that would be accomplished by the Plan in addressing the problems presented by this case. Second, he found that well-established precedent – which he described as "Congress in the Bankruptcy Code and the courts interpreting it" – authorized him to confirm the Plan. *Id.* Insofar as is relevant to this appeal,[41] Judge Drain reached the following conclusions.

A. The Section 10.7 Shareholder Release and Settlement with the Sacklers

The meat of this case, both before Judge Drain and on this appeal, is the Bankruptcy Court's approval of the broad releases that the Plan affords to all members of the Sackler family and to their related entities, including businesses and trusts.

The Plan includes two settlements with every member of the Sackler family – whether or not that individual had anything to do with the management of Purdue or personally exercised any control over Purdue – and with a variety of entities related to the Sacklers, including various trusts,

[41] Many issues addressed by Judge Drain in his comprehensive opinion are not implicated by any of the appeals to this Court, and so will not be addressed in this decision. These include: objections from insurers that the Plan was not insurance neutral; from the U.S. Trustee to the Plan's treatment of certain attorney fees and expenses; to objections by certain prisoners who filed claims but challenged the sufficiency of notice and what they perceived as a compromising of their rights under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A; objections by certain states to their classification in the same voting class as their political subdivisions; an objection by the State of West Virginia to the allocation plan for states from the NOAT; and objections by certain Pro Se Appellants to the Plan's release of the Sacklers from criminal liability (it does not).

businesses, and IACs. Taken together these individuals and entities (not all of whom have been or apparently can be identified) are known as the "Shareholder Released Parties." *Id.* at *24.

The first settlement disposed of claims that the Debtors could assert against the Shareholder Released Parties for the benefit its creditors. *Id.* These included claims for (1) breach of fiduciary duty against those members of the Sackler family who were involved in – indeed, who drove – the business decisions that were the basis for Purdue's criminal and civil liability, and (2) fraudulent conveyance arising out of the Sackler family's removal of nearly $11 billion from the Debtor corporations over the course of a decade. *See id.* at *31-32.

The second settlement disposed of certain third-party claims that could not be asserted by the Debtors against the Shareholder Released Parties, but were particularized to others. Chief among these claims are claims asserted by the states – both the consenting states and the objecting states – arising under various unfair trade practices and consumer protection laws that make officers, directors and managers who are responsible for corporate misconduct personally liable for their actions. Judge Drain did not review on a state-by-state basis the various state laws applicable to these objector claims, including laws that might forbid insurance coverage or indemnification and contribution claims by those individuals, such that their personal assets are very much at risk. *Id.* at *48.

In exchange for these releases, the Shareholder Released Parties agreed to contribute $4.325 billion to a fund that would be used to resolve both public and private civil claims as well as both civil and criminal settlements with the federal government. *Id.* at *25. The Sacklers also agreed to the dedication of two charities worth at least $175 million for abatement purposes; to a resolution that barred them from insisting on naming rights in exchange for charitable contributions; to refrain from engaging in any business with NewCo and to dispose of their interest

in the non-U.S. Purdue entities within seven years; to certain “snap back” provisions that were designed to ensure the collectability of their settlement payments; and to the creation of an extensive document repository that would archive in a comprehensive manner the history of the Debtors and their involvement in the development, production and sale of opioids. *Id.*

Judge Drain made three fundamental findings relating to these settlements: that the Sackler Settlements were necessary to the Plan; that they were fair and reasonable; and that it was necessary and appropriate for him to approve the non-consensual release of certain third-party claims against the Sacklers, even though they are not debtors.

B. The Sackler Settlements Were Necessary

Judge Drain concluded that these settlements were necessary to the Plan. He noted that a variety of other settlements that were essential components of the Plan – including agreed-upon allocations of the pot of money to be created by the Debtors’ estate and the Sackler contribution – would unravel for lack of funding if the Sacklers did not make their $4.325 billion contribution. And he found that they would not make that contribution unless they obtained broad releases from past and future liability. *Id.* at *46-47.

1. The Sackler Settlements Were Fair and Reasonable in Amount

Judge Drain evaluated the fairness of the settlement in light of the factors laid out by the Second Circuit in *Motorola Inc. v. Official Committee of Unsecured Creditors & JP Morgan Chase Bank, N.A. (In re Iridium Operating LLC),* 478 F. 3d 452, 464-66 (2d Cir. 2007), which is controlling law in this Circuit on the questions. He made the following findings:[42]

(a) The Sackler settlements were the product of arms-length bargaining conducted by able counsel in two separate mediations presided over by three outstanding mediators and preceded

[42] Judge Drain considered all of the *Iridium* factors, but not in the order in which they are discussed in *Iridium*. I employ Judge Drain’s framework in this decision.

by what he described as the "most extensive discovery process not only I have seen after practicing bankruptcy law since 1984 and being on the bench since 2002, but I believe any court in bankruptcy has ever seen." *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *26-27. That process led to the production of almost 100 million pages of documents, through which all interested parties could learn "anything suggesting a claim against the shareholder released parties." *Id*.

(b) The settlements were negotiated by exceedingly competent counsel who were, as a result of the discovery process described above, well-informed about both the claims they might bring against the Shareholder Released Parties and the difficulties they would have in pursuing those claims. *Id.* at *27-28.

(c) Purdue's creditors overwhelmingly supported the settlement. *Id.* at *28. Some 120,000 votes were cast on the Plan – a number far exceeding the voting in any other bankruptcy case. *Id*. at *3. Over 95% of those voting in the aggregate favored the Plan: over 79% of the states and territories supported the Plan; over 96% of other governmental entities and tribes; and over 96% of the personal injury claimants; together with a supermajority of all other claimants. *Id*. at *28.

(d) The failure to approve the settlement was likely to result in complex and protracted litigation, with attendant cost and delay, while the settlement offered significant and immediate benefits to the estate and its creditors. *Id.* at *28-29.

(e) Judge Drain focused particularly on the difficulty of collecting any judgments that might be obtained against the Sacklers. *Id.* at *29. Ordinarily this factor would rest on things like the paucity of assets available to satisfy judgments. But in this case the problems with collection were the result of what the Sacklers did with the money that they admittedly took out of the corporations between 2008-2016. The assets of family members are held principally in purportedly

spendthrift trusts located in the United States and offshore – many of them on the Bailiwick of Jersey – and many of those assets cannot readily be liquidated. As Judge Drain correctly observed, spendthrift trusts can and often do insulate assets from the bankruptcy process. And while generally applicable law governing U.S. trusts allows those trusts to be invaded when they are funded by fraudulent conveyances, there is a substantial question whether the same is true under Jersey law. Additionally, he noted that many Sackler family members live abroad, raising a barrier to an American court's acquiring personal jurisdiction over them. Although the learned bankruptcy judge did not reach any final conclusion about these complicated issues, he readily drew the conclusion that collectability presented a significant concern, one that was obviated by the settlement.

(f) Judge Drain also noted that the cost and delay attendant to the pursuit of the Sacklers – which was in and of itself substantial – would be compounded by the unraveling of the other settlements that were baked into the Plan. Judge Drain concluded that the unraveling of the Plan would inevitably result in the liquidation of Debtors under Chapter 7, which would in turn lead to no recovery for the unsecured creditors (including the personal injury plaintiffs), and no money for any abatement programs. *Id.* at *30. This conclusion was reinforced by the fact that, absent confirmation of the Plan, the United States would have a superpriority administrative expense claim in an amount ($2 billion) that would wipe out the value of Purdue's business as a going concern ($1.8 billion). *Id.* at *16.

(g) Finally, Judge Drain considered the legal risks of the estates' pursuit of claims against the Sacklers against the benefits of settlement. *Id.* at *31-33.

Judge Drain first chronicled the problems Purdue would have in proving that the admitted conveyances qualified as fraudulent. He noted that over 40% of the purportedly avoidable transfers

were used to pay federal and states taxes associated with Purdue, none of which was going to be refunded. *Id.* at *31. He identified various technical defenses that the Sacklers could assert to fraudulent conveyance claims, including statutes of limitations and the impact of prior settlements. *Id.* at *32. And while admitting that at least some of the Sacklers appeared to have been very much aware of the risk of opioid litigation to Purdue's solvency and their own, he also pointed to evidence that Purdue may not have been "insolvent, unable to pay its debts when due, or left with unreasonably small capital" – which would be necessary to make a conveyance fraudulent – until as late as 2017 or 2018, by which time most or all of the conveyances had been made. *Id.*

As for alter ego, veil-piercing and breach of fiduciary duty claims, Judge Drain noted that most of the Sackler family members had nothing to do with Purdue's operations, and that no one had identified any action taken by any of them in their capacity as passive shareholders that would make them liable on such claims. *Id.* He also identified the extensive government oversight of Purdue after its 2007 Plea Agreement and Settlement with the federal government and certain states, and the fact that neither DHHS nor various state reviews ever identified any improper actions. *Id.* at *33.[43]

Judge Drain made no findings about the actual merit of any of the estates' claims against any member of the Sackler family. But weighing these difficulties against the benefits that would be derived from the settlement, he concluded:

> I believe that in a vacuum the ultimate judgments that could be achieved on the estates' claims . . . might well be higher than the amount that the Sacklers are contributing. But I do not believe that recoveries on such judgments would be higher after taking into account the catastrophic effects on recoveries that would result from pursuing those claims and unravelling the plan's intricate settlements. And as I said at the beginning of this analysis, there is also the serious issue of

[43] Given Purdue's admissions in connection with its 2020 Plea Agreement, this Court cannot assign much weight to the "oversight" factor.

> problems that would be faced in collection that the plan settlements materially reduce.

Id.

Judge Drain ended his discussion of the *Iridium* factors with a deeply personal reflection – dare I say, a *cri de coeur* – that is perfectly understandable coming from one who had labored so long and so hard to try to achieve a better result. Admitting that he had "expected a higher settlement," he said:

> This is a bitter result. B-I-T-T-E-R. It is incredibly frustrating that the law recognizes, albeit with some exceptions, although fairly narrow ones, the enforceability of spendthrift trusts. It is incredibly frustrating that people can send their money offshore in a way that might frustrate U.S. law. It is frustrating, although a long-established principle of U.S. law, that it is so difficult to hold board members and controlling shareholders liable for their corporation's conduct.
>
> It is incredibly frustrating that the vast size of the claims against the Debtors and the vast number of claimants creates the need for this plan's intricate settlements. But those things are all facts that anyone who is a fiduciary for the creditor body would have to recognize, and that I recognize.

Id.

Ultimately, however, the learned bankruptcy judge decided that the perfect was the enemy of the good:

> I am not prepared, given the record before me, to risk [the parties'] agreement. I do not have the ability to impose what I would like on the parties.

Id. at *34. And so, albeit with obvious reluctance, he concluded that the settlement was reasonable as that term is understood at law.

2. <u>The Section 10.7 Shareholder Release Was In all Respects Legal</u>

Having concluded that the settlements were fair and reasonable in amount, Judge Drain went on to address a number of challenges to his legal authority to impose the most controversial

element of those settlements: The Section 10.7 Shareholder Release. *Id.* at *35. He rejected each such challenge.

Subject matter jurisdiction. First, Judge Drain concluded that he had subject matter jurisdiction to impose the third-party releases and injunctions. Citing *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995) and *SPV OSUS, Ltd. v. UBS AG*, 882 F. 3d 333, 339-40 (2d Cir. 2018), he held that he had the undoubted power to enjoin the claims of third parties that had "any conceivable effect" on the Debtors' estates as part of a Bankruptcy Court's "related to" jurisdiction, conferred by Congress in 28 U.S.C. § 1334(b). *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *36-38. He concluded that the third-party claims covered by the Section 10.7 Shareholder Release would directly affect the *res* of the Debtors' estates in three different ways: insurance rights, the Shareholder Released Parties' right to indemnification and contribution, and the Debtors' ability to pursue its own overlapping claims against the Sacklers. He concluded by saying, "Depending on the kinds of third-party claims covered by a plan's release and injunction of such claims, *I conclude, therefore, that the Court has jurisdiction to impose such relief, based upon the effect of the claims on the estate rather than on whether the claims are 'derivative . . .'*" *Id.* at *38 (emphasis added).

Due process. Next, Judge Drain concluded that the Section 10.7 Shareholder Release did not violate the third-party claimants' right to due process. *Id.* at *38-39. He rejected the argument that a release constitutes a *de facto* adjudication of the claim, holding that such a release "is part of the settlement of the claim that channels settlement funds to the estate." *Id.* at 38. And he held that claimants had been provided with constitutionally sufficient notice of the proposed releases. Uncontroverted testimony that Judge Drain found credible established that messages tailored to reach persons who may have been harmed by Debtors' products had reached roughly 98% of the

adult population of the United States and 86% of the adult population of Canada, with supplemental notice reaching an estimated 87% of all U.S. adults and 82% of Canadian adults, as well as audiences in 39 countries, with billions of hits on the internet and social media in addition to notice delivered by TV, radio, publications, billboards and outreach to victim advocate and abatement-centered groups. While references contained in the notices sent readers to complex lawyerly descriptions of the release provisions, the notices themselves were written in plain English and specifically mentioned that the Plan contemplated a broad release of civil (not criminal) claims against the members of the Sackler family and related entities.

Constitutional authority. Judge Drain next concluded that he had constitutional power to issue a final order confirming a plan that contains a third-party claims release. *Id.* at *40. He determined that a proceeding to determine whether a chapter 11 plan containing such a release was a "core" proceeding, so ordering the non-debtor releases and enjoining the prosecution of third-party claims against non-the Sacklers qualified as "constitutionally core" under *Stern v. Marshall*, 546 U.S. 462 (2011) and its progeny.

Statutory authority. Finally, Judge Drain concluded that he had statutory power to confirm and enter the third-party releases. *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *40-43. He started from the proposition that the Second Circuit, in *Deutsche Bank A.G. v. Metromedia Fiber Network, Inc., (In re Metromedia Fiber Network, Inc.)*, 416 F. 3d 136, 141 (2d Cir. 2005), had indicated that non-consensual third-party releases of claims against non-debtors could be approved, albeit only in "appropriate, narrow circumstances." *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *40. He noted that most of the Circuits were of that view and rejected the reasoning of those courts of appeal that held otherwise. Indeed, he asserted that the view of those Circuits (the Fifth, Ninth, and Tenth Circuits) – which is that Section 524(e) of the Bankruptcy

Code precluded the grant of any such release in the context of a settlement – "has been effectively refuted." *Id.* at *41. He analogized the enjoining of third-party claims against non-debtors to his undoubted power to impose a preliminary injunction against the temporary prosecution of third-party claims in order to facilitate the reorganization process. And he asked rhetorically why such a stay could not become permanent if it was crucial to a reorganization process involving massive numbers of overlapping estate and third-party claims. *Id.* at *42.

Having concluded that Section 524(e) was not a statutory impediment to a Bankruptcy Court's approval of third-party releases, the Bankruptcy Judge then addressed the question of exactly what provision or provisions in the Bankruptcy Code conferred the necessary authority over claims against non-debtors on him. *Id.* at *42-43. He found such authority in the "necessary or appropriate" power in Section 105(a) of the Bankruptcy Code coupled with Section 1123(b)(6)'s grant of power to "include any other appropriate provision not inconsistent with the applicable provisions of this title" – what the Seventh Circuit referred to in *In re Airadigm Communications, Inc.*, 519 F. 3d 640, 657 (7th Cir. 2008) as a bankruptcy court's "residual authority." *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *43. He also cited Sections 1123(b)(5) and 1129 of the Bankruptcy Code.

Judge Drain carefully noted that the release in this case extended beyond so-called "derivative" claims – claims that the Debtors could bring against the Sacklers– which claims could assuredly be released by a bankruptcy court exercising *in rem* jurisdiction over the *res* of the estate. But he concluded – largely in reliance on *In re Quigley Co., Inc.*, 676 F.3d 45, 59-60 (2d Cir. 2012) – that he had statutory authority to authorize the release of non-derivative – direct or particularized – claims, because the third party claims to be released in this case were "premised as a legal matter on a meaningful overlap with the debtor's conduct." *In re Purdue Pharma L.P.*, 2021 WL 4240974,

at *43-47. Such a claim – one that "essentially dovetail[s] with the facts of the claimants' third-party claims against the Debtors" – was, in Judge Drain's view, "sufficiently close to the claims against the debtor to be subject to settlement under the debtor's plan if enough other considerations support the settlement." *Id*. at *45-46.

As noted above, Judge Drain did insist that the Section 10.7 Shareholder Release be modified so that it covered only third-party claims in which "a Debtor's conduct, or a claim asserted against the Debtor, must be a legal cause of the released claim, or a legally relevant factor to the third-party cause of action against the shareholder released party." *Id.* at *45. In other words, he insisted that there be substantial factual overlap between the released particularized claims and the derivative claims that no one disputes he had the power to release, such that the released non-derivative claims were "sufficiently close to the claims against the debtor."

***Metromedia* analysis.** Having disposed of all constitutional, jurisdictional, and statutory challenges to his authority to enter the Section 10.7 Shareholder Release (as modified), Judge Drain turned finally to whether this was the "unique" case in which it would be was appropriate to impose them. *Id.* at *46. He concluded that it was.

In this regard, he reviewed the law in the various circuits on the subject, viewing with special interest the Third Circuit's conclusion that:

> "To grant non-consensual releases a court must assess 'fairness, necessity to the reorganization' and make specific actual findings to support these conclusions." *In re Cont'l Airlines*, 203 F. 3d 203, 214 (3d Cir. 2001). Relevant consideration might include whether the non-consensual release is necessary to the success of the reorganization; whether the releasees have provided a critical financial contribution to the debtor's plan and whether that financial contribution is necessary to make the plan feasible; and whether the non-consenting creditors received reasonable compensation in exchange for the release, such that the release is fair." *In re Spansion, Inc.,* 426 B.R. 114, 144 (Bankr. D. Del 2010).

In re Purdue Pharma L.P., 2021 WL 4240974, at *46.

Judge Drain also cited with approval the Seventh Circuit's practice of engaging in a fact-based inquiry into such matters as whether the release is "narrowly tailored, not blanket" (unlike the Section 10.7 Shareholder Release, which releases all types of conduct, including fraud and willful misconduct); whether the release is an essential component of the plan; and whether it was achieved by the exchange of good and valuable consideration that will enable unsecured creditors to realize distributions (which is in fact going to happen in this case). *Id.* at *47.

Judge Drain also noted that the Fourth, Sixth and Eleventh Circuits apply a multi-factor test in deciding when it is appropriate to impose a non-consensual release of third-party claims. (*Id.* at *46).

Then, while recognizing that "this is not a matter of factors or prongs" (*id.* citing *Metromedia*, 416 F. 3d at 142), Judge Drain made a long list of findings about why this was the "rare" and "unique" case in which a nonconsensual third-party claims release was appropriate. *Id.* at *46-49. These include the following: (i) the Purdue bankruptcy was exceedingly complex; (ii) the Plan has overwhelming creditor support; (iii) without the Sackler payment the settlements would unravel; (iv) while not every Sackler would be making a specific payment toward the settlement,[44] the aggregate settlement payment hinged on each member of the family's being released; (v) the settlement amount was substantial; (vi) the release "is narrowly tailored;"[45] (vii) the settlement was fundamentally fair to the third parties; and (viii) for the reasons discussed at length *supra*, Background Section XII(B)(1), the cost and likelihood of success on the third party

[44] It is actually not clear what members of the Sackler family are contributing to the settlement and in what amounts. The record contains some suggestion that the various trusts that are contributing are for the benefit of all members of the family.

[45] Judge Drain did not explain what he meant by that, except to say that the release would be further narrowed so that it was limited in the manner discussed above. I assume that he meant that the release was limited to claims involving the Debtor's conduct, and claims in which the Debtor's conduct is "a legal cause of the released claim, or a legally relevant factor to the third-party cause of action." *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *45.

claims against the Sacklers – including both the merits and the impediments to collection of any judgment – was outweighed by the immediate and definite benefits of the settlement.

"Best interests" analysis. Section 1129 of the Bankruptcy Code requires that a plan of reorganization may be confirmed only if a litany of requirements is met. One such requirement is found in Subsection (a)(7) of Section 1129, which provides that, for any impaired creditor or class of creditors, if all members of the class do not approve the plan, each member of the class "will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date." *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *50.

Judge Drain applied this so-called "best interests" test to conclude that the holders of claims against non-debtor third parties would receive, on account of the Plan (and taking into account their claims against the Debtors as well as the third parties), materially more than they would receive in a hypothetical chapter 7 liquidation.[46] *Id.* at *50-51.

State police powers. Judge Drain concluded that his ordering of the non-debtor releases did not violate state sovereignty or any state police power. *Id.* at *51-53. He concluded that actions exempted from the automatic stay by virtue of Section 362(b)(4) were nonetheless subject to court-ordered (*i.e.*, not automatic) injunctive relief, and that Congress' express power under the bankruptcy clause of the Constitution to enact uniform bankruptcy laws overrode any state regulatory or sovereignty argument.

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[46] Judge Drain also argued that the best interest test under section 1129(a)(7) requires that the amount that an objecting creditor stands to receive under the plan on account of its claim be at least as much it would receive if the debtor were liquidated under chapter 7. *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *50. Thus, he concluded, the best interest test does not require analysis of the claimant's rights against third parties. *Id.* He acknowledged that his reading of the statute was at odds with at least two of his colleagues' reading of the same statute. I mention this fact but it has nothing to do with the ultimate decision on this appeal.

The classification of the Canadians. Finally, Judge Drain addressed whether that the Canadian creditor's classification as Class 11(c) creditors, rather than as Class 4 and 5 creditors, was impermissible. Certain Canadian creditor groups objected to the confirmation of the Plan, arguing that they should be classified with the U.S. unsecured creditor groups in Classes 4 and 5 to participate in the opioid abatement trusts created under the Plan for those classes, rather than receiving their pro rata share of the cash payment to Class 11(c). But Judge Drain concluded that, because there were legitimate reasons for separately classifying the Canadian unsecured creditors from there domestic counterparts, the classification was perfectly permissible. First, the Canadian creditors operate under "different regulatory regimes . . . with regard to opioids and abatement" than their domestic counterparts. *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *12. And second, "the allocation mediation conducted by Messrs. Feinberg and Phillips that resulted in the plan's division of the Debtors' assets . . . involved only *U.S.-based* public claimants with their own regulatory interests and characteristics." *Id*. (emphasis added).

XIII. The Appeal

The U.S. Trustee, eight states,[47] D.C., certain Canadian municipalities and First Nation groups,[48] and five *pro se* individuals[49] filed notices of appeal of Judge Drain's Confirmation Order in September 2021. (*See* Bankr. Dkt. No. 3724 (amended by Dkt. No. 3812), 3725, 3774 (amended by 3949), 3775 (amended by 3948), 3776 (amended by 3799), 3780 (amended by Dkt. No. 3839), 3784 (amended by Dkt. No. 3818), 3810, 3813, 3832, 3849, 3851, 3853, 3877, 3878). The U.S. Trustee also appealed the Advance Order (Bankr. Dkt. No. 3777) and the Disclosure Order (Dkt.

[47] California, Connecticut, Delaware, Maryland, Oregon, Rhode Island, Vermont, and Washington.

[48] The City of Grande Prairie as Representative for a Class Consisting of All Canadian Municipalities, the Cities of Brantford, Grand Prairie, Lethbridge, and Wetaskiwin; the Peter Ballantyne Cree Nation on behalf of All Canadian First Nations and Metis People and on behalf itself and the Lac La Ronge Indian Band.

[49] Ronald Bass, Marie Ecke, Andrew Ecke, Richard Ecke, and Ellen Isaacs on Behalf of Patrick Ryan Wroblewski.

No. 3776).

Among those who did not appeal the Plan were the UCC, the ACH, MSGE, the PI Ad Hoc Group, and other creditors supporting the Plan.

ISSUES ON APPEAL AND CONCLUSIONS OF LAW

This Court's answers to the questions that are being decided on appeal are summarized as follows:

1. Does the Bankruptcy Court have subject matter jurisdiction to impose a release of non-debtor claims?

Yes. Under the law of this Circuit, as most recently set forth in *SPV OSUS Ltd. v. UBS*, 882 F.3d 333 (2d Cir. 2018), the Bankruptcy Court has broad "related to" jurisdiction over any civil proceedings that "might have any conceivable effect" on the estate. *Id.* 339-340. Because the civil proceedings asserted against the non-debtor Sackler family members *might have* a conceivable impact on the estate, the Bankruptcy Court has subject matter jurisdiction to approve the Section 10.7 Shareholder Release and release the claims against the non-debtor Shareholder Released Parties.

2. Does the Bankruptcy Court have statutory authority to approve the non-debtor releases?

No. The Bankruptcy Code does not authorize a bankruptcy court to order the non-consensual release of third-party claims against non-debtors in connection with the confirmation of a chapter 11 bankruptcy plan. The Confirmation Order fails to identify any provision of the Bankruptcy Code that provides such authority. Contrary to the bankruptcy judge's conclusion, Sections 105(a) and 1123(a)(5) & (b)(6), whether read individually or together, do not provide a bankruptcy court with such authority; and there is no such thing as "equitable authority" or "residual authority" in a bankruptcy court untethered to some specific, substantive grant of authority in the Bankruptcy Code. Second Circuit law is not to the contrary; indeed, the Second

Circuit has not yet taken a position on this question.

3. Did the Bankruptcy Court fail to provide equal treatment between the Canadian Appellants and their domestic unsecured creditor counterparts?

No. Under the Plan, the Canadian Appellants belong to a different class than their domestic, unsecured creditor "counterparts" – the non-federal governmental claimants and tribe claimants – but legitimate reasons are proffered for that differentiation. The Code does not require that all creditor classes be treated the same – only that there be a reasonable basis for any differentiation between classes. *See Boston Post Rd. Ltd. P'ship v. FDIC (In re Boston Post Rd. Ltd. P'ship)*, 21 F.3d 477, 482-83 (2d Cir. 1994). Here, Judge Drain identified a reasonable basis for differentiating between the Canadian Appellants and the non-federal governmental claimants and tribe claimants. The Plan's classification of the Canadian Appellants thus does not violate the Bankruptcy Code.

It is not necessary to reach any of the other issues that were briefed. The issues identified above are dispositive of all the appeals that have been filed.[50] Nor is it necessary to reach either the various constitutional challenges to the Section 10.7 Shareholder Release (lack of due process, infringement on state police powers), or to decide whether, if there were no other legal impediment to approving the Section 10.7 Shareholder Release, it should be approved on the facts of this particular case.

STANDARD OF REVIEW

The Court has jurisdiction to hear bankruptcy appeals pursuant to 28 U.S.C. § 158(a). "Generally in bankruptcy appeals, the district court reviews the bankruptcy court's factual findings

[50] Beyond the above issues, (1) the State Appellants asserts a further issue that the bankruptcy court improperly applied the best interest of creditors test; (2) the Canadian Appellants assert that the Bankruptcy Court does not have personal jurisdiction over their claims, and that the bankruptcy court's approval of the release violated their foreign sovereign immunity and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq.; and (3) the U.S. Trustee also asserts that the Bankruptcy Court erred by approving the Debtors' disclosure statement and plan solicitation materials and by authorizing the Debtors to advance funds under Advance Order.

for clear error and its conclusions of law *de novo*." *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 482-83 (2d Cir. 2012) (citing Fed. R. Bankr. P. 8013). Conclusions of law reviewed *de novo* include "rulings as to the bankruptcy court's jurisdiction" and "interpretations of the Constitution." *In re Motors Liquidation Co.*, 829 F.3d 135, 152, 158 (2d Cir. 2016). As to findings of fact, the "clear error standard is a deferential one." *Id.* at 158. A finding of fact is clearly erroneous only if this Court is "left with the definite and firm conviction that a mistake has been committed." *In re Lehman Bros. 3 Holdings Inc.*, 855 F.3d 459, 469 (2d Cir. 2017).

The standard of review of findings of act is far less deferential if a bankruptcy court is presented with something it cannot adjudicate to final judgment as a constitutional matter unless the parties consent. *Stern v. Marshall*, 564 U.S. 462 (2011). In such a circumstance, a bankruptcy judge has authority only to "hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for *de novo* review and entry of judgment." *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 34-36 (2014). In that case, the findings of fact are reviewed *de novo* as well. If a bankruptcy court issues a final order in the mistaken belief that it has constitutional authority to do so, the district court can treat a bankruptcy court's order as a report and recommendation, but it "must review the proceeding *de novo* and enter final judgment." *Id.* at 34.

In this case, the Bankruptcy Court concluded that it had constitutional authority under *Stern* to enter a final order granting the release, because the issue arose in the context of confirming a plan of reorganization – the most "core" of bankruptcy proceedings. *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *40. Appellants urge that Judge Drain misreads *Stern* and argue that he lacked authority to give final approval to those releases, even though they were incorporated into a plan of reorganization.

I agree with Appellants.

In 28 U.S.C. §157(a), Congress divided bankruptcy proceedings into three types: (1) those that "arise under" title 11; (2) those that "arise in" a title 11 case; (3) and those that are "related to" a title 11 case. Cases that "arise under" or "arise in" a title 11 matter are known as core bankruptcy proceedings, while "related to" proceedings are non-core. 28 U.S.C. § 157(b)(1)-(2)(C). Every proceeding pending before a bankruptcy court is either core or non-core.[51]

The core vs. non-core distinction is critical when assessing a bankruptcy court's constitutional authority to enter a final judgment disposing of that proceeding.[52] In particular, a bankruptcy court lacks the constitutional authority to enter a final judgment in a proceeding over which it has only "related to" subject matter jurisdiction unless all parties consent. Any doubt on that score was put to rest by the United States Supreme Court in *Stern v. Marshall*, 564 U.S. 462 (2011). In that case, the Supreme Court held that a bankruptcy court lacked constitutional power to adjudicate and enter judgment on a counterclaim asserted by a debtor, Vickie Marshall (aka Anna Nicole Smith) in an adversary proceeding that a creditor (her stepson) had filed against her. The counterclaim (for tortious interference with an *inter vivos* gift from the debtor Marshall's late husband, who was also the creditor's father) did not arise under title 11, nor did it arise in a title 11 case. Even though the claim was asserted in the context of a bankruptcy proceeding, it existed prior to and was independent of debtor Marshall's bankruptcy case.

The Supreme Court ruled that Congress could not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity, or in admiralty." *Murray's Lessee v. Hoboken Land & Improvement Co*., 59 U.S. 272, 284 (1855). Because

[51] "Non-core" proceedings are interchangeably referred to as "related to" proceedings.

[52] The core/non-core distinction is also critically important when assessing the bankruptcy court's subject matter jurisdiction, a topic that will be taken in that section.

Marshall's counterclaim for tortious interference was just such a claim, it could only be adjudicated to final judgment by an Article III court; and Congress had no power to alter that simply because the counterclaim might have "some bearing on a bankruptcy case." *Stern,* 564 U.S. at 499.

In this case, the learned Bankruptcy Judge improperly elided his authority to confirm a plan of reorganization (indubitably a core function of a bankruptcy court) with his authority to finally dispose of claims that were non-consensually extinguished pursuant to that plan over which – as he himself recognized – he has only "related to" jurisdiction over the third-party claims against the non-debtor Sacklers. *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *36-38. *Stern* itself illustrates that not every issue that is litigated under the umbrella of a core proceeding is, to use Judge Drain's phrase, "constitutionally core." The stepson-creditor's claim against Marshall's estate was properly litigated to judgment by the bankruptcy court in a claims allowance adversary proceeding – a core proceeding – but because the debtor's counterclaim was not a "core" claim, it could not be adjudicated to final judgment by the Bankruptcy Court, even though it would impact how much the creditor was ultimately owed.

Judge Drain reasoned that the non-consensual third-party releases that he was approving were "constitutionally core" under *Stern* because plan confirmation is a "fundamentally central aspect of a Chapter 11 case's adjustment of the debtor/creditor relationship." *Id.* at *40. But nothing in *Stern* or any other case suggests that a party otherwise entitled to have a matter adjudicated by an Article III court forfeits that constitutional right if the matter is disposed of as part of a plan of reorganization in bankruptcy. Were it otherwise, then parties could manufacture a bankruptcy court's *Stern* authority simply by inserting the resolution of some otherwise non-core matter into a plan.

The learned bankruptcy judge relied on the Third Circuit's recent decision in *In re Millennium Lab Holdings II, LLC*., 945 F.3d 126, 139 (3d Cir. 2019), *cert. denied sub nom. ISL Loan Tr. v. Millennium Lab Holdings II, LLC*, 140 S. Ct. 2805 (2020). In *Millennium*, the court, like Judge Drain in this case, concluded that the "operative proceeding" for purposes of *Stern* analysis was the confirmation proceeding, not the underlying third-party claim against a non-debtor that was being released pursuant to the plan. *In re Millennium Lab Holdings II, LLC*, 591 B.R. 559, 574 (D. Del. 2018), *aff'd sub nom. In re Millennium Lab Holdings II, LLC*., 945 F.3d 126 (3d Cir. 2019). The Third Circuit read *Stern* to allow a bankruptcy court to confirm a plan containing such releases "because the existence of the releases and injunctions" are "'integral to the restructuring of the debtor-creditor relationship.'" *Millennium Lab Holdings II, LLC*., 945 F.3d at 129 (quoting *Stern*, 564 U.S. at 497).

Perhaps they are, but that is beside the point. In *Stern*, the Supreme Court held that bankruptcy courts have the power to enter a final judgment only in proceedings that "stem[] from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Stern*, 564 U.S. at 499. It did not say that a bankruptcy court could finally dispose of non-core proceedings as long as they were "integral to the restructuring of the debtor-creditor relationship." The counterclaim in the lawsuit between debtor Marshall and her stepson-creditor was integral to the restructuring of their debtor-creditor relationship, but it was not a core proceeding, so the bankruptcy court could not finally adjudicate it. The correct constitutional question, and the question on which the Bankruptcy Court should have focused in this case, is whether the third-party claims released and enjoined by the Bankruptcy Court either stem from the bankruptcy itself or would necessarily be resolved in the claims allowance process – not whether the release and injunction are "integral to the restructuring of the debtor-creditor relationship."

The third-party claims at issue neither stem from Purdue's bankruptcy nor can they be resolved in the claims allowance process. Yet those claims are being finally disposed of pursuant to the Plan; they are being released and extinguished, without the claimants' consent and without any payment, and the claimants are being enjoined from prosecuting them. Debtors and their affiliated non-debtor parties cannot manufacture constitutional authority to resolve a non-core claim by the artifice of including a release of that claim in a plan of reorganization. As Bankruptcy Judge Bernstein made clear in *In re SunEdison, Inc.*, 576 B.R. 453, 461 (Bankr. S.D.N.Y. 2017), "In assessing a court's jurisdiction to enjoin a third party dispute under a plan, the question is not whether the court has jurisdiction over the settlement that incorporates the third party release, but whether it has jurisdiction over the attempts to enjoin the creditors' unasserted claims against the third party." That proposition applies with equal force to a bankruptcy court's *Stern* authority.

Appellees' argument that *Stern* only limits a bankruptcy court's authority to *adjudicate* claims – not its authority to enter judgments that terminate claims without adjudicating them on the merits – is also flawed. As the U.S. Trustee correctly points out, *Stern's* holding is to the contrary: "The Bankruptcy Court in this case exercised the judicial power of the United States by *entering a final judgment* on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection." *Stern*, 564 U.S. at 469 (emphasis added). A bankruptcy court's order extinguishing a non-core claim and enjoining its prosecution without an adjudication on the merits "finally determines" that claim. It is equivalent to entering a judgment dismissing the claim. It bars the claim under principles of former adjudication. Therefore, Congress may not allow a bankruptcy court to enter such an order absent the parties' consent – and consent is lacking here. *See Stern* at 484.

There really can be no dispute that the release of a claim "finally determines" that claim. It does so by extinguishing the claim, so that it cannot be adjudicated on the merits. A nonconsensual third-party release is essentially a final judgment against the claimant, in favor of the non-debtor, entered "without any hearing on the merits." *In re Aegean Marine Petroleum Network Inc*., 599 B.R. 717, 725 (Bankr. S.D.N.Y. 2019) (citing *In re Digital Impact*, 223 B.R. 1, 13 n. 6 (Bankr. N.D. Okla. 1998)) (noting that a third-party release has "the effect of a judgment – a judgment against the claimant and in favor of the non-debtor, accomplished without due process."). The fact that the releases are being ordered in the overall context of a plan confirmation that "settles" many disputed matters (against the Debtors, not against non-debtors) does not alter this. The Appellants in this case do not want to settle their claims against the non-debtors – at least, not on the terms set forth in the Plan. This "settlement" is non-consensual – which means that, under *Stern*, a bankruptcy court cannot enter the order that finally disposes of their claims against those non-debtors.

Nor is there any doubt that the entry of an order releasing a claim has former adjudication effects, which is a key attribute of a final judgment. The Supreme Court has twice held that non-consensual third-party releases confirmed by final order are entitled to *res judicata* claim preclusion barring any subsequent action bringing a released claim: First in *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938), and again in *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 155 (2009).[53]

Because the non-consensual releases and injunction are the equivalent of a final judgment for *Stern* purposes, Judge Drain did not have the power to enter an order finally approving them.

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[53] This court's decision in *In re Kirwan Offices S.à.R.L.,* 594 B.R. 489 (S.D.N.Y. 2018) does not stand for the proposition that *Stern* authorizes a bankruptcy court to release non-core claims because a release is not a final judgment on the merits of the third-party claim. In that case, *Stern* was of no moment because, as this court held and the Second Circuit affirmed, all parties had consented to the bankruptcy court's exercise of jurisdiction. *In re Kirwan Offices S.à.R.L*, 792 F. App'x 99, 103 (2d Cir. 2019).

To the extent of his approval of the Section 10.7 Shareholder Releases, his opinion should have been tendered as proposed findings of fact and conclusions of law, both of which this court could review *de novo*. 11 U.S.C. § 157(c)(1). *Stern*, 564 U.S. at 475. If approved by this Court, those releases would of course be incorporated into the Plan.

So the standard of review in this case is *de novo* as to both the Bankruptcy Court's factual findings and its conclusions of law.[54]

DISCUSSION

I. The Bankruptcy Court Has Subject Matter Jurisdiction Over Third-Party Claims Against Non-Debtors That Might Have Any Conceivable Effect on the Debtors' Estate.

A bankruptcy court is a creature of statute. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). Its subject matter jurisdiction is *in rem* and is limited to the *res* of the estate. *Central Virginia Community College v. Katz*, 546 U.S. 356, 362 (2006) ("Bankruptcy jurisdiction, at its core, is *in rem*."). Its jurisdiction is limited to "civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b).

A proceeding "arises under" title 11 if the claims "invoke substantive rights created by" that title. *See In re Housecraft Industries USA, Inc.*, 310 F.3d 64, 70 (2d Cir. 2002). A proceeding "arises in" a title 11 case if for example "Parties . . . , by their conduct, submit themselves to the bankruptcy court's jurisdiction" by litigating proofs of claim without contesting personal jurisdiction. *In re Millenium Seacarriers, Inc.*, 419 F.3d 83, 98 (2d Cir. 2005); *see In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702, 706 (2d Cir. 1995) ("*a claim filed against the estate . . . could arise only in the context of bankruptcy*") (emphasis in original) (quotation omitted). And a proceeding is "related to" a title 11 proceeding if its "outcome might have any conceivable effect

[54] The practical impact of this holding is non-existent, as no one has challenged any of Judge Drain's findings of fact – only the conclusions he drew from them – and the court has always had the obligation to review those conclusions *de novo*.

on the bankrupt estate." *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir.1992) *Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 579 (2d Cir. 2011); *SPV OSUS Ltd. v. UBS*, 882 F.3d 333, 339-340 (2d Cir. 2018).

The release of most third-party claims against a non-debtor touches the outer limit of the Bankruptcy Court's jurisdiction. *See In re Johns-Manville Corp*., 517 F.3d 52, 55 (2d Cir. 2008) ("*Manville III*"), *rev'd and remanded on other grounds sub nom. Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009). But the Second Circuit defines that limit quite broadly. *See SPV OSUS Ltd.*, 882 F.3d at 339-340. The standard is not that an action's outcome will certainly have, or even that it is likely to have, an effect on the *res* of the estate, as is the case in some other Circuits. It is, rather, whether it *might have any conceivable impact* on the estate. *Id.*

Bound to adhere to this broad standard, which has been consistently followed in this Circuit for almost three decades and was applied most recently in *SPV Osus*, I agree with the Debtors that the Bankruptcy Court had subject matter jurisdiction over the direct (non-derivative) third party claims against the Sacklers, under the "related to" prong of bankruptcy jurisdiction.

A. Governing Law

Decades ago, the Second Circuit concluded that the outer limit of a bankruptcy court's *in rem* jurisdiction was defined by whether the outcome of a proceeding asserting a particular claim "might have any conceivable effect" on the *res* of the estate. *See In re Cuyahoga Equipment Corp.*, 980 F.2d at 114. In that case, a liquor distillery and its site of operation containing hazardous wastes was sold to a purchaser that subsequently went bankrupt; the bankruptcy court was asked to resolve not only the proceedings in bankruptcy but approve a settlement that released a creditor bank from claims related to separate environmental cleanup litigation (brought by the creditor Environmental Protection Agency (the "EPA")). *Id.* at 111-112. The original owner of the liquor distillery site – a non-debtor third party and defendant in the environmental cleanup litigation –

objected and appealed arguing, *inter alia*, that the court lacked jurisdiction to approve the settlement. The Second Circuit found that the court had related to jurisdiction because the bank's and the EPA's claims against the estate "bring into question the very distribution of the estate's property." *Id.* at 114. "[Section] 1334(b) undoubtedly vested the district court with the power to approve the agreement between the parties at least to the extent it compromised the bankruptcy claims asserted by the bank and the government." *Id.* at 115.

In *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), the United States Supreme Court decreed that "related to" jurisdiction was "a grant of some breadth" and that "jurisdiction of bankruptcy courts may extend . . . broadly" in "reorganization under Chapter 11." *Id.* at 308. And while some courts of appeal have circumscribed the scope of "related to" jurisdiction in their circuits, *see e.g.*, *In re W.R. Grace & Co.*, 900 F.3d 126 (3d Cir. 2018), the Second Circuit has never backed away from its broad reading of "related to" jurisdiction. *See, e.g., In re Ampal-American Israel Corporation*, 677 Fed.Appx. 5, 6 (2d Cir. 2017) (summary order).

The Circuit's most recent discussion of the subject can be found in *SPV OSUS Ltd. v. UBS AG*, 882 F.3d 333 (2d Cir. 2018). SPV Osus Ltd. ("SPV") had sued UBS AG ("UBS") (among others) in the New York State Supreme Court for aiding and abetting Bernie Madoff ("Madoff") and Bernard L. Madoff Investment Securities LLC ("BLMIS") in perpetrating their massive Ponzi scheme. *Id.* at 337-338. If UBS was indeed a joint tortfeasor with Madoff, it had a contingent claim for contribution against the Madoff estate. *Id.* at 340. However, it had not yet asserted such a claim (it was not yet ripe), and the unwaivable bar date for filing claims against the Madoff estate under the Securities Investor Protection Act ("SIPA") had already passed. *Id.* Moreover, there was no realistic possibility that there would be any money available at the end of the day to fund a claim for contribution. *Id.* SPV argued that these facts meant there was no possibility that the outcome

of UBS' contribution case "might have any conceivable effect" on the *res* of the Madoff estate. *Id.* It is indeed hard to quarrel with that factual analysis.

But Judge Pooler, writing for a unanimous panel, concluded that UBS's contingent claim for joint tortfeasor contribution against the Madoff estate "might" have an effect on the Madoff estate if there were any "reasonable legal basis" for its assertion. *Id.* at 340-41 (quotation omitted). She explained that the broad jurisdictional standard reflects Congress' intent "'to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.'" *Id.* at 340 (quoting *Celotex*, 514 U.S. at 308). While recognizing that "'related to' jurisdiction is not 'limitless,'" Judge Pooler indicated that "it is fairly capacious." *Id.* And she said, "'An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.'" *Id.* (quoting *Celotex*, 514 U.S. at 308, n. 6).

The fact that UBS and the debtor (Madoff) were alleged to be joint tortfeasors – who, as a matter of state law, have a right of contribution against one another – provided a "reasonable legal basis" why UBS might someday be able to assert its contingent claim. And while Judge Pooler recognized that ". . . a payout by the estate to defendants may be improbable, it is not impossible." *Id.* at 342. Since "any claim by defendants potentially alters that distribution of assets among the estates' creditors," *id.*, that was all it took to make the contingent claim "conceivably related" to the Madoff bankruptcy.

Finally – and of particular importance for the case at bar – Judge Pooler found that the "high degree of interconnectedness between this action and the Madoff bankruptcies" supported a finding of "related to" jurisdiction. *Id.* She explained that, "SPV can only proceed on [its claims

against UBS] if it establishes that the Madoff fraud occurred" and "it is difficult to imagine a scenario wherein SPV would not also sue Madoff and BLMIS, given that SPV alleges that UBS aided and abetted in their fraud." *Id.*

So in this Circuit, it is well settled that the only question a court need ask is whether "the action's outcome *might have* any conceivable effect on the bankrupt estate." *Id.* (emphasis added). If the answer to that question is yes, then related to jurisdiction exists – no matter how implausible it is that the action's outcome actually will have an effect on the estate.

B. Application of the Law to the Facts

Under the broad standard set forth in *SPV Osus*, I find that the Bankruptcy Court had "related to" subject matter jurisdiction to approve the release of direct, non-derivative third-party claims against the Sacklers. There is absolutely no question that the answer to the question of whether the third-party claims *might have* any conceivable impact on the res of the debtors' estate is yes. Moreover, the intertwining of direct and derivative claims against certain members of the Sackler family, as well as the congruence between the only claim that anyone has identified against the other Sacklers and Purdue's own claim for fraudulent conveyance, justifies the assertion of "related to" jurisdiction under *SPV Osus*'s "interconnectedness" test.

First, the non-derivative third-party claims that are being or might be asserted against the Sacklers are, as in *In re Cuyahoga Equipment Corp.*, the type of claims that "bring into question the very distribution of the estate's property." 980 F.2d at 114. As the Debtors pointed out in oral argument, and as Judge Drain recognized in his opinion, pursuit of the third-party claims threatens to "unravel[] the plan's intricate settlements" and "recoveries on . . . judgments" against the Sacklers would have a "catastrophic effect" on all parties' possible recovery under the Plan. *See In re Purdue Pharma L.P.*, 2021 WL 4240974, at *33; (Oral Arg. Tr., Nov. 30, 2021, at 124:14-

16 ("Continued litigation against the Sacklers destroys all of the interlocking intercreditor settlements enshrined in the plan.")).

Second, as in *SPV Osus*, the claims raised against the Sacklers might have a conceivable impact on the estate, in that they threaten to alter "the liabilities of the estate" and "change" "the amount available for distribution to other creditors." *SPV Osus*, 882 F.3d 341. This "is sufficient to find that litigation among non-debtors is related to the bankruptcy proceeding." *Id.*

Here, the non-derivative litigation against the Sacklers *might* alter the liabilities and change the amount available for distribution. If, for example, the Appellants were successful in their related claims against the Sacklers, the findings could alter, or even determine, Purdue's own liability on similar claims, as well as the amount owed to Appellants as creditors. Further, as the Debtors explained at oral argument, there also is the threat that the Appellants' claims could affect "the debtors' ability to pursue the estate's own closely related, indeed, fundamentally overlapping claims against the Sacklers"; this is so because, if the related third-party claims were litigated poorly, the debtor's estate might be less likely to recover on its own claims against the Sacklers, which are worth billions. (*See* Oral Arg. Tr., Nov. 30, 2021, at 123:17-124:13).

Judge Drain pointed out the conceivable effect that the potential alteration of liabilities and ultimate amounts owed creditors and the estate would have on the *res* in his opinion. *See In re Purdue Pharma L.P.*, 2021 WL 4240974, at *37. I agree that these potential effects support a finding of "related to" jurisdiction.

Third, as in *SPV Osus*, all the claims in this case have a high degree of interconnectedness with the lawsuits against the debtors and against the Sacklers – especially those members of the family who can be sued derivatively as well as directly.

As the *SPV Osus* Court explained, "'The existence of strong interconnections between the third-party action and the bankruptcy has been cited frequently by courts in concluding that the third-party litigation is related to the bankruptcy proceeding.'" *SPV OSUS*, 882 F.3d at 342 (quoting *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 321 (S.D.N.Y. 2003)). Here, the Section 10.7 Shareholder Release only extends to those claims where the "debtor's conduct or the claims asserted against it [are] a legal cause or a legally relevant factor." (Confr. Hr'g Tr., Sept. 1, 2021, at 134:18-135:2); *see In re Purdue Pharma L.P.*, 2021 WL 4240974, at *45; Plan, at § 10.7(b)). This limitation alone supports a conclusion that any claim that could fall within the scope of the release would necessarily have a high degree of interconnectedness with the debtor's conduct.

Looking at the claims of the Appellants themselves, the interconnectedness of the claims against the Sacklers with those against the Debtors is patent. (*See, e.g.*, Dkt. No. 103-7, at A-1553; Dkt. No. 95-1, at A0008; Dkt. No. 91-7, at App.2598; Dkt. No. 91-8, at App.2661; Dkt. No. 91-9, at App.3153). In fact, the direct and derivative claims against the "insider" or "managerial" Sacklers are essentially congruent. The Appellants have asserted claims in multiple instances against both Purdue and the Sacklers, and in every case they rely on detailed and virtually identical sets of facts to make the claims. Because various state statutes authorize the assertion of direct claims against certain managerial personnel of a corporation who can be held independently liable for the same conduct that subjects the corporation to liability (and them to liability to the corporation for faithless service in their corporate roles), a determination in one of the State Appellants' cases would likely have preclusive impact on a case alleging derivative liability against the same people – a case over which the Bankruptcy Court has undoubted jurisdiction. As the Debtor pointed out at oral argument, there is an obvious inconsistency in bringing "lawsuits against the Sackler[s] alleging that they controlled Purdue, and that Purdue did terrible things, and

500,000 people's lives were maybe snuffed out by Purdue's conduct" yet arguing that those suits "will [not] affect the debtors in any conceivable way." (*See* Oral Arg. Tr., Nov. 30, 2021, at 123:12-17). Some things have not changed since this court decided *Dunaway v. Purdue Pharma. L.P.*, 619 B.R. 38 (S.D.N.Y. 2020); one that has not is this: "Appellants would rely on the same facts to establish the liability of both parties" and there would be "no way for the Appellants to pursue the allegations against Dr. Sackler without implicating Purdue, and vice versa." *Id.* at 51. The acts of the Sacklers that could form the basis of any released claim "are deeply connected with, if not entirely identical to, Purdue's alleged misconduct." *See id.*

In so holding, I acknowledge that in *In re Johns-Manville Corp*., 517 F.3d 52 (2d Cir. 2008) ("*Manville III*"), *rev'd and remanded on other grounds sub nom. Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009) and *In re Johns-Manville Corporation v. Chubb Insurance*, 600 F. 3d 135 (2d Cir. 2010) ("*Manville IV*"), the Second Circuit said that the existence of shared facts between claims against the debtor and claims against the non-debtor arising out of an independent legal duty that was owed by the non-debtor to a third party was not sufficient to confer "related to" subject matter jurisdiction over the claims against the non-debtors. *Manville III*, 517 F.3d at 64-65. As a result, the Court of Appeals held that the bankruptcy court lacked jurisdiction to enjoin the prosecution of claims asserted by third parties against Travelers, Manville's erstwhile insurer, that arose out of Travelers' alleged failure to alert those third parties to the harmful properties of asbestos, about which Travelers had allegedly learned during its long relationship with Manville. *Id.* at 65. However, while there was a substantial factual overlap between defective product claims against Manville and the failure to disclose claims asserted against its insurer Travelers that were discussed in *Manville III*, there was absolutely no basis for asserting that there could be any impact

on the res of Manville's bankruptcy estate if the third party claims were not enjoined. For that reason, *Manville III/IV* is not inconsistent with *SPV/OSUS*.

The fact that the release extends to members of the Sackler family who played no role in running the affairs of the company does not alter the analysis. At the present time, the court is not aware of any lawsuits that have been brought against any of those individuals; and despite months of my asking, no one can identify any claim against them that would be released by the Section 10.7 Shareholder Release, other than as the recipients of money taken out of Purdue and up-streamed to the family trusts. But any claims relating to those transfers rightfully belong to the Debtors, whose claims against the world either "arise under" or "arise in" the bankruptcy. And those claims are not implicated by the Section 10.7 Shareholder Release.

Fourth, it is more than conceivable that Purdue's litigation of the question of its indemnification, contribution, or insurance obligations to the director/officer/manager Sacklers could burden the assets of the estate.

Appellants – most particularly the State and Canadian Appellants – insist that their claims lie beyond the "related to" jurisdiction of the Bankruptcy Court in part because their laws bar indemnification, contribution, or insurance coverage for actions like those of the Sacklers (*see* Dkt. Nos. 224, 228-231), and so the claims cannot be extinguished by that court. Without viable claims for indemnification, contribution, or insurance claims, the Appellants argue that their claims against the Sacklers will not have any conceivable effect on the Debtors' estate, thereby depriving the Bankruptcy Court of subject matter jurisdiction.

I begin by noting that this is precisely the type of reasoning that Judge Pooler rejected in *SPV Osus* – a case, I submit, in which the actual possibility that a contingent contribution claim would have any impact on the *res* of the Madoff estate was far less likely than it is in this case.

The issue is not whether, at the end of the day, the Sacklers would lose on their contingent claims; it is whether they have a reasonable legal basis for asserting them. (*See* Dkt. Nos. 154, 156).

And the Sacklers do have a reasonable legal basis to assert those claims. The Sacklers named in the State Appellants' suits served as officers, directors or managers of Purdue. As a result, they have claims against Purdue for indemnification and contribution, as well as a call on any D&O insurance proceeds that cover Purdue's officer and directors. As this court noted almost two years ago in *Dunaway*, Purdue's current and former directors and officers of the company are covered by various Limited Partnership Agreements ("LPA"), which provide that Purdue shall indemnify these directors and officers "so long as the Indemnitee shall be subject to any possible Proceeding by reason of the fact that the Indemnitee is or was . . . a director, officer or Agent of [the Purdue entities]." (JX-1773; *see also* JX-1806; JX-1049). The various state unfair trade practices laws that have been cited to this court all subject the Sacklers to the potential for liability because of their status as officers, directors or managers of the corporation – even though that liability is direct, not derivative. Moreover, the LPAs are governed by Delaware law, which allows for indemnification (*see* 6 Del. C. § 17-108; 8 Del. C. § 145), and the states as a general matter look to the state of incorporation for the availability of indemnity. (*See, e.g.*, Dkt. No. 230, at 3, 8–9, 13, 17). Similarly, the Purdue insurance policies that cover the Sackler former directors could be depleted, *inter alia*, if a Sackler former director prevailed in litigation or a plaintiff prevailed in litigation on a non-fraud claim. (*See* Dkt. No. 156, at 15).[55] Under various state laws, the Sacklers parties can also seek an advance against defense costs; even if those costs are ultimately recouped, those defense funds will, for at least some time, leave the estate. *See* CT Gen Stat § 33-776; 8 Del.

[55] The debtors clarified at oral argument that for the relevant periods of time "like 2017 when the claims were made and those policies got triggered" there are applicable claims-made insurance policies, as well as "over a billion dollars of general liability policies" and other policy language that "creates the risk that all Sackler-owned entities could assert claims under those policies." (Oral Arg. Tr., Nov. 30, 2021, at 125:21-12614).

C. § 145. The law governing insurance coverage is generally the law governing the policy – not the law of the objecting state. Only one state has an exception to that – California, whose law specifically prohibits indemnity or insurance coverage for losses resulting from a violation of its false advertising law or unfair competition law, and under which law an insurer has no duty to defend or advance costs. (Dkt. No. 95, at 3-4); *see* Cal. Ins. Code § 533.5; *Adir International, LLC v. Starr Indemnity and Liability Co.*, 994 F.3d 1032, 1045 (9th Cir. 2021).

And while each objecting state asserts that its laws would bar one or more of indemnification, contribution or insurance in certain instances, no state's law bars all three – not even California's. (*See* Dkt. Nos. 228-231; *see also* Dkt. No. 224).

Recognizing this, the states argue that there can be no indemnification, contribution, or insurance on these facts, including on public policy grounds, because the Sacklers acted in bad faith. (*See e.g.*, Dkt. No. 230, at 2). However, the question of bad faith in this case is hotly disputed. There is no doubt that the Shareholder Released Parties' right to indemnification, contribution, and/or insurance will be vigorously litigated, as Judge Drain rightly pointed out below. *See In re Purdue Pharma L.P.*, 2021 WL 4240974, at *38. That litigation will cost money. And so it very well *might have* an impact on the estate; in fact, it likely *will have* such an impact.

Given the breadth of the Second Circuit law under *SPV Osus*, I must and I do find that the claims asserted against the Shareholder Released Parties *might have* some conceivable effect on the estate of a debtor, for each of the foregoing reasons, and thus fall within the "related to" jurisdiction of the Bankruptcy Court.

But that only gets us to the next question. And it is the next question that is, in my view, dispositive.

II. The Bankruptcy Court Does Not Have Statutory Power to Release Particularized Third-Party Claims Against Non-Debtors.

Appellants argue that the Bankruptcy Court has no statutory authority to approve a release of third-party claims against non-debtors.

One would think that this had been long ago settled.

It has not been.

There is a long-standing conflict among the Circuits that have ruled on the question, which gives rise to the anomaly that whether a bankruptcy court can bar third parties from asserting non-derivative claim against a non-debtor– a matter that surely ought to be uniform throughout the country – is entirely a function of where the debtor files for bankruptcy.

And while the Second Circuit long ago identified as questionable a court's statutory authority to do this outside of asbestos cases, *In re Metromedia Fiber Network, Inc*., 416 F.3d 136 (2d Cir. 2005), it has not yet been required to identify any source for such authority.

Lacking definitive guidance from our own Court of Appeals, Judge Drain consulted the law in every Circuit. He concluded that he was statutorily authorized to approve the Section 10.7 Shareholder Release because it is "subject to 11 U.S.C. 1129(a)(1), 1123(a)(5) & (b)(6), 105, and 524(e)." *In re Purdue Pharma L.P*., 2021 WL 4240974, at *43. "In other words," he stated, "those releases flow from a federal statutory scheme." *Id*.

I appreciate that this Court has, on a prior occasion, said exactly the same thing, using exactly the same language – albeit in the context of affirming a plan that contained an easily distinguishable injunction that barred third parties (one in particular) from bringing one specific type of claim against non-debtors (his former partners) in order to protect the integrity of bankruptcy court orders. *In re Kirwan Offices S.à.R.L.*, 592 B.R. 489, 511 (S.D.N.Y. 2018*), aff'd sub nom. In re Kirwan Offices S.a.R.L.*, 792 F. App'x 99 (2d Cir. 2019). But in *Kirwan,* this Court

did not analyze whether there was a statutory (as opposed to a jurisdictional or constitutional) basis for the injunction that was at issue in that case. Indeed, no statutory argument was made.[56]

In this case, however, Appellants – most particularly, the U.S. Trustee, with the United States Attorney for this District appearing as *amicus* – have mounted a full-throated attack on a court's statutory authority to release third-party claims against non-debtors in connection with someone else's bankruptcy.

With the benefit of full briefing and extensive argument from experienced counsel, it is possible to decide whether a court adjudicating a bankruptcy case has the power to release third-party claims against non-debtors. Moreover, it is necessary to reach a conclusion on this subject before delving into constitutional issues that need not be reached if Appellants are correct.

I conclude that the sections of the Code on which the learned Bankruptcy Judge explicitly relied, whether read separately or together, do not confer on any court the power to approve the release of non-derivative third-party claims against non-debtors, including specifically the Section 10.7 Shareholder Release that is under attack on this appeal.

As no party has pointed to any other section of the Bankruptcy Code that confers such authority, I am constrained to conclude that such approval is not authorized by statute.

A Caveat and Some Definitions: I begin this discussion with a caveat. The topic under discussion is a bankruptcy court's power to release, on a non-consensual basis, *direct/particularized* claims asserted *by third parties* against *non-debtors* pursuant to the Section 10.7 Shareholder Release. This speaks to a very narrow range of claims that might be asserted against the Sacklers.

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[56] In *Kirwan*, the appellant chalked up his failure to raise the issue of statutory authority to his belief that the U.S. Trustee ought to have done so. *In re Kirwan Offices S.à.R.L.*, 592 B.R. at 501. The U.S. Trustee, for perfectly understandable reasons that will be noted when *Kirwan* is discussed below, had no particular interest in using that case as a vehicle to mount such an attack.

For these purposes, by derivative claims, I mean claims that would render the Sacklers liable because of Purdue's actions (which conduct may or may not have been committed because of the Sacklers). "Derivative" claims are those seek to recover from the estate indirectly "on the basis of [the debtor's] conduct," as opposed to the non-debtor's own conduct. *Manville III*, 517 F.3d at 62 (quoting *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988)). Derivative claims in every sense relate to the adjustment of the debtor-creditor relationship, because they are claims that relate to injury to the corporation itself. If the creditor's claim is one that a bankruptcy trustee could bring on behalf of the estate, then it is derivative. *Madoff*, 40 F.3d at 90.

By direct claims, I mean claims that are not derivative of Purdue's liability, but are based on the Sacklers' own, individual liability, predicated on their own alleged misconduct and the breach of duties owed to claimants other than Purdue. "Direct" claims are based upon a "particularized" injury to a third party that can be directly traced to a non-debtor's conduct. *Id*.

The release of claims against the Sacklers that are derivative of the estate's claims them is effected by Section 10.6(b) of the Plan, which is not attacked as being beyond the power of the Bankruptcy Court.

The Section 10.7 Shareholder Release under attack is different. It releases all members of the Sackler families, as well as a variety of trusts, partnerships and corporations associated with the family and the people who run and advise those entities,[57] from liability for claims that have been brought against them personally by third parties – claims that are not derivative, but as to

[57] The Section 10.7 Shareholder Release extends to every Sackler presently alive, to their unborn progeny, and to various trusts, partnerships, corporations, and enterprises with which they are affiliated or that have been formed for their benefit. Exhibit X to the Settlement Agreement, expressly incorporated into the Plan (*see* Dkt. No. 91-3, at App. 1112), identifies over 1,000 separate released parties, either by name or by some "identifying" feature, such as "the assets, businesses and entities owned by" the named released parties. (*See* Dkt. No. 91-3, at App.1041-1069).

which Purdue's conduct is a legally relevant factor. Example: nearly all of the State Appellants have a law under which individuals who serve in certain capacities in a corporation are individually and personally liable for their personal participation in certain unfair trade practices. As Judge Drain recognized (*see In re Purdue Pharma L.P.*, 2021 WL 4240974, at *44), the liability imposed by these statutes is not derivative; the claims arise out of a separate and independent duty that is imposed by statute on individuals who, by virtue of their positions, personally participated in acts of corporate fraud, misrepresentation and/or willful misconduct. Liability under those laws is limited to persons who occupied the roles of officer, manager or director of a corporation – which means that there is considerable *factual* overlap, perhaps even complete congruence, between those claims and the derivative claims against the same individuals that Judge Drain had undoubted authority to release and enjoin. But it is undisputed that these laws impose liability, and even penalties, on such persons independent of any corporate liability (or lack of same), and independent of any claim the corporation could assert against them for faithless service as a result of those same acts.[58]

The discussion that follows, then, applies only to direct (non-derivative) claims – sometimes referred to as "particularized" claims – that arise out of the Sacklers' own conduct (*In re Purdue Pharma L.P.*, 2021 WL 4240974, at *45), and that either have been or could be asserted against the non-debtor members of the Sackler family and their affiliates (the Shareholder Released Parties) by parties other than the Debtors' estate.

[58] While Judge Drain expressly found that these claims were not derivative (*In re Purdue Pharma L.P.*, 2021 WL 4240974, at *44), he was quite clear that the congruence between these claims and derivative claims against the same individuals was critically important to his conclusion that they could be released.

The Text of the Bankruptcy Code

As one always should when assessing statutory authority, we turn first to the text of the statute.

All parties agree that one and only one section of the Bankruptcy Code expressly authorizes a bankruptcy court to enjoin third party claims against non-debtors without the consent of those third parties. That section is 11 U.S.C. § 524(g), which was passed by Congress in 1994. It provides for such an injunction solely and exclusively in cases involving injuries arising from the manufacture and sale of asbestos. And it sets out a host of conditions that must be satisfied before any such injunction can be entered, including all of the following:

(i) the injunction is to be implemented in connection with a trust the is to be funded in whole or in party by the securities of the debtor and that the debtor will make future payments, including dividends, to that trust 524(g)(2)(B)(i)(I);

(ii) the extent of such alleged liability of a third party arises by reason of one of four enumerated relationships between the debtor and third party (524(g)(4)(A)(ii));

(iii) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind (524(g)(4)(B)(i)); and

(iv) the court determines the injunction is fair and equitable to persons that might subsequently assert such demands, and, in light of the benefits provided to such trust on behalf of such third parties. § 524(g)(4)(B)(ii)).

Section 524(g) injunctions barring third party claims against non-debtors cannot be entered in favor of just any non-debtor. They are limited to enjoin actions against a specific set of non-

debtors: those who have a particular relationship to the debtor, including owners, managers, officers, directors, employees, insurers, and financiers. 11 U.S.C. § 524(g)(4)(A).

The language of the statute plainly indicates that Congress believed that Section 524(g) created an exception to what would otherwise be the applicable rule of law. Subsection 524(g)(4)(A)(ii) says: "Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor." 11 U.S.C. § 524(g)(4)(A)(ii). Section 524(e) provides: "Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). The word "notwithstanding," suggests that the type of injunction Congress was authorizing in § 524(g) would be barred by § 524(e) in the absence of the statute.

A. Legislative History of the Statute

Section 524(g) was passed after the United States Court of Appeals for the Second Circuit had affirmed the entry of an unprecedented injunction barring claims against certain non-debtors in connection with the bankruptcy of the nation's leading manufacturer of asbestos, the Johns Manville Corporation. *MacArthur Co. v. Johns–Manville Corp.* (*In re Johns–Manville Corp.*), 837 F.2d 89, 91 (2d Cir. 1988) ("*Manville I*"). The permanent injunction in that case extended to actions against Manville's insurers, all of whom had dedicated the entire proceeds of their policies – proceeds on which parties other than Manville were additional insureds and had a call – to a settlement fund into which the claims of asbestos victims would be channeled, valued, and resolved. The Second Circuit concluded that the bankruptcy court could permanently enjoin and channel lawsuits against a debtor's insurer relating to those insurance policies because those

policies were "property of the debtor's estate." *Id*. at 90. The Court of Appeals did not cite to a single section of the Bankruptcy Code as authorizing entry of the injunction.

Despite the Second Circuit's affirmance of the *Manville I* injunction, questions continued to be raised about its legality. Congress passed Sections 524(g) and (h) of the Bankruptcy Code to remove any doubt that those injunctions were authorized. *See* H.R. Rep. 103-835 at *41 (noting that Subsection (g) was added to Section 524 "in order to strengthen the Manville and UNR trust/injunction mechanisms and to offer similar certitude to other asbestos trust/injunction mechanisms that meet the same kind of high standard with respect to regard for the rights of claimants, present and future, as displayed in the two pioneering cases").

That Section 524(g) applies only to asbestos cases is clear. The statute explicitly states than the trust that "is to assume the liabilities of a debtor" be set up in connection with "actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products" (11 U.S.C. § 524(g)(B)(i)(I)). If that were not clear enough, Congress passed another section to provide that injunctions that had previously been entered *in asbestos cases* – not in any other kind of case – would automatically be deemed statutorily compliant, even if those injunctions did not have all the features required by § 524(g). *See*, 11 U.S.C. § 524(h) ("Application to Existing Injunctions"). The limitation of § 524(h) to asbestos injunctions is important because, prior to the statute's passage, injunctions releasing third party claims against non-debtors had been entered by a few courts in cases involving other industries. *See e.g.*, *In re Drexel Burnham Lambert Grp*., Inc., 960 F. 2d 285 (2d Cir. 1992) (securities); *In re A.H. Robins Co., Inc*., 880 F.2d 694 (4th Cir. 1989) (medical devices). The revisions to the Bankruptcy Code neither extend to those injunctions nor deem them to be statutorily compliant.

At the same Congress passed Sections 524(g) and (h), it passed Public Law 111, which provided a rule of construction for Section 524(g). It states that nothing in the 1994 amendments to the Bankruptcy Code, including 524(g), "shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." Pub. L. 103–394 § 111(b) (uncodified). Congress made this statement because the parties in non-asbestos bankruptcy cases took the position that Sections 524(g) and (h) were unnecessary, in that bankruptcy courts already authorized the entry of such injunctions and corresponding approval of non-debtor releases – viz, *Robins* and *Drexel*. But the passage of Public Law 111 did not mean that Congress agreed with that position. As the House Committee on the Judiciary noted in the legislative history of these new provisions:

> Section 111(b) . . . make[s] clear that the special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts *may* already have to issue injunctions in connection with a plan [of] reorganization. Indeed, [asbestos suppliers] Johns–Manville and UNR firmly believe that the court in their cases had full authority to approve the trust/injunction mechanism. And other debtors in other industries are reportedly beginning to experiment with similar mechanisms. *The Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind.*

Vol. E., *Collier on Bankruptcy,* at App. Pt. 9–78 (reprinting legislative history pertaining to the 1994 Code amendments) (emphasis added). P.L. 111 was not incorporated into the Bankruptcy Code.

Congress' used of the word "may" indicates that a bankruptcy court's authority to enter such an injunction was at best uncertain. And in light of the last sentence – in which the Committee made it clear that Congress expressed no opinion on that subject – one cannot read this tidbit of legislative history as indicating that Congress had concluded that a bankruptcy court already had such authority under its "traditional equitable powers."

During the course of this appeal, it has been suggested that P.L. 111 expresses Congress' intent to pass a limited law and then allow the courts to work out the contours of whether and how to extend § 524(g)-style authority outside the asbestos context.[59] The very next sentence from that statute's legislative history reveals that nothing could be further from the truth:

> The Committee has decided to provide explicit authority in the asbestos area because of the singular cumulative magnitude of the claims involved. How the new statutory mechanism works *in the asbestos area* may help the Committee judge whether the concept should be extended into other areas.

Id. (Emphasis added)

Plainly, Congress made a decision to limit the scope of the experimenting that was "reportedly" to be happening (and that was in fact happening) in other industries. And it left to itself, not the courts, the task of determining whether and how to extend a rule permitting non-debtor releases "notwithstanding the provisions of section 524(e)" into other areas.

Since 1994, Congress has been deafeningly silent on this subject.

B. Survey of the Relevant Case Law

1. Supreme Court Law

The United States Supreme Court has never specifically considered whether the non-consensual release of non-derivative claims asserted by third parties against non-debtors can be approved in the context of a debtor's bankruptcy. Indeed, on *certiorari* to the Second Circuit from one of its orders in the ongoing *Manville* saga, the High Court announced that its opinion did "not resolve whether a bankruptcy court, in 1986 or today, could properly enjoin claims against

[59] I can only assume that this argument derives from Congress' mention of the fact that courts dealing with non-asbestos bankruptcies were "reportedly beginning to experiment with similar mechanism."

nondebtor insurers that are not derivative of the debtor's wrongdoing." *Travelers Indem. Co. v. Bailey*, 557 U.S. at 155.

The Court has, however, spoken on several occasions about issues that are germane to the consideration of that question.

For one thing, the Court has indicated that the Bankruptcy Code was intended to be "comprehensive." *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions") (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)).

For another, it has held that the "traditional equitable power" of a bankruptcy court "can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

And in two recent cases, the Supreme Court has held, albeit in contexts different from the one at bar, that a bankruptcy court lacks the power to award relief that varies or exceeds the protections contained in the Bankruptcy Code – not even in "rare" cases, and not even when those orders would help facilitate a particular reorganization.

For example, in *Law v. Siegel*, 571 U.S. 415 (2014), the Supreme Court unanimously held the bankruptcy court does not have "a general, equitable power" to order that a debtor's statutorily exempt assets be made available to cover attorney's fees incurred by an estate's trustee in the course of the chapter 7 bankruptcy case. Section 522 of the Bankruptcy Code, by reference to applicable state law, entitled the debtor in that case to exempt equity in his home from the bankruptcy estate. *See* 11 U.S.C. § 522(b)(3)(A). A dispute arose between the debtor and the trustee of the estate, causing the trustee to incur substantial legal fees, purportedly as a result of

the debtor's "abusive litigation practices." *Law v. Siegel*, 571 U.S. at 415-16. Seeking to recoup the cost of resolving the dispute with the debtor, the trustee asked the bankruptcy court to order that the otherwise exempt assets be made available to cover his attorney's fees. He argued that such an order was authorized by the "inherent power" of the Bankruptcy Court and by Section 105(a) of the Bankruptcy Code, which provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

The High Court disagreed, stating flatly, "A bankruptcy court may not exercise its authority to 'carry out' the provisions of the Code" by taking an action inconsistent with its other provisions. *Law v. Siegel*, 571 U.S. at 425. It announced that there is "no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code," because the Bankruptcy Code was intended to be a *comprehensive* statement of the rights and procedures applicable in bankruptcy. *Id*. at 416. The Code explicitly exempts certain debtor assets from the bankruptcy estate and provides a finite number of exceptions and limitations to those asset exemptions. *See* 11 U.S.C. § 522. To the Supreme Court, "comprehensive" means precisely that: "The Code's meticulous – not to say mind-numbingly detailed – enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions." *Law v. Siegel*, 571 U.S. at 424.

More recently, in *Czyzewski v. Jevic Holdings Corp.*, 137 S. Ct. 973 (2017), the Court held that the protections explicitly afforded by the Bankruptcy Code could not be overridden in a "rare" case, even if doing so would carry out certain bankruptcy objectives. In chapter 11 bankruptcies,

a plan that does not follow normal priority rules cannot be confirmed over the objection of an impaired class of creditors. 11 U.S.C § 1129(b). Notwithstanding that, the bankruptcy court in *Jevic* approved the structured dismissal[60] of a chapter 11 case in which unsecured creditors were prioritized over non-consenting judgment creditors – a violation of ordinary priority rules. The bankruptcy court and the proponents of the structured dismissal argued that the Bankruptcy Code did not specifically state whether normal priority rules had to be followed in chapter 11 (as opposed to chapter 7) cases – that is, the statute was "silent" on the subject – so the court could exercise such authority in "rare" cases in which there were "sufficient reasons" to disregard priority. But the Supreme Court disagreed that any such power existed. It observed that the priority system applicable to those distributions had long been considered fundamental to the Bankruptcy Code's purposes and held that the "importance of the priority system leads us to expect more than simply statutory silence if, and when, Congress were to intend a major departure." *Jevic Holding Corp*., 137 S. Ct. at 984. To the argument that a bankruptcy court could disregard priority if there were "sufficient reasons" to do so, Justice Breyer aptly noted: "It is difficult to give precise content to the concept 'sufficient reasons.' That fact threatens to turn a 'rare case' exception into a more general rule." *Id.* at 986.

It is with these holdings in mind that I examine the law in the various Circuits on the subject of non-consensual release of third-party claims against non-debtors.

I begin, of course, with our own.

[60] In a structured dismissal, the debtor obtains an order that simultaneously dismisses its chapter 11 case and provides for the administration and distribution of its remaining assets.

2. Second Circuit Law

Manville I: The relevant law in the Second Circuit begins with *Manville I*, which has already been discussed. *Manville's I*'s injunction was subsequently codified in §§ 524(g) and (h)[61] – which, as noted above, are plainly in the Bankruptcy Code, and are limited to the asbestos context, and have never been extended by Congress to other areas of endeavor. It is, moreover, significant that the injunction authorized by the Second Circuit in *Manville I* extended only to claims against parties (insurance companies) holding property that was indisputably part of the *res* of the debtor's estate (policies covering Manville for the manufacture and sale of asbestos). As will be seen when we get to *Manville III/IV*, when the non-debtor was seeking a release in exchange for contributing property to the debtor's estate – as opposed to surrendering property that already was part of the debtor's estate – the result, even in a statutorily authorized asbestos case, was different.

Drexel: The debtor in *In re Drexel Burnham Lambert Grp*., Inc., 960 F. 2d 285 (2d Cir. 1992) was the investment bank Drexel Burnham Lambert Group ("DBL"), which filed for bankruptcy in 1990. DBL's principal creditor was the Securities and Exchange Commission, which was owed $150 million pursuant to a prior settlement. But over 15,000 creditors filed proof of claims against the estate, alleging fraud in connection with four different types of securities transactions.

Judge Milton Pollack of this district withdrew all of these securities claims from the bankruptcy court pursuant to 28 U.S.C. § 157(d) in order to facilitate their settlement. The parties negotiated a settlement that had as its key feature the certification of all the securities claimants

[61] The Court is advised that the *Manville I* injunction did not conform in every particular to the rules set out in Section 524(g), and that Section 524(h) was included in the Bankruptcy Code to be sure that the *Manville I* injunction was deemed to be Code-compliant notwithstanding that fact.

into a single, mandatory, non-opt-out class (Rule 23(b)(1)(B)), which was itself divided into two subclasses: A and B. The members of Subclass B – comprised of securities fraud class action plaintiffs – were, as part of the settlement, enjoined from bringing any future actions against the former officers and directors of DBL; while not themselves debtors, those individuals had contributed to DBL's estate.

The district court certified the classes and approved the settlement over the objections of 8 of the 850 proposed class members. Three of the objectors filed appeals, contending in relevant part that the district court had erred by approving the settlement with it the mandatory injunction against the pursuit of third-party claims by non-consenting plaintiffs.

The Second Circuit affirmed the settlement of the securities fraud cases. It noted in passing that, "In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided this injunction plays an important part in the debtor's reorganization plan." *Drexel*, 960 F. 2d at 293 (citing *In re A.H. Robins Co*., 880 F.2d 694, 701 (4th Cir.)). But it cited no section of the Bankruptcy Code that authorized this proposition. In its brief discussion of the objectors' challenge to the provision in the settlement agreement that barred members of subclass B from bringing or maintaining suits against DBL's officers and directors, the Court of Appeals, reasoning tautologically, said this:

> The Settlement Agreement is unquestionably an essential element of Drexel's reorganization. In turn, the injunction is a key component of the Settlement Agreement. As the district court noted, the injunction limits the number of lawsuits that may be brought against Drexel's former directors and officers. This enables the directors and officers to settle those suits without fear that future suits will be filed. Without the injunction, the directors and officers would be less likely to settle. Thus, we hold that the district court did not abuse its discretion in approving the injunction.

In re Drexel Burnham Lambert Grp., Inc., 960 F. 2d at 293. In other words, the Circuit held that the district court had discretion to approve non-debtor releases as part of the settlement of

numerous securities fraud class actions in the context of a bankruptcy, simply and solely because funds were being funneled to the estate that would not otherwise be contributed.

There are numerous reasons why *Drexel* does not answer the question about a court's statutory authority under the Bankruptcy Code to release non-debtors over the objection of third parties who have direct claims against them. Two, however, are dispositive.

First and foremost, the Second Circuit simply did not address this question in *Drexel*. *Drexel* mentioned in passing something about a bankruptcy court's power to enjoin claims but did not identify any source of that power in the Bankruptcy Code. It appears to have assumed *sub silentio* that such authority existed.

Second, *Drexel* was decided two years before Congress passed Sections 524(g) and (h). The opinion's passing mention of a bankruptcy court's power to enjoin a creditor from suing a non-debtor became far less persuasive after Congress (1) amended the Bankruptcy Code to authorize such injunctions, but only in asbestos cases; (2) expressed agnosticism about whether any such authority existed outside of its new legislation; and (3) indicated its intent to consider at some later time whether to extend this authority to industries that were "reportedly experimenting" with such injunctions – which it never has.[62]

There are other reasons to question the continuing viability of *Drexel*. Whether its reasoning can be extended to mass tort cases like this one is highly dubious. Seven years after the Second Circuit's opinion in *Drexel,* the Supreme Court expressed grave doubt about whether the Rule 23(b)(1)(B) "limited fund class action" device that was employed in *Drexel* could ever be employed in the mass tort context like this one, *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999).

[62] It bears reiterating that *Drexel* was one of those cases to which the Judiciary Committee referred when it said that debtors in other industries were "reportedly experimenting" with non-debtor injunctions in the years prior to the passage of Section 524(g). *See supra*, note 59.

Subsequent to *Ortiz*, courts have consistently rejected attempts to apply the limited fund mandatory class action device to mass torts. *See, e.g., In re Simon II Litig*., 407 F.3d 125, 137-38 (2d Cir. 2005) (tobacco punitive damages litigation); *Doe v. Karadzic*, 192 F.R.D. 133, 140-44 (S.D.N.Y. 2000) (actions by victims of war crimes committed by Bosnia–Herzegovina brought under the Alien Tort Claims Act).

Moreover, the Supreme Court also said in *Ortiz* that a fund which is "limited" only because the contributing party keeps a large portion of its wealth (*a la* the Sacklers) is "irreconcilable with the justification of necessity in denying any opportunity for withdrawal of class members whose jury trial rights will be compromised, whose damages will be capped, and whose payments will be delayed." *Ortiz v. Fibreboard Corp*., 527 U.S. at 860. The exact same thing could be said of the third parties whose claims are being extinguished as part of the Debtors' Plan.

Subsequent Second Circuit law in the *Manville* cases also casts doubt on a bankruptcy court's subject matter jurisdiction to authorize the release of third-party claims against the officers and directors of DBL simply because they would not otherwise have made a contribution to the debtor's estate. *Manville III*, 517 F.3d at 66. In *Manville III/IV*, the Second Circuit concluded that "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate," and held that claims asserted against non-debtors that sought "to recover directly from [the] debtor's insurer for the insurer's own independent wrongdoing" did not have such impact. *Manville III*, 517 F.3d at 65-66. In so ruling the Second Circuit held it of no moment for jurisdictional purposes that the non-debtor was making made a financial contribution to a debtor's estate (*id.*), saying: "It was inappropriate for the bankruptcy court to enjoin claims brought against a third-party non-debtor *solely on the basis of that third-party's financial contribution to a debtor's estate*." *Id.* (Emphasis added) For this proposition, the *Manville III* panel

cited with approval the Third Circuit's warning from *In re Combustion Engineering*, where the court had observed that:

> a debtor could create subject matter jurisdiction over any on-debtor third-party [simply] by structuring a plan in such a way that it depended upon third party contribution. As we have made clear, subject matter jurisdiction cannot be conferred by consent of the parties. Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization.

In re Combustion Engineering, 391 F. 3d 190, 228 (3d Cir. 2004).

Finally, changes in class action law since *Drexel* was decided have rendered its facile analysis of the Rule 23(a) factors, especially commonality and typicality, highly suspect. *Amchem Products, Inc., v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). I strongly suspect that the *Drexel* class certification, and so the *Drexel* settlement, would not and could not be approved today.[63]

But one thing is clear: *Drexel* sheds no light whatsoever on the issue of whether releases like the one at bar are authorized *by the Bankruptcy Code*. That statute was never mentioned.

New England Dairies/Metromedia: In *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc., (In re Dairy Mart Conveniences Stores),* 351 F. 3d 86, 92 (2d Cir. 2003), the Court of Appeals for this circuit definitively rejected the argument that §105(a) of the Bankruptcy Code (*see supra*, at p. 101-102) could "create substantive rights that are otherwise unavailable under applicable law." As the author of the opinion (Judge Jacobs) recognized:

> The equitable power conferred on the bankruptcy court by section 105(a) is the power to exercise equity in carrying out the *provisions* of the Bankruptcy Code, rather than to further the purposes of the Bankruptcy Code generally, or otherwise to do the right thing. This language "suggests that an exercise of section 105 power

[63] It is, of course, for the Second Circuit to make that call – not a district court in the Second Circuit.

> be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective." 2 *Collier on Bankruptcy* ¶ 105.01[1].[64]

In re Dairy Mart Conveniences Stores, 351 F. 3d at 92.

In re Dairy Mart did not involve the confirmation of a plan containing non-debtor releases of third-party claims, so technically it did not speak to the question pending before this Court. But two years later, Judge Jacobs authored *In re Metromedia Fiber Network, Inc*., 416 F.3d 136 (2d Cir. 2005), which did.

Metromedia Fiber Network, Inc. and its subsidiaries declared bankruptcy. *See Metromedia,* 416 F.3d 136, 138 (2d. Cir. 2005). The company's founder, John W. Kluge, did not. However, as part of the plan of reorganization, Kluge, as grantor, established the "Kluge Trust." *Id.* at 141 n.4. Under the plan of reorganization proposed to the court, the Kluge Trust was to make "a 'material contribution' to the estate" in the bankruptcy, (*id.* at 143), by "[i] forgiv[ing] approximately $150 million in unsecured claims against Metromedia; [ii] convert[ing] $15.7 million in senior secured claims to equity in the Reorganized Debtors; [iii] invest[ing] approximately $12.1 million in the Reorganized Debtors; and [iv] purchas[ing] up to $25 million of unsold common stock in the Reorganized Debtors' planned stock offering." *Id.* at 141. Metromedia itself would continue to exist after its reorganization – albeit under a new name, AboveNET – and to engage in the business of providing high bandwidth telecommunications circuits, which was its historic business model.

In exchange for the Kluge Trust's contributions, the Kluge Trust and certain "Kluge Insiders" were to receive 10.8% of the Reorganized Debtors' common stock and something called the "Kluge Comprehensive Release." *Id.* The Kluge Comprehensive Release provided:

[64] *In re Dairy Mart* was hardly the first time this settled principle had been recognized by the Second Circuit. *See, e.g*., *FDIC v. Colonial Realty Co.,* 966 F.2d 57, 59 (2d Cir. 1992) ("105(a) limits the bankruptcy courts equitable powers, which `must and can only be exercised within the confines of the Bankruptcy Code") (quoting *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206, (1988)).

> the Kluge Trust and each of the Kluge Insider shall receive a full and complete release, waiver and discharge from . . . any holder of a claim of any nature . . . of any and all claims, obligations, rights, causes of action and liabilities arising out of or in connection with any matter related to [Metromedia] or one or more subsidiaries . . . based in whole or in part upon any act or omission or transaction taking place on or before the Effective Date.

Id.

The release was broad and did not carve out any exception – even for claims that could not be discharged against a debtor in bankruptcy, such as those predicated on fraud or willful misconduct.

Following confirmation of the plan, appellant creditors Deutsche Bank AG (London Branch) and Bear, Stearns & Co., Inc. challenged the "largely implemented" plan of reorganization and argued that the releases in the plan of reorganization "improperly shield certain nondebtors from suit by the creditors." *Id.* at 138. On appeal, the district court both affirmed the plan of reorganization and ruled that the relief sought by the two banks was not "barred by the doctrine of equitable mootness because effective relief could have been afforded without 'unraveling the plan.'" *Id.* at 139.

The Second Circuit vacated the district court's affirmance of the plan, on the ground that the bankruptcy court had failed to make certain findings necessary to a determination that the non-consensual third-party releases should be approved. *Id.* at 143. But the plan had been substantially consummated by the time the appeal was heard, so the Circuit concluded that the matter was indeed equitably moot. As a result, it declined to remand so that a lower court could make the missing findings and reconsider the propriety of the releases. *Id.* at 145.

Before reaching this result, the panel discussed whether non-debtor releases were available in connection with someone else's bankruptcy. The Circuit identified "two considerations that

justify . . . reluctance to approve non-debtor releases." *Id.* at 141. It noted that such releases were not specifically authorized outside of the asbestos context:

> [T]he only explicit authorization in the Bankruptcy Code for nondebtor releases is 11 U.S.C. § 524(g), which authorizes releases in asbestos cases when specified conditions are satisfied, including the creation of a trust to satisfy future claims . . .

Metromedia Fiber Network, Inc., 416 F.3d at 142. And it held, consistent with *In re Dairy Mart*, that Section 105(a) of the Bankruptcy Code did not authorize the approval of such releases:

> True, 11 U.S.C. § 105(a) authorizes the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]"; but section 105(a) does not allow the bankruptcy court "to create substantive rights that are otherwise unavailable under applicable law." *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.),* 351 F.3d 86, 92 (2d Cir.2003) (quotations and citation omitted). Any "power that a judge enjoys under § 105 must derive ultimately from some other provision of the Bankruptcy Code." Douglas G. Baird, Elements of Bankruptcy 6 (3d ed.2001); accord *Dairy Mart*, 351 F.3d at 92 ("Because no provision of the Bankruptcy Code may be successfully invoked in this case, section 105(a) affords [appellant] no independent relief.").

Metromedia, 416 F. 3d at 142.

The panel also cautioned that courts should be careful about approving a non-consensual non-debtor release because the device "lends itself to abuse." *Id.* One particular form of abuse identified by the panel manifests when the release, in effect, "operate[s] as a bankruptcy discharge arrange without a filing and without the safeguards of the Bankruptcy Code." *Id*. Indeed, "The potential for abuse is heightened when releases afford blanket immunity." *Id*.

After observing that, "No case has tolerated nondebtor releases absent a finding of circumstances that may be characterized as unique,." *Id.* , the panel listed circumstances in which such releases had been authorized in the past, and identified factors that a court should consider when evaluating such releases in the future: (1) the release is important to the plan, (2) the enjoined claims would be channeled to a settlement fund rather than extinguished, (3) the estate receives

substantial consideration in return, (4) the released claims would otherwise indirectly impact the debtors' reorganization by way of indemnity or contribution, and (5) the plan otherwise provided for the full payment of the enjoined claims. *Id.* at 141–42. However, the Circuit insisted that the ultimate decision about whether to authorize such releases was "not a matter of factors and prongs." *Id.* 142.

Having said all that, the *Metromedia* court did not rule on whether any or all of the factors it had identified were satisfied in the particular case before it. Nor did it conclude that a non-debtor release should be approved if the factors were satisfied, or consider whether, in the case before it, there might be other reasons why the proposed non-debtor releases should not be approved.

Instead, as noted above, the Circuit vacated approval of the plan and declined to remand for further consideration because the matter had become equitably moot – thereby guaranteeing that those open questions – including the question about whether there was statutory authority for such releases – would not be answered.

So to summarize: No third-party releases were approved in *Metromedia.* The Court of Appeals did not conclude that such releases were consistent with or authorized by the Bankruptcy Code. It did not conclude that the case before it was one of the "unique" instances in which a court's reluctance to approve such releases might (assuming they were authorized) be overcome. And it did not decide whether the Kluge releases measured up to the level that might justify approving them if the case qualified as "unique." *In re Metromedia Fiber Network*, 416 F.3d at 142–143.

In other words, while *Metromedia* said a great deal, the case did not hold much of anything.[65] Its relevance, for present purposes, is that Judge Jacobs cautioned that statutory

[65] I disagree with Appellants that *Metromedia*'s discussion of non-consensual third-party releases is dictum. (*See id*.). The actual holding in the case is that the bankruptcy court failed to make the findings in order to justify approval of

authority for non-consensual non-debtor releases outside of the asbestos context was at best uncertain – and then disposed of the case on other grounds, without identifying what section or sections of the Bankruptcy Code might actually authorize such relief in non-asbestos bankruptcy.[66]

No subsequent Second Circuit case has filled in the blank.

Manville III/IV and In re Quigley[67]: These were asbestos cases, in which a court's statutory authority to impose such non-debtor injunctions is undoubted, as long as all the conditions listed in § 524(g) are met.

As discussed above, in *Manville III/IV*, the Second Circuit concluded that the bankruptcy court lacked subject matter jurisdiction over third party claims against Manville's non-debtor insurer that arose out of an alleged independent duty owed by the insurer to those third parties, rather than out of its contractual relationship as Manville's insurer. The court did not discuss any issue of statutory authority.

And in *Quigley*, the Circuit held that certain claims against the debtor's parent—claims based on the use of the parent's name on the debtors' asbestos products—could not be enjoined pursuant to § 524(g) because the alleged liability was not "by reason of" any of the four "statutory relationships" identified in that section. *Quigley*, 676 F.3d at 49, 60-61. Had the proposed injunction fallen within one of the express statutory relationships, it would have been authorized because the case involved asbestos.

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such a release. *Metromedia*, 416 F.3d at 143. A discussion of what type of findings would be necessary to approve a non-consensual third-party release was, at least arguably, a necessary predicate to that holding. The court's equitable mootness ruling only justified the decision not to remand so that the missing findings could be made. The court did not vacate approval of the releases on equitable mootness grounds, so it was not the actual holding in the case.

[66] Further to the discussion of *Drexel* – the case was cited by a Second Circuit in *Metromedia*, but only for the proposition that a contribution to a debtor's estate from a released third party was one factor that had in the past been relied on by a court to justify a non-debtor release. That is true as a matter of simple fact. As far as this Court can tell, that is about all that can be said to be left of *Drexel.*

[67] *Manville III*, 517 F.3d at 66; *Manville IV*, 600 F. 3d at 152; *In re Quigley Co.*, 676 F.3d 45 (2d Cir. 2012).

Madoff: *In re Bernard L. Madoff Inv. Securities LLC*, 740 F.3d 81 (2d Cir. 2014) involved a chapter 7 liquidation under the Securities Investor Protection Act (SIPA). The debtor, Bernie L. Madoff Investment Securities ("BLMIS"), was an investment enterprise created to effect the Ponzi scheme of its principal, Bernie Madoff. The bankruptcy estate settled its claims against the estate of Jeffry M. Picower, an alleged Madoff co-conspirator, releasing its claims in exchange for a $5 billion dollar contribution to Madoff bankruptcy estate. In addition to approving that settlement and release, the bankruptcy court permanently enjoined two of the debtor's customers from pursuing putative state tort law class actions against the estate of Jeffry M. Picower in the United States District Court for the Southern District of Florida, to the extent those claims arose from or related to the Madoff Ponzi scheme.

The Second Circuit affirmed the non-debtor injunction because the customer's complaints were predicated on secondary harms flowing from to them from BLMIS, and so were derivative claims that a bankruptcy court had power to discharge pursuant to Section 105(a). The *Madoff* court explained that the Florida plaintiffs had not alleged any direct claim against Picower's estate, because they failed to allege that Picower took any actions aimed at BLMIS customers (such as making misrepresentations to them) that caused particularized injury to those customers. *Id*. at 93.

However, the Second Circuit was careful to note that factual congruence between an estate's claim and an individual creditor's claim against the same non-debtor was not what rendered the asserted claims derivative. It held that, "there is nothing illogical or contradictory" about factual overlap between the allegations asserted in direct claim and a derivative claim; a non-debtor "might have inflected direct injuries on both the [estate's creditors] and [the debtor estate] during the course of dealings that form the backdrop of both sets of claims." *Id*. at 91 (quoting *In re Seven Seas Petroleum, Inc.*, 522 F.3d 575, 587 (5th Cir. 2008)). A creditor could,

therefore, bring a direct claim against a non-debtor, even though the debtor might have suffered an identical injury – provided the creditor was not seeking to recover for injuries suffered by the debtor, but for injuries it suffered *directly*. *Id*.

Significantly for our purposes, the Second Circuit did not simply sweep away the Florida class actions; it permitted the creditors to amend their Florida complaints to assert direct claims if they could identify some direct injury that Picower caused them, as there was "conceivably some particularized claim" that the customers could assert against the non-debtor that could not also be asserted or released by the estate. *Id*. at 94.

Tronox: *In re Tronox, Inc*., 855 F.3d 84 (2d Cir. 2017) was not an asbestos case, but it adds nothing to the above discussion, for two reasons. First and foremost, the Court of Appeals dismissed the appeal for lack of appellate jurisdiction. Second, in that case, the claims asserted against the non-debtors by the third party were again derivative, not direct, claims (*e.g*., alter ego, piercing the corporate veil, and successor liability) – as in *Madoff*, the plaintiff alleged "no particularized injury" to the claimant. *Id*. Because success on a derivative claim benefits all creditors of the estate, the Circuit held that the bankruptcy "trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action." *In re Tronox Inc*., 855 F.3d at 103 (internal quotation omitted).

But the court went on to say that, "when creditors have a claim for injury that is particularized as to them, they are exclusively entitled to pursue that claim, and the bankruptcy estate is precluded from doing so." *Id*. at 99 (internal citation omitted). There was no discussion of enjoining such particularized claims, let alone any discussion of statutory authority for doing so.

Kirwan (Lynch v. Lapidem): And so we come to *Lynch v. Lapidem* (*In re Kirwan Offs. S.à.R.L.*) 792 Fed. Appx. 99 (2d Cir. 2019) (“*Kirwan*”).

In *Kirwan,* the Second Circuit affirmed a bankruptcy court injunction that was included in a plan of reorganization in order to prevent collateral attacks on prior orders of that court. The appellant in *Kirwan* (Lynch) was one of three shareholders in the bankrupt enterprise. He challenged the *bona fides* of the bankruptcy filed by his former partners but lost after trial. The dissident shareholder then absented himself from the hearing on the plan of reorganization, of which he had notice. He did so in the (mistaken) belief that he could avoid any *res judicata* effect of the bankruptcy court’s orders as long as he did not participate. *See In re Kirwan Offs. S.à.R.L.*, 592 B.R. 489, 501 (S.D.N.Y. 2018), *aff’d sub nom. In re Kirwan Offs. S.à.R.L.*, 792 F. App’x 99 (2d Cir. 2019).

Anticipating that the dissident shareholder would try to mount a collateral attack on the bankruptcy court’s order confirming the plan, the other two shareholders had included therein a provision enjoining any person, including Lynch, from suing anyone in any forum on a claim arising out of the bankruptcy proceeding and the court-approved reorganization. Judge Drain confirmed the plan containing that provision. At the time he entered the order confirming the plan, the Bankruptcy Judge made it clear that Lynch’s “opposition to any reasonable restructuring . . . scurried, if not crossed the line, over into bad faith” (*Kirwan,* 592 B.R. at 499), and said it was “in that context . . . that I am prepared to approve the exculpation and injunction provisions of the plan.” *Id*. He specifically found that the provision was narrowly tailored and necessary in order to forestall “back-door attacks and collateral litigation for their activities related to those things,” which would impact the reorganized debtor as well the non-debtors who had proceeded in good faith throughout the bankruptcy. *Id*.

In short, the injunction affirmed in *Kirwan* was plainly one designed to preserve and protect the authority of the bankruptcy court and the integrity of its actions *vis a vis* the debtor's estate. Unlike the third-party claims in this case, Lynch's claims against his erstwhile partnership inherently involved the property of the estate – the relief sought would have redistributed *post hoc* the estate following the bankruptcy court's confirmation of the plan.

As noted earlier (*see* footnote 56), Lynch did not argue, either in this Court or in the Second Circuit, that the injunction was not statutorily authorized by the Bankruptcy Code. The grounds asserted and decided were jurisdictional and constitutional, not statutory. Neither this Court nor the Second Circuit analyzed the question of statutory authority, even in the context of the very limited and specially targeted injunction that was included in the debtor's plan.

Summary of Second Circuit Law: The only fair characterization of the law on the subject of statutory authority to release and enjoin the prosecution of third-party claims against non-debtors in a bankruptcy case is: unsettled, except in asbestos cases, where statutory authority is clear. Because the Court of Appeals has decided every other case on non-statutory grounds, its only clear statement is that Section 105(a), standing alone, does not confer such authority on the bankruptcy court outside the asbestos context.

3. The Law in Other Circuits

All but three of the other Circuits have spoken directly to the issue of statutory authority. They have reached conflicting results – a most unfortunate circumstance when dealing with a supposedly uniform and comprehensive nationwide scheme to adjust debtor-creditor relations.

Three of the eleven Circuits – the Fifth, Ninth, and Tenth – reject entirely the notion that a court can authorize non-debtor releases outside the asbestos context. *See In re Pacific Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009); *In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re W. Real Estate Fund*, 922 F.2d 592, 600 (10th Cir. 1990). Those courts read § 524(e) as barring

the granting of such relief – put otherwise, they under Congress' use of the phrase "Notwithstanding the provisions of §524(e)" in § 524(g) as creating an exception to an otherwise applicable rule.

The Third Circuit also has not identified any section of the Bankruptcy Code that authorizes such non-debtor releases. Judge Drain points to *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 133-40 (3d Cir. 2019) (*In re Purdue Pharma L.P.,* 2021 WL 4240974, at *40), but as in the Second Circuit cases like *Manville III/IV* and *Tronox*, the Third Circuit does not discuss statutory authority in that case. Instead, the *Millennium* court concluded that the bankruptcy court had *constitutional* authority to extinguish certain third-party claims by confirming a chapter 11 plan. *In re Millennium Lab Holdings II, LLC*, 945 F.3d 139-40.

On those occasions when the Third Circuit did address a bankruptcy court's *statutory* authority to impose non-debtor releases, it overturned bankruptcy court orders granting them. For example, in *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000), the Court of Appeals *rejected as extra-statutory* the provision in a plan of reorganization that released claims against current and former directors of Continental, and that permanently enjoined shareholder actions against them, finding that the Bankruptcy Code "does not explicitly authorize the release and permanent injunction of claims against non-debtors, except in one instance not applicable here" – that being asbestos cases. *Id*. at 211; 11 U.S.C. § 524(g). And in *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004), the Third Circuit, like the Second Circuit in *Metromedia*, held that Section 105(a) does not give the court the power to create substantive rights that would otherwise be unavailable under the Bankruptcy Code, and vacated the channeling injunction. *Id*. at 238. Neither *Continental Airlines* nor *Combustion Engineering* has ever been overruled by the Third Circuit.

The First, Eighth, and D.C. Circuits have yet to weigh in on the question of whether statutory authority to impose non-debtor releases exists. Judge Drain contends that the First Circuit did decide that issue, in *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F. 3d 973 (1st Cir 1995), but again, the First Circuit did not identify any statutory authority to impose non-debtor releases in that case. It declined to decide whether Section 105(a) authorized the imposition of a non-debtor release; and it did not cite any other section of the Bankruptcy Code as conferring that authority. *Id*. at 983-94.

Judge Drain cited *In re AOV Indus., Inc*., 792 F.2d 1140, 1153 (D.C. Cir. 1986) for the proposition that the D.C. Circuit has approved the non-consensual release of third-party claims against non-debtors. But that is wrong. The *AOV Industries* court did not say a word about whether such relief was authorized by statute. The court simply found that the issue before it – whether the bankruptcy court had *constitutional* authority to enter an order releasing non-debtor claims – was equitably moot. *Id*.

The Fourth and Eleventh Circuits have concluded that Section 105(a), without more, authorizes such releases. *See Nat'l Heritage Found., Inc. v. Highbourne Found., Inc*., 760 F.3d 344, 350 (4th Cir. 2014); *In re Seaside Eng'g & Surveying*, 780 F.3d 1070, 1076-79 (11th Cir. 2015). After *In re Dairy Mart* and *Metromedia,* we know that is not the law in the Second Circuit. So Fourth and Eleventh Circuit law contradict Second Circuit law, and cannot be relied on as authority for the proposition that such releases are statutorily authorized.

That leaves the Sixth and Seventh Circuits, both of which have concluded that Sections 105(a) and 1123(b)(6) of the Bankruptcy Code, read together, codify something that they call a bankruptcy court's "residual authority," and hold that a bankruptcy court can impose non-consensual releases of third-party claims against non-debtors in connection with a chapter 11 plan

pursuant to that "residual authority."[68] As discussed in my summary of his opinion, Judge Drain adopted the reasoning of these courts, and added two other sections of the Bankruptcy Code to buttress the analysis.

<u>Summary of Extra-Circuit Law</u>: A majority of the Circuits that have spoken to the statutory authority question either dismiss the idea that such authority exists or, as with the Second Circuit, (i) reject the notion that such authority can be found by looking solely to Section 105(a) and then (ii) fail to answer the question of where such authority can be found. Two Circuits rely solely on Section 105(a), and so have law that conflicts with the Second Circuit's pronouncement. Only two Circuits support the position taken by the learned Bankruptcy Judge.

It is against that backdrop of higher court authority that I turn to the order on appeal.

C. The Statutory Provisions Upon Which the Bankruptcy Court Relied

Judge Drain was quite explicit about the statutory provisions that he believed gave him authority to approve these releases as "necessary or appropriate" to carry out the provisions of the Bankruptcy Code: Sections 105(a), 1123(a)(5) and (b)(6), and 1129, together with "residual authority." *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *43.

The question that arises is whether any of the sections other than Section 105(a) confers some substantive right such that a release to enforce that right could be entered pursuant to Section 105(a).

I conclude that they do not.

Rather, each of the cited sections, like Section 105(a), confers on the Bankruptcy Court only the power to enter orders that carry out other, substantive provisions of the Bankruptcy Code.

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[68] They get the phrase "residual authority" from *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990), which I discuss in detail below.

None of them creates any substantive right; neither do they create some sort of "residual authority" that authorizes the action taken by the Bankruptcy Court.

<u>Section 1123(b)(6):</u> Subsections (a) and (b) of 11 U.S.C. § 1123, entitled "Contents of Plan," lay out in considerable detail what a plan of reorganization *must* (subsection (a)) and *may* (subsection (b)) contain in order to be confirmed.

We can quickly dispense with the notion that Section 1123(b)(6) provides the substantive authority for a Section 105(a) injunction or approval of a release.

Section 1123(b)(6) provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C § 1123(b)(6). In form, Section 1123(b)(6) is substantively analogous to Section 105(a)'s authorization of "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). If the latter does not confer any substantive authority on the bankruptcy court – and that proposition is well settled, at least in this Circuit – then the former can in no way be read to do so.

That alone would be reason to conclude that Section 1123(b)(6) does not provide the statutory authorization we are seeking. But as Appellants point out, various aspects of the non-consensual Section 10.7 Shareholder Release are indeed inconsistent with certain other provisions of title 11.

First and foremost, the Section 10.7 Shareholder Release is inconsistent with the Bankruptcy Code because it discharges a non-debtor from debts that Congress specifically said could not be discharged by a debtor in bankruptcy. The Section 10.7 Shareholder Release does not carve out or exempt claims for fraud or willful and malicious conduct, liabilities from which Purdue cannot be discharged in its own bankruptcy. *See* 11 U.S.C. §§ 523(a)(2), (4), (6). Reading the Bankruptcy Code as authorizing a bankruptcy court to discharge a non-debtor from fraud

liability – something it is strictly forbidden from doing for a debtor – cannot be squared with the fact that Congress intended that the Bankruptcy Code "ensure that all debts arising out of fraud are excepted from discharge no matter what their form." *Archer v. Warner*, 538 U.S. 314, 321 (2003) (internal citation omitted). In other cases in which the releases at issue called for relief from suit that encompassed otherwise non-dischargeable claims, courts either ensured fraud claims were exempt from the releases before approving them, *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 657 (7th Cir. 2008), or simply refused to approve the releases because they included otherwise non-dischargeable claims. *See e.g.*, *In re Fusion Connect, Inc.*, No. 20-05798, 2021 WL 3932346, at *7 (S.D.N.Y. Sept. 2, 2021) (reversing the bankruptcy court's decision to discharge a debtor from an outstanding civil penalty because liability "arising from fraud on consumers" and payable to a governmental entity is "nondischargeable" in a chapter 11 bankruptcy under Section 523(a)(2)). Aside from *Drexel* – which, for all the reasons discussed above, is probably no longer good law – the Second Circuit has never approved a non-consensual release of claims against non-debtors of this sort, nor has it ever explained what provision of the Bankruptcy Code authorizes a bankruptcy court to do so.

Second, as the State Appellants point out, a debtor's discharge cannot relieve him of "any debt . . . to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty. . ." 11 U.S.C. § 523(a)(7). At least some of the claims asserted by the State Appellants seek relief in the nature of non-dischargeable civil penalties payable to and for the benefit of governmental units. Such claims could not be discharged if the Sacklers had filed for personal bankruptcy.

To the extent that Judge Drain held that the Section 10.7 Shareholder Release was not inconsistent with these sections, I respectfully disagree.

Appellants also argue that the Section 10.7 Shareholder Release and corresponding injunctions are inconsistent with Section 524(e) of the Bankruptcy Code, which provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). On the facts of this case, I cannot agree with that argument – but not because the Code is silent on the subject.

Section 524(e) says, in sum and substance, that releasing a debtor on a debt owed to a creditor does not affect the liability that a non-debtor may have for the same debt. But the claims that would be released by the Section 10.7 Shareholder Release are not claims on which the Sacklers are jointly liable with Purdue. The various state statutes being invoked by Appellants give rise to Sackler liability *independent* of Purdue's liability – albeit for the very same violations of the very same laws – because those laws impose an independent duty on persons who occupy certain managerial positions in a corporation. We would not have this appeal if the Sackler debts being eliminated by the Section 10.7 Shareholder Release were also debts owed by Purdue; we would be back in Section 10.6 land, dealing with derivative claims, where the Bankruptcy Court's power is unchallenged.

It is true that, when passing Section 524(g), Congress stated explicitly that the non-debtor releases therein authorized were being allowed "notwithstanding the provisions of sect. 524(e)." 11 U.S.C. § 524(g). It is hard to read that phrase and not conclude that Congress thought it was creating an exception to Section 524(e) by authorizing the release of third-party claims against non-debtors in certain limited circumstances.

However, back when Congress was considering § 524(g), it had before it a specific situation: the claims being released were against non-debtor insurance companies whose liability was premised on the conduct of their insureds that fell within the terms of the policies they had

issued. Everything that was being released was part and parcel of the bankruptcy estate; the debts owed by Manville and its insurers were the same debts; § 524(e) was obviously implicated. There is no indication, either in the text of the statute or in the legislative history, that Congress ever envisioned that a bankruptcy court could discharge the debts of non-debtors that were not also debts of the debtor. That being so, I cannot read the "notwithstanding" language to create an inconsistency on the facts of this case.

I am, therefore, constrained to conclude that the Section 10.7 Shareholder Release is not inconsistent with § 524(e), because it contains the discharge of debts that are not contemplated by § 524(e).

Section 1123(a)(5): Section 1123(a)(5) of the Bankruptcy Code provides that a plan of reorganization must "provide adequate means for [its] implementation." 11 U.S.C. § 1123(a)(5). That section contains a laundry list of things that a plan can include in order to make sure that resources are available to implement the plan – any of which can be ordered by a bankruptcy court.

Injunctions against the prosecution of third-party claims against non-debtors, and the release of such claims, are nowhere to be found on that list. Every single example listed in Subsections 5(A) through (J) authorizes the court to do something with the *debtor's assets* (retaining estate property; transfer of property; sale of property; satisfaction or modification of a lien; cancellation or modification of an indenture or similar instrument; curing or waiving defaults; extension of maturity dates; issuing securities; even amending the debtor's charter). Since the bankruptcy court has *in rem* jurisdiction over the *res* of the debtor's estate, none of that should be surprising. It is equally unsurprising that none of the types of relief listed in Section 1123(a)(5) involves disposing of property belonging to someone other than the debtor or a creditor of the

debtor. That is because it is the debtor's resources – not the resources of some third party – that are supposed to be used to implement a plan that will adjust the debtor's relations with its creditors.

Of course, this is not the first case in which the resources of non-debtors are being used to implement a plan; and § 1123(a)(5) does not pretend to contain an exhaustive list of all ways that a plan can provide means for its implementation. The Section begins, after all, with the words "such as." In this case, Debtors argue that the only way to get the resources necessary to implement a viable plan was to agree to the Sacklers' demand for broad releases in exchange for their contribution of money to the bankruptcy estate. They insist that the Section 10.7 Shareholder Release and corresponding injunctions carry out the requirements of Section 1123(a)(5) by ensuring that the Plan has the funding it needs – and if that funding was obtained from some third-party funder on condition of a release and an injunction, then those forms of relief are authorized because the money is needed to fund the Plan.

But the fact that Purdue needs the Sacklers to give the money back does not mean that Section 1123(a)(5) confers on the Debtors or the Sacklers any right to have the non-debtors receive a release from non-derivative third-party claims in exchange for a contribution to Purdue's estate. The Debtors' suggestion that this Section confers some substantive right is exactly the sort of circular reasoning that was rejected by Judge Jacobs where Section 105(a) was concerned. *See In re Dairy Mart,* 351 F.3d at 92 (any such power conferred by Section 105(a) must "be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective") (quoting 2 *Collier on Bankruptcy* ¶ 105.01[1]). Getting to a confirmable plan is the general bankruptcy objective, nothing more.

Nor does Section 1123(a)(5) confer any special power on the Bankruptcy Court. A court does not propose the plan; the debtor and its creditors put the plan together and present it to the

court, which cannot approve the plan unless it contains the required provisions and need not approve it even then. To the extent that any court order is contemplated by Section 1123(a), it is the Confirmation Order – not an injunction and release of claims against non-debtors in order to obtaining funding for a plan, which is essentially what Debtors are proposing.

Finally, and most important, Section 1123(a)(5) does not authorize a court to give its imprimatur to something the Bankruptcy Code does not otherwise authorize, simply because doing so would ensure funding for a plan. Nothing in Section 1123(a)(5) suggests that a debtor has the right to secure sufficient funds for implementation by any means necessary. Section 1123(a)(5) would not, for example, authorize a court to enter an order enjoining a bank from suing a non-debtor employee who embezzled funds and then offered them to her bankrupt brother's estate in exchange for a release of all claims a third party could assert against her. That example is silly, of course, but the point is simple: the mere fact that the money is being used to fund implementation of the plan does give a bankruptcy court statutory authority to enter an otherwise impermissible order in order to obtain that funding. As was the case with Section 1123(b)(6), Judge Drain's reliance on Section 1123(a)(5) begs the ultimate question that must be answered: whether the court has some *independent* statutory authority to issue the non-debtor releases and enjoin third party claims against the Sacklers, such that the Bankruptcy Court can enter a "necessary and appropriate" order to obtain the funding.

Section 1129(a)(1): Finally, Section 1129(a)(1) does not provide the substantive authority for a Section 105(a) injunction or approval of a release. Section 1129 is entitled "Confirmation of plan," and Subsection 1129(a)(1) provides that a bankruptcy court "shall confirm a plan only if . . . the plan complies with the applicable provisions of this title." 11 U.S.C.A. § 1129. Like the cited sections of §1123, §1129(a) confers no substantive right that could be used to undergird a §

105(a) injunction. One highly general provision simply does not confer substantive authority that is required to invoke another highly general provision.

Lack of Any Statutory Prohibition: Having exhausted the statutory provisions on which Judge Drain relied and finding that none of them confers any substantive right as required by *Metromedia,* our exercise should be at an end. But it is not. The Debtors argue that the Bankruptcy Court must be statutorily authorized to approve these releases because no provision of the Bankruptcy Code – including but not limited to § 524(e) – expressly prohibits them.

The notion that statutory authority can be inferred from Congressional silence is counterintuitive when, as with the Bankruptcy Code, Congress put together a "comprehensive scheme" designed to target "specific problems with specific solutions." *RadLAX Gateway Hotel,* 566 U.S. at 645. In this particular case, a number of red flags suggest that Congressional silence (if indeed Congress was silent) was not intended to mean consent.

The first is that silence is inconsistent with comprehensiveness, and the Bankruptcy Code "provides a *comprehensive* federal system . . . to govern the orderly conduct of debtors' affairs and creditors' rights." *E. Equip. & Servs. Corp. v. Factory Point Nat. Bank, Bennington*, 236 F.3d 117, 120 (2d Cir. 2001) (emphasis added). "Comprehensive" means "complete, including all elements." Reading elements that do not appear in the text of the Code into the Code is the antithesis of comprehensiveness.

Then-District Judge Sullivan recognized as much in *In re Lehman Bros. Holdings Inc.*, 508 B.R. 283 (S.D.N.Y. 2014). There, the bankruptcy court granted a certain creditor's application for reimbursement of post-petition counsel fees over the U.S. Trustee's objection that the Bankruptcy Code only permitted reimbursement of post-petition administrative expenses. On appeal, Judge Sullivan was not persuaded by appellees' argument that reimbursement for professional fees was

authorized by the Bankruptcy Code simply because nothing in the Bankruptcy Code expressly forbade it. He held that, "no such explicit prohibition is necessary" because the requested reimbursement clearly goes against the *purpose* of a reorganization – "Reorganization plans exist to pay claims . . . [the] professional fee expenses were all incurred post-petition, and thus cannot be treated as 'claims.'" *Id*. at 293. He further noted that the federal bankruptcy scheme "cannot remain comprehensive if interested parties and bankruptcy courts in each case are free to tweak the law to fit their preferences." *In re Lehman Bros. Holdings Inc*., 508 B.R. 283, 294 (S.D.N.Y. 2014) (internal citations omitted).

As I noted above, Justice Breyer recently wrote when discussing the priority scheme set out in the Bankruptcy Code, the importance of certain critical aspects of the bankruptcy scheme "leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure." *Jevic Holdings Corp*., 137 S. Ct. at 984. Granting releases to non-debtors for claims that could not be released in favor of the debtors themselves is so far outside the scope of the Bankruptcy Code and the purposes of bankruptcy that the "silence does not necessarily mean consent" principle applies with equal force.

Second, it is hard to infer consent from silence in circumstances when one would not expect Congress to speak. The Code was intended "to free the debtor of his personal obligations *while ensuring that no one else reaps a similar benefit*" *Green v. Welsh*, 956 F.2d 30, 33 (2d Cir. 1992) (emphasis added). It is counterintuitive to imagine that Congress would have thought it necessary to include language specifically forbidding things that that ran counter to that purpose. As one of Judge Drain's colleagues recently reminded us, the ordering of an involuntary release of third-party claims against non-debtors is "an extraordinary thing" that is "different . . . from what courts ordinarily do." *In re Aegean Marine Petroleum Network Inc*., 599 B.R. 717, 723 (S.D.N.Y. 2019).

That is especially true where, as is proposed here, we find ourselves in what Judge Wiles called "the odd situation where we are being asked to use an unwritten authority to release non-debtor officers and directors from claims when the Bankruptcy Code would bar us from giving similar relief to those persons if they were debtors in their own cases." *Id.* at 726 (citing *Metromedia*, 416 F.3d at 142).

Third, Congress has in fact spoken on this subject, and what it has said suggests that it intended Sections 524(g) and (h) to preempt the field where non-debtor releases were concerned. I will not repeat the extensive discussion about the law and its legislative history that appears above, except to say that Congress in its wisdom elected to limit Code-based authority to release third party claims against non-debtors to asbestos litigation – and it declined either to agree with those who argued that bankruptcy courts already had a broader power to authorize such releases. Congress was not unaware that there were non-asbestos bankruptcies with thousands of claimants and nationwide implications in the early 1990s. Other mass tort bankruptcies with thousands upon thousands of potential claimants were pending (*i.e.*, in *A.H. Robins/Dalkon Shield*), as was the highly publicized bankruptcy of a major investment bank (*Drexel*). The Judiciary Committee mentioned the "experimentation" with *Manville*-like relief that was beginning in other industries.

Yet Congress declined to make this extraordinary form of relief – relief that ran counter to the fundamental purpose of the Bankruptcy Code – available in circumstances other than asbestos bankruptcies. And it reserved for itself the right to change that.

So the silence that speaks volumes is not Congress' failure to say, "And you can't give involuntary non-debtor releases to anyone except in an asbestos case." The silence that speaks volumes is the twenty-seven years of unbroken silence that have passed since Congress said, "We

are limiting this to asbestos for now, and maybe, when we see how it works in that context, we will extend it later."

Fourth, but by no means least, "it is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel*, 504 U.S. at 384. The Supreme Court of the United States has relied on that principle on multiple occasions in refusing to allow generalized provisions of the Bankruptcy Code to override specific directives on a particular subject.

Take, for example, *RadLAX* itself. The plan proposed by the debtors in *RadLAX* provided for the sale of unencumbered assets securing a bank creditor's claim free and clear of all liens. But, in contravention of the provision governing such a "cram down" plan under the Bankruptcy Code, the bid procedures proposed by the debtors precluded the bank holding the mortgage on the property from credit-bidding the amount of its claim, which the Bankruptcy Code specifically authorized the bank to do. 11 U.S.C. § 1129(b)(2)(A)(ii). Nonetheless, the bankruptcy court approved the plan. It agreed with the debtors that the bank did not need to be permitted to bid on the property as long as it was provided with the "indubitable equivalent" of its claim in some other fashion – in this particular case, the cash generated by the auction. 11 U.S.C. § 1129(b)(2)(A)(i)-(iii).

The Supreme Court rejected the debtors' justification, holding that the "indubitable equivalents" subclause (subclause iii) was a general subclause that could not be used to circumvent the specific requirement of subclause (ii) that the bank be permitted to credit-bid at the sale. The Court stated that the debtors' reading of the statute – that clause (iii) permits precisely what clause (ii) proscribes – is "hyperliterally contrary to common sense." *RadLAX Gateway Hotel*, 566 U.S. at 640. The Court called it "axiomatic" that specific statutory provisions control over general provisions and emphasized that the "general/specific canon" applies with particular force in

bankruptcy, because "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *Id*.

Where, as here, Congress has deliberately limited a specific targeted solution (the release of third-party claims against non-debtors) to a specific identified problem (asbestos bankruptcies) – and has even denominated that solution as an exception to the usual rule – *RadLAX* strongly suggests that the general/specific canon should apply with particular force.

Ginsberg & Sons v. Popkin, 285 U.S. 204 (1932) is a pre-Code case, but it illustrates the same principle. There, petitioner argued that Clause 15 of Section 2 of the Bankruptcy Act empowered district judges to issue orders directing the arrest of the former officers and directors of the debtor. Clause 15 provided, "The courts of bankruptcy are hereby invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings . . . [t]o] make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title." Section 2, 11 USCA s 11(15). The reader will immediately appreciate that Clause 15 is the Bankruptcy Act's equivalent of Section 105(a) of the Bankruptcy Code – it was the "necessary and appropriate" clause in the old statutory scheme.

But Section 9(a) of the Bankruptcy Act specifically precluded "a court of bankruptcy" from directing the arrest of former directors and officers, except for contempt or disobedience of its lawful orders. And Section 9(b) prescribed in great detail the conditions to and procedures for invoking the exception under which the court could direct the arrest and detention of such former directors and officers who posed a flight risk.

The Supreme Court refused to read Clause 15 of Section 2 in a way that would render the specific prohibitions and procedures enumerated in Sections 9(a) and (b) superfluous: "In view of

the general exemption of bankrupts from arrest under section 9a and the carefully guarded exception made by section 9b as to those about to leave the district to avoid examination, there is no support for petitioner's contention that the general language of section 2(15) is a limitation upon section 9(b) or grants additional authority in respect of arrests of bankrupts." *D. Ginsberg & Sons v. Popkin*, 285 U.S. at 207–08.

The Supreme Court's holdings in these cases old and new are instructive in the present context. Here, Debtors and their allies seek to apply general provisions – Sections 105(a) and 1123(a)(5) and (b)(6) – to justify expanding the express authority conferred by Congress under §524(g) into a situation that is manifestly not comprehended by that statute. Because the specific controls the general, that reliance is misplaced.

For all these reasons, I cannot conclude that Congressional "silence" should be deemed consent to an expansion of Section 524(g). In fact, I do not believe that Congress has been silent at all. But to the extent it has, its silence supports the Appellants' position, not the Debtors'.

Residual Authority: Finally, I turn to the concept of "residual statutory authority." In these circumstances, I conclude that such authority simply does not exist.

Judge Drain framed the question before him as, "whether the court has statutory *or other power* to confirm a plan with a third-party claim release," and, if so, "what is the statutory *or other source of power* for such a release?" *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *40, *43 (emphasis added). He identified the "other source of power" as the residual power of bankruptcy courts.

But such power, if it even exists, is of no help where, as here, it is being exercised in contravention of specific provisions of the Bankruptcy Code.

Debtors rely heavily on the Supreme Court's decision in *In re Energy Resources Co*, 495 U.S. 545 (1990) for the proposition that a bankruptcy court has "residual authority" to approve reorganization plans that includes all "necessary and appropriate" provisions, as long as those provisions are not inconsistent with title 11. In that case, the Court concluded that two bankruptcy courts – which were forbidden by the Bankruptcy Code from discharging a tax debt[69] and required not to confirm a plan unless satisfied that the IRS would in all likelihood be able to collect taxes owed within six years[70] – had not "transgressed one of the limitations on their equitable power" by directing in a plan of reorganization that certain tax payments be credited in the first instance to so-called "trust fund" tax debt, and only when that debt was satisfied to so-called "non-trust fund" tax debt. *In re Energy Resources Co*., 495 U.S. 499-50. Trust fund tax debt is guaranteed by third parties; an order directing that the guaranteed debt be paid first meant that if there were any unpaid taxes at the end of the plan period, the IRS could probably not look to third parties for payment. The IRS argued that this provision of the plan was inconsistent with the Bankruptcy Code, because requiring the debtor to pay non-trust fund taxes first would give the IRS a greater chance of recovering 100 cents on the dollar.

But the Supreme Court ruled that the Bankruptcy Code did not require that a plan of reorganization be structured so that the unsecured tax debt was paid first. The bankruptcy court had found (as required by the Bankruptcy Code) that the plan of reorganization proposed by the debtors was likely to succeed. It further found that, if the plan did succeed, all taxes would be fully paid within six years. The express terms of the Bankruptcy Code required nothing more. Therefore, the order directing that tax payments be credited first to back taxes secured by the trust fund, and

[69] 11 U.S.C. §§ 507(a)(7), 523(a)(1)(A).

[70] 11 U.S.C. § 1129(a)(9)(C).

then to unsecured back taxes, was not inconsistent with any applicable provision of title 11. All the substantive guarantees that the Bankruptcy Code afforded to the IRS were baked into the court's approval of the plan.

No reference in *Energy Resources* to a bankruptcy court's "residual power" authorizes the learned Bankruptcy Judge's approval of the Section 10.7 Shareholder Release under any "residual power" theory. Just two years prior to the *In re Energy Resources* decision, the same Supreme Court – made up of the same nine justices – held that the bankruptcy court's residual equitable authority was bounded by the provisions of the Bankruptcy Code. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) (holding "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code"). *Energy Resources* is consistent with this principle. Congress legislated a particular right into the Bankruptcy Code; the Supreme Court refused to allow lower courts to expand that right and held that the Bankruptcy Court had the power to authorize anything that was not inconsistent with that right. But the Bankruptcy Code conferred a specific right. In this case, there is nothing in the Bankruptcy Code that specifically authorizes the Section 10.7 Shareholder Release; the Bankruptcy Court (and this Court) is being asked to insert a right that does not appear in the Bankruptcy Code in order to achieve a bankruptcy objective. That is precisely what *In re Dairy Mart* and *Metromedia* prohibit.

Additionally, the *Energy Resources* Court, echoing its own holding of two years earlier, recognized that any residuary power enjoyed by a bankruptcy court must be exercised in a way that "is not inconsistent with the applicable provisions of this title." I have become convinced, for the reasons discussed in great detail above, that the Section 10.7 non-debtor releases are in fact inconsistent with applicable provisions of title 11 – with Sections 524 (g) and (h), with Section

523, and with Section 1141(d), and possibly even with Section 524(e). Therefore, no residual power can authorize such an order.

As a corollary to the "residual authority" argument, several Appellees argue the release of claims against the non-debtor Sacklers and their related entities are proper because the Bankruptcy Code, taken as a whole, creates a "special remedial scheme" in which certain legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process. They cite *Martin v. Wilks*, 490 U.S. 755 (1989) for their proposition.

In *Martin v. Wilks*, the Supreme Court announced that, as a general rule, "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." It affirmed the Eleventh Circuit's judgment allowing certain individuals who were *not* parties to an original action to challenge consent decrees entered in that original case. *Id*. at 762. But, in a footnote, the Court acknowledged an exception to the general rule exists "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process." *Id*. at 762, n. 2.

Judge Drain did not adopt this reasoning or rest his view about his statutory authority on the Bankruptcy Code's "special remedial scheme" – and rightly so, because it is contrary to Second Circuit law. The "special remedial scheme" contemplated by the Bankruptcy Code addresses the rights of persons who have claims against a debtor in bankruptcy – not claims against other non-debtors. The Code lays out a claims allowance process so that creditors can file their claims against someone who has invoked the protection of the Bankruptcy Code; it provides a mechanism for those parties to litigate those claims against the debtor and to determine their value. In order to

take advantage of this "special remedial scheme," debtors have to declare bankruptcy, disclose their assets, and apply them – all of them, with *de minimis* exceptions – to the resolution of the claims of their creditors.

Non-debtors have no such obligations, and so do not have any rights at all under the "special remedial scheme" that is bankruptcy – certainly not the "right" to have claims that are being asserted against them outside the bankruptcy process released. As the Second Circuit held in *Manville III*, the "special remedial scheme" due process exception relating to *in rem* bankruptcy proceedings simply does not give a bankruptcy court subject matter jurisdiction to release *in personam* third-party claims against a non-debtor. *In re Johns-Manville Corp.*, 600 F. 3d 135, 158 (2d Cir. 2010).

Conclusion: No Statutory Authority. In *Metromedia*, the Second Circuit signaled that a Bankruptcy Code could not order the non-consensual release of third-party claims against non-debtors unless some provision of the Bankruptcy Code aside from Section 105(a) authorized it to do so. For the reasons stated above, I conclude that there is no such section, and so no such authority.

It is indeed unfortunate that that this decision comes very late in a process that, from its earliest days in 2019, has proceeded on the assumption that releases of the sort contemplated in Section 10.7 of the Debtors' Plan would be authorized – this despite the language of the Bankruptcy Code and the lack of any clear ruling to that effect. I am sure that the last few years would have proceeded in a very different way if the parties had thought otherwise. But that is why the time to resolve this question for once and for all is now – for this bankruptcy, and for the sake of future bankruptcies. It should not be left to debtors and their creditors to guess whether such

releases are statutorily authorized; and it most certainly should not be the case that their availability, or lack of same, should be a function of where a bankruptcy filing is made.

I also acknowledge that the invalidating of these releases will almost certainly lead to the undoing of a carefully crafted plan that would bring about many wonderful things, including especially the funding of desperately needed programs to counter opioid addiction. But just as, "A court's ability to provide finality to a third-party is defined by its jurisdiction, not its good intentions" (*Manville III*, 517 F.3d at 66), so too its power to grant relief to a non-debtor from non-derivative third party claims "can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington*, 485 U.S. at 206.

Because the Bankruptcy Code confers no such authority, the order confirming the Plan must be vacated. Because the Advance Order is an adjunct of and follows from the Confirmation Order, it, too, must be vacated.[71]

III. The Plan's Classification and Treatment of the Canadian Appellants' Claims Does Not Violate the Bankruptcy Code.

Because the court reverses on the ground that there is no statutory authorization in the Bankruptcy Code for the Bankruptcy Court to impose a non-voluntary release of third-party claims against non-debtors, I do not reach the Canadian Appellants' separate attack on the Section 10.7 Shareholder Release. But part of the Canadian Appellants' argument on appeal is that the Plan as confirmed violates the Bankruptcy Code by treating the Canadian Appellants' unsecured claims unfavorably as compared to the claims of their domestic counterpart creditors. The Canadian Appellants explained at Oral Argument that this "inequality" issue must be decided, regardless of

[71] The U.S. Trustee has also appealed from the Disclosure Order, asserting that it was inaccurate in certain respects. (Dkt. No. 91, at 10; Dkt. No. 191, at 10). As the Confirmation Order has been vacated without reaching the notice/due process constitutional issues that were raised by the U.S. Trustee, I do not understand that any substantive ruling is needed with respect to the Disclosure Order. Like everything else connected with the Plan, it simply falls by the wayside.

how the court ruled on the Section 10.7 Shareholder Release. (*See* Oral Arg. Tr., Nov. 30, 2021, at 71:6-21).

Pursuant to the Plan, the Canadian Appellants are entitled to a share of the $15 million dollars distributed to a trust that will be divided among all of the general unsecured creditors of the Debtor. (Dkt. No. 59, at 47). At the same time, domestic government and tribe unsecured creditors are not classified as "general" unsecured creditors but are placed in classes 4 and 5 as "Non-Federal Domestic Governmental" claimants and "Tribe" claimants respectively. (*See* Plan, at 2). The Canadian Appellants argue that the Bankruptcy Code contains an "equal-treatment mandate" in Section 1129(a)(4) requiring that "all creditors within the same class enjoy the same 'opportunity' to recover." (Dkt. No. 59, at 47). Because, they argue, the domestic non-federal government claims (Class 4) and tribal claims (Class 5) are "indistinguishable" from theirs (*id.*), the Canadian Appellants posit that they are "similarly situated" to their "domestic counterparts" and thus should be part of the same creditor "class." Since the Plan does not allow the Canadian Appellants to "enjoy shares in trusts seeded with $4.5 billion—300 times as much" as would be available to the general unsecured creditors of Purdue (*Id.*) – the Canadian Appellants argue that there exists "an inequality that is independently fatal to the Plan's treatment of the Canadian Appellants' claims." (*Id.*).

The Court disagrees. Under the Plan, the Canadian Appellants belong to a different class than their domestic, unsecured creditor "counterparts" for perfectly legitimate reasons. The Code does not require that all creditor classes be treated equally, only that there be a reasonable basis for any differentiation. *See Boston Post Rd. Ltd. P'ship v. FDIC (In re Boston Post Rd. Ltd. P'ship)*, 21 F.3d 477, 482-83 (2d Cir. 1994).

First, the Bankruptcy Code expressly permits differentiation *between* classes of creditors and the Canadian Appellants rightly recognize that their "equal-treatment mandate" applies only to claims of "all creditors within the same class." (*See* Dkt. No. 59, at 47). The Canadian Appellants' argument that they are of the same "class" as the non-federal government and tribe claimants is unconvincing. It does not matter that the Canadian Appellants' claims are purportedly "indistinguishable" from those held by the domestic unsecured creditors in Classes 4 and 5; a chapter 11 plan may separately classify similar claims so long as the classification scheme has a reasonable basis for doing so. *See In re Boston Post Rd. Ltd. P'ship*, 21 F.3d at 482-83.

In *Boston Post Rd. Ltd. P'ship*, the chapter 11 plan classified unsecured claims against the insolvent Debtor, the Boston Post Road Limited Partnership ("BRP"), differently between the Federal Deposit Insurance Corporation ("FDIC") and BPR's other trade creditors. The classification treated the unsecured trade creditors more favorably than FDIC, while FDIC was BPR's largest unsecured creditor and an anticipated objector to the plan; the differentiation between these classes was done to achieve a "cramdown" of the plan over FDIC's objections. *Id.* at 479. The bankruptcy court denied confirmation of a chapter 11 plan on the basis that the plan impermissibly separately classified similar claims, holding that FDIC's unsecured claims should have been placed in the same class with other unsecured creditors, and the District Court affirmed. *Id.* On appeal, the Second Circuit found that the "Debtor was unable and failed to adduce credible proof of any legitimate reason for segregating the FDIC's unsecured claim from the unsecured claims of BPR's trade creditors." *Id.* at 483. The Debtor's only reasons were that the FDIC's claim purportedly "were created from different circumstances" and "BPR's future viability as a business depends on treating its trade creditors more favorably than the FDIC." *Id.* These reasons were "availing" to the Circuit. *Id.* In particular, the Circuit took issue with classifying similar claims

differently "in order to gerrymander an affirmative vote on a reorganization plan." *Id.* at 482-83 (quotation omitted). The Circuit explained, "approving a plan that aims to disenfranchise the overwhelmingly largest creditor through artificial classification is simply inconsistent with the principles underlying the Bankruptcy Code." *Id.*

In this case, unlike in *Boston Post Rd.* Judge Drain identified a reasonable basis for separately classifying the Canadian Appellants from the domestic unsecured creditors: First, Judge Drain explained that the Canadian creditors operate under "different regulatory regimes . . . with regard to opioids and abatement" than their domestic counterparts. *In re Purdue Pharma L.P.*, 2021 WL 4240974, at *12. Second, Judge Drain explained that "the allocation mediation conducted by Messrs. Feinberg and Phillips that resulted in the plan's division of the Debtors' assets . . . involved only *U.S.-based* public claimants with their own regulatory interests and characteristics." *Id*. (emphasis added). As the Debtors point out, the Canadian Appellants themselves differentiate themselves from the other classes in this manner, explaining (i) "[t]he Canadian Appellants are in Canada, [(ii)] the bulk of their legal claims arise in Canada, [(iii)] those claims concern the operations of Purdue Canada," and (iv) the Canadian Appellants' claims "bear no relation to the Shareholder Released Parties' control, direction, and oversight of the Debtors or their U.S. operations." (Dkt. No. 59, at 17-18; Dkt. No. 151, at 120-121). That very classification on the part of the Canadian Appellants accords with Judge Drain's findings that there is a reasonable basis for the separate classifications. And there is no argument that such separate classification was done for the purpose of disenfranchising a particular group in a manner inconsistent with the Bankruptcy Code, to engineer an assenting impaired class; or manipulate class voting, all of which must be carefully scrutinized by the court. Indeed, it was not.

Under the Plan, the Canadian creditors are classified in Class 11(c), while the domestic municipalities and domestic Indian tribes are classified as Class 4 and 5 creditors. These are perfectly legitimate classifications and the proffered reasons for doing so are reasonable. And the Canadian Appellants do not (and cannot) argue that under the Plan their claims will receive unequal treatment as compared to other claims in their class, Class 11(c), as indeed all claims classified as Class 11(c) are treated equally under the Plan. (Dkt. No. 59, at 44, 47-48).

Finally, Canadian Appellants *cannot* argue that their Class 11(c) claims are treated unfavorably as compared the other creditor classes (like Class 4 and/or Class 5) because their class, Class 11(c), voted to accept the Plan. Under the Bankruptcy Code, only creditors of a *dissenting* class can object to the confirmation of a plan on the grounds that the plan discriminates against its creditor class. Pursuant to section 1129(b)(1) of the Bankruptcy Code, a plan shall be confirmed "if the plan does not discriminate unfairly . . . with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). Because the Canadian creditors – as part of Class 11(c) – voted to accept the Plan, the Canadian Appellants cannot contend that they are being treated unfavorably.

The classification and treatment of the Canadian Appellants' claims under the Plan does not violate the Bankruptcy Code.

CONCLUSION

For the foregoing reasons, the Bankruptcy Court's Confirmation Order and related Advance Order must be vacated.

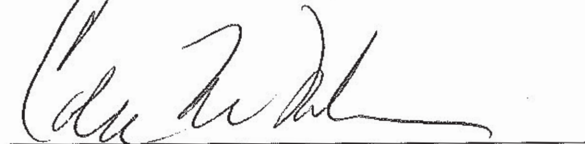
This decision leaves on the table a number of critically important issues that were briefed and argued on appeal – principal among them, whether the Section 10.7 Shareholder Release can

or should be approved on the peculiar facts of this case, assuming all the other legal challenges to their validity were resolvd in Debtors' favor.

But sufficient unto the day. This and the other issues raised by the parties can be addressed if they need to be addressed – which is to say, if this ruling is reversed.

This constitutes the decision and order of the court. This is a written opinion.

Dated: December 16, 2021



U.S.D.J.

BY ECF TO ALL COUNSEL

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
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In re: Chapter 11

PURDUE PHARMA L.P., et al., Case No. 19-23649 (RDD)

(Jointly Administered)

Debtors.

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MODIFIED BENCH RULING ON REQUEST FOR CONFIRMATION OF ELEVENTH AMENDED JOINT CHAPTER 11 PLAN[1]

Hon. Robert D. Drain, United States Bankruptcy Judge

The wrongful use, including marketing and distribution, of opioid products has contributed to a massive public health crisis in this country. The role of the debtors before me (the "Debtors" or "Purdue") and their owners in that crisis makes these bankruptcy cases highly unusual and complex.

This is so primarily because of the nature of the creditor body, given the extraordinarily harmful effects of the Debtors' primary product, the prescription drug

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[1] Because of the importance of promptly delivering a ruling on confirmation of the amended joint chapter 11 plan in these cases, I gave a lengthy bench ruling rather than reading from and issuing a written decision. I informed the parties, however, that after reviewing the transcript of that ruling I might modify it to make it clearer, add information that I inadvertently omitted, and of course correct typographical errors in the transcript. This Modified Bench Ruling, while still more colloquial than a written decision, attempts to do that and is being filed separately from the transcript of my bench ruling.

OxyContin, and other synthetic opioids on ordinary people as well as on the local governments, Indian tribes, hospitals and other first responders, states and territories, and the United States that confront these effects every day. In a very real sense, every person in the range of the Debtors' opioid products, sold throughout the United States, was a potential creditor.

Bankruptcy cases present a unique and perhaps the only means to resolve the collective problem presented by an insolvent debtor and a large body of creditors competing for its insufficient assets, including especially when there are mass claims premised on products to which, as here, massive harm is attributed.

Bankruptcy cases focus the solution away from individual litigations to a fair collective result subject to the unique ability under bankruptcy law to bind holdouts under well-defined circumstances who could not otherwise be bound under non-bankruptcy law.

Over the years courts and the parties to bankruptcy cases have refined and improved on such solutions, which clearly have been brought to bear in these cases involving likely the largest creditor body ever. And I'm not speaking solely of the roughly 618,000 claims that were filed, although I believe that is a record, but also,

as noted, the people who could arguably be said to be represented by their local and state governments and by the United States.

Here, too, the parties have worked in unique and trailblazing ways to address the public health catastrophe that underlies those claims.

These cases are complex also because the Debtors' assets include enormous claims against their controlling shareholders, and in some instances directors and officers, who are members of the Sackler family, whose aggregate net worth, though greater than the Debtors', also may well be insufficient to satisfy the Debtors' claims against them and other very closely related claims that are separately asserted by third parties who are also creditors of the Debtors.

Since the start, then, key issues for these cases have been (a) how can such claims be resolved to best effect for the claimants and (b) is such a resolution authorized under the Bankruptcy Code and law? The primary questions for me now, focusing on the Chapter 11 plan before the Court, are can these issues be resolved by confirmation of the plan, and should they?

It is clear after a lengthy evidentiary hearing that there is now no other reasonably conceivable means to

achieve the result that would be accomplished by the Chapter 11 plan in addressing the problems presented by the Debtors' Chapter 11 cases. I believe it is also clear under well-established precedent that, with a sufficient factual record, Congress in the Bankruptcy Code and the courts interpreting it provide the authority for such a resolution. That leaves the question whether the proposed resolution should be implemented.

This ruling explains my findings and conclusions regarding these issues, informed by the record of these cases, the parties' votes on the plan, the parties' briefing, and the record of a six-day trial involving 41 witnesses and a courtroom full of exhibits and two full days of oral argument.

Notice. The notice of the Debtors' request for confirmation of the plan was described by Jeanne C. Finegan in her declarations and live testimony, primarily in her third supplemental declaration, which, under my order setting procedures for the confirmation hearing, served as her direct testimony but also referred to prior declarations that she had provided in these cases regarding the notice to claimants and potential claimants.

As established by her testimony, the Debtors' notice of (a) these cases, (b) the right to assert a claim

against the Debtors, (c) the Debtors’ request for confirmation of the plan, and (d) the proposed release of third parties' claims against the released parties in the plan, primarily of such claims against the Sacklers and their related entities (the “shareholder released parties”), was unprecedentedly broad.

Ms. Finegan's testimony was uncontroverted and credible that the Debtors' noticing program as implemented under her supervision reached roughly 98 percent of the adult population of the United States and approximately 86 percent of Canadian adults, with an average frequency of message exposure in each case of four times, and also was extended extensively throughout the world where the Debtors' products might have caused harm. As testified to by Ms. Finegan, the supplemental confirmation hearing notice plan reached an estimated 87 percent of all U.S. adults, with an average message frequency of five times, and an estimated 82 percent of all Canadian adults, with an average message frequency of six times. It also was expanded to 39 countries not included in the bar date notice, served over 3.6 billion online and social impressions, and resulted in over 3,400 news mentions around the world.

The program was carefully tailored to reach not only known creditors but also the population at large,

including through various types of media aimed especially at people who may have been harmed by the Debtors' products. Ms. Finegan's calculations reflect literally billions of hits on the internet and social media as well as reliable estimates of the very wide extent of the other means of notice by TV, radio, various types of publications, billboards, and outreach to victims’ advocates and abatement-centered groups.

The only caveat that I have to the extraordinarily broad scope of the notice of the Debtors’ request for confirmation of the plan pertains to notice to those in prison. The notice program was in large part effective in reaching prisons and groups known to work with people who are in prison and suffering from opioid use disorder or other adverse effects of opioids. But it is possible that because of prison regulations and at times the lack of access to TV, radio and other media, prisoners may not have received the same high level of notice of these cases, the bar date, and the Debtors’ request to confirm the plan, including of the proposed third-party claim releases in the plan.

On the other hand, the Debtors, including in the plan’s personal injury trust procedures, have shown a willingness to consider requests to assert and prove claims

late based on evidence of prisoners' unique circumstances that may have restricted notice to them.

The United States Trustee has suggested that references in notices to the plan would have sent people to a lengthy and complex set of release provisions. This is true, as is the observation that it helps to have legal training to parse those provisions, although during the confirmation hearing they have been narrowed and simplified. And as reflected by the record of the parties' responses to my comments during the hearing, those provisions were subject to some potential for differing interpretations, although I believe that is not the case now that they have been revised.

Nevertheless, the most widespread notices of the plan's proposed third-party claims release were simple, in plain English that the plan contemplated a broad release of the Sacklers and their related entities of civil claims pertaining to the Debtors, including claims against them held by third parties. Finegan Decl. at paragraphs 19-22 (describing various ways this notice was disseminated). In addition, extensive media coverage of these cases also hammered home that point. Indeed, wide media coverage exaggerated the extent of the plan's proposed releases of claims against the Sacklers and further noted controversy

over its basis in applicable law. And it is these aspects of the plan’s third-party claims release –- that it is too broad and unfair and that it is not authorized under applicable law -- that primarily underly the objections to confirmation of the plan that have been filed, including by the U.S. Trustee, not that the releases are hard to read.

I therefore conclude that the Debtors' notice of the confirmation hearing and the proposed releases in the plan was sufficient and indeed unprecedentedly broad.

Voting on the Plan. I should next note the vote on the plan by the classes of claimants entitled to vote. It is important to address this issue up front because if a plan is not accepted by the vote of an impaired class, the plan proponent must proceed with respect to that class under the so-called cramdown provision of the Bankruptcy Code, section 1129(b). On the other hand, if the impaired classes have voted in favor of the plan’s confirmation, the Court analyzes only section 1129(a)'s requirements for confirmation and the incorporated provisions of the Bankruptcy Code related to it, such as sections 1122 and 1123 of the Code.

Based on the ballot declaration and testimony of Christina Pullo, an unprecedented number of votes were cast on the plan, over 120,000. In contrast, votes on most

Chapter 11 plans, even in large cases, number between a few and a few thousand.

And of the votes cast, the plan was in fact accepted by every voting class, thus obviating the need to proceed with the "cramdown" provisions of the Bankruptcy Code except as to insider classes where the plan has satisfied section 1129(b).

In addition, and significantly, each voting class voted in favor of confirmation of the plan overwhelmingly. In the aggregate, the vote was over 95 percent in favor of confirmation. That, too, is a remarkable result given the very large number of people who got notice, who were entitled to vote, and who voted.

For the personal-injury claims classes, the vote was 95.7 percent (Class 10(b)) to over 98 percent (Class 10(a)). In each class the percent voting in favor of the plan was above 93 percent with the exception of the class of hospital claims, which was over 88 percent (and no member of that class is pursuing an objection to the plan).

I will address later two objections that allege that this overwhelming acceptance of the plan should be looked at differently. They allege that the plan improperly classified certain claims together with other claims, which, if classified in a separate class, would not have accepted

the plan as overwhelmingly. These objectors acknowledge, though, that such a hypothetical class would still have voted in favor of confirmation by well over the 75 percent supermajority threshold that Congress provided for in section 524(g) of the Bankruptcy Code when setting a bar for the release of third-party claims in Chapter 11 plans addressing asbestos liability. Again, I will discuss such classification objections separately.

In addition, and frankly baffling to me, the United States Trustee has argued that I should not look at the votes cast but at the votes that were not cast in determining whether the plan was overwhelmingly accepted. That, of course, is not how elections are conducted. There is no conceivable way to determine the preferences of those who didn't vote other than that they didn't object to confirmation.

But where a vote is as extensive as occurred here, under any measure this plan has been overwhelmingly accepted. And of course it is the actual vote that counts under section 1126 of the Bankruptcy Code, as it does in every election, not a statement by a bureaucrat or his or her sense of where the wind is blowing. That's why we have elections.

Burden of Proof, Uncontested Subsections of 11

U.S.C. § 1129(a), and Statutory Bases for the Objections to Confirmation of the Plan. A plan's proponent has the burden of proof on the applicable elements of Bankruptcy Code section 1129(a) that must be met for a plan to be confirmed. That burden of proof is satisfied by showing that the test in the applicable subsection of section 1129(a) has been met by a preponderance of the evidence. In re Ditech Holding Corp., 606 B.R. 544, 554 (Bankr. S.D.N.Y. 2019), and the cases cited therein.

Many of the subsections of section 1129(a) that are applicable to this plan are uncontested. And based on my review of the relevant witness declarations, including those of Jon Lowne, John S. Dubel, and Jesse DelConte, I conclude that with respect to the applicable uncontested subsections of section 1129(a), the Debtors have carried their burden of proof.

The subsections of section 1129(a) that have been contested in objections to the plan include section 1129(a)(1), which states that the plan "must comply with the applicable provisions of this title," i.e., the Bankruptcy Code, and thus incorporates for purposes of these objections sections 1122 and 1123(a)(1) and (4) of the Bankruptcy Code pertaining to the classification and treatment of claims.

In addition, certain objections contend that the

Debtors have not satisfied their burden to show under Bankruptcy Code section 1129(a)(3) that the plan has been proposed in good faith and not by any means forbidden by law, including not only as to the proposed settlement of claims against the shareholder released parties but also as to other plan provisions or related acts that, objectors contend, violate other provisions of the Code or were not in good faith.

The United States Trustee has objected that the payment of certain legal fees and expenses under section 5.8 of the plan (x) violates section 1129(a)(4) of the Code, which states that it is a requirement for confirmation that "[a]ny payment made or to be made by the proponent, or by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable," 11 U.S.C. § 1129(a)(4); and (y) can be allowed only if sought and granted under the standard set forth in sections 503(b)(3) and (4) of the Code, which the plan does not propose to meet.

One set of objectors has suggested that the plan does not satisfy section 1129(a)(11) of the Bankruptcy

Code's so-called feasibility test, which requires a showing that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11).

The remaining objections to the plan contend that the proposed settlement of the Debtors' and third parties' claims against the shareholder released parties are not sustainable on various theories challenging (x) the merits of the settlement of the Debtors' claims under section 1123(b)(3)(A) of the Bankruptcy Code and Bankruptcy Rule 9019, (y) the Court's jurisdiction and power to approve the plan's third-party claims' release under 28 U.S.C. §§ 157(a)-(b) and 1334(b), Article III of the U.S. Constitution, sections 105(a) and 1123(a)(5) and (b)(6) of the Bankruptcy Code, and (z) the merits of the shareholder released parties settlement and third-party claims release under applicable case law.

In addition, these objections contend that the Debtors have not satisfied the so-called best interests test of section 1129(a)(7) of the Bankruptcy Code, which requires a showing that "[w]ith respect to each impaired class of

claims or interests, each holder of a claim or interest of such class has (i) accepted the plan or (ii) will receive or retain under the plan on account of such claim or interest property of a value as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date.” 11 U.S.C. § 1129(a)(7).

The objectors who have argued that the Debtors have not satisfied section 1129(a)(7) argue that because their third-party claims against the shareholder released parties are being channeled to the plan trusts or otherwise precluded in return for their distributions under the plan, whereas they would not be so channeled and precluded in a Chapter 7 liquidation, the plan fails the "best interests " comparison of their liquidation recovery to their recovery under the plan.

Each of these objections will be addressed below.

Insurers’ Objections. Navigators Specialty Insurance Company, American Guaranty and Liability Insurance Company, and Steadfast Insurance Company have pursued a limited objection to confirmation of the plan, joined in by National Union Fire Insurance Company. (Another objection, by the Chubb Insurance USA has been withdrawn.)

The Debtors seek certain findings in the proposed confirmation order regarding the effectiveness of the transfer of the Debtors' insurance or insurance rights to the trusts established under the plan to fund and make distributions to creditors or to NewCo, the public benefit company to be established under the plan to fund distributions and develop and sell at or near cost drugs to combat opioid addiction and overdoses. They also seek a finding regarding the plan's settlement of claims against the Debtors that potentially are covered by such insurance: that the treatment of such claims under the plan does not violate consent rights under any applicable insurance coverage because it is a bona fide settlement on due notice to the objecting insurers, as well as to the other insurers who did not object.

The plan does not otherwise seek findings as to the Debtors' insurance. For example, it does not seek a declaration that any insurance coverage or insurance rights apply to claims that have been asserted to such coverage (this issue is the subject of a separate litigation that will take its own course). Rather, the findings that the Debtors seek are integral to the effectuation of the transfer by the Debtors of insurance and insurance rights to the plan trusts or NewCo, notwithstanding any "anti-

assignment” provisions in the applicable policies, and to obviate a defense that the plan itself in providing for a means to pay creditors’ claims somehow derogates the insurers' rights to review and consent to the payment of insured claims.

The objectors contend that the plan and confirmation order should not just be largely "insurance neutral,” however, but that it be completely so -- that is, that even these findings should be postponed for another day.

But there is no requirement that a Chapter 11 plan be “insurance neutral” in any respect. And where a plan provides for the transfer of a debtor’s insurance or insurance rights to a trust or successor, as here, the issue of transferability has been joined in the context of the confirmation hearing and can and should be resolved then. Similarly, the plan’s settlement of claims that might be covered by insurance is integral to the plan -- indeed, it is a fundamental purpose of a plan -- and therefore the bona fides of that settlement are ripe for determination at confirmation. The Court is properly situated to decide those issues without a subset relating to the insurers’ consent rights being carved out for a separate, second litigation.

This contrasts with, again, general coverage issues, such as whether any claim against the insurance is subject to a coverage exclusion, which is not something that is inherently raised in the request to confirm the plan and where the plan clearly reserves such rights assertable by the trustees of the trusts that will hold the insurance and insurance rights, on the one hand, and the insurers on the other.

The "insurance-neutral" argument of the objecting insurance companies therefore is not grounded on an underlying principle of bankruptcy law but rather only on a due process concern. The insurers contend that as originally filed the plan was arguably completely "insurance neutral" and did not seek even the foregoing limited determinations in connection with confirmation.

I find, however, that the objecting insurers and all other insurers have had sufficient notice for months that the Debtors were going to seek these limited findings in the confirmation order. The insurers were well represented and are highly sophisticated, as evidenced by their negotiations over the plan's provisions and the proposed confirmation order relating to them. They had a full opportunity to challenge the findings that I've just outlined, first disclosed to them in May 2021, which more

than subsumes the applicable notice period under Bankruptcy Rule 2002(b) for the plan and confirmation hearing.

The plan as amended during the confirmation hearing also resolves the remaining due process issue that the insurers had originally raised -- that, as originally drafted, the plan left open the possibility that additional findings could be sought or documents filed that the insurers would not have notice of and might nevertheless be binding on them. As the plan has been amended, this is not going to happen.

As far as the requested finding regarding the bona fides of the plan's resolution of arguably insured claims by providing for the distribution of 100 percent of the value of the Debtors on account of the claims asserted against them in the form of payments between 700 and $750 million through personal injury trusts and at least 5 billion more to abate the opioid crisis in various forms, it is almost impossible to see how an insurer could claim that its consent rights were violated, and in fact the insurers do not give any examples of how those rights might have been violated.

The claims filed in these cases assert at least roughly $40 trillion of liability (excluding a $100 trillion claim that was filed by an individual), which, moreover,

covers only roughly 10 percent of the claims filed, the rest asserting wholly unliquidated amounts. As stated in the expert trial declaration of Jessica B. Horewitz, Ph.D., the allowed, fixed claim of the United States under the November 2020 civil and criminal settlement between the Debtors and the Department of Justice will receive less than a one-percent recovery.

Under those circumstances, given the plan’s wide notice, the lack of any objection to the plan's allocation of value either to personal injury claimants or to abate the opioid crisis, and the fact that insurers' consent rights, like any other contract party’s consent rights, are circumscribed by the Bankruptcy Code's separate notice and hearing process, the Debtors' request for a finding that the plan does not violate the policies’ applicable consent provisions is justified and appropriate.

In addition, ample case law establishes the authority under sections 1123(a)(5)(B) and (b)(2) and (6) of the Bankruptcy Code to transfer insurance rights and insurance policies as part and in furtherance of a plan to pay mass claims, such as in these cases.

The analysis of this issue in In re Federal-Mogul Global, 684 F.3d 355 (3d. Cir. 2012), cannot be improved on. I will note, though, that although that case was driven by

asbestos claims, the logic behind it was based on Bankruptcy Code sections 1123(a)(5) and 1141, not section 524(g) of the Code and, therefore, would apply here. See also In re W.R. Grace & Co., 475 B.R. 34, 139 n.189 (D. Del. 2012), aff'd 729 F.3d 311 (3d Cir. 2013), and the cases cited therein, which show the extensive, and perhaps unanimous, authority for the finding and conclusion that the Debtors seek here that notwithstanding any anti-assignment provision in any applicable insurance policy, under the plan the insurance policies, insurance rights, or rights to insurance proceeds can be lawfully assigned to the trusts created under the plan or NewCo for administration and distribution under the plan.

I will note that both requested findings are also warranted because it appears that at least at this stage the objecting insurers have either disclaimed coverage or indicated that they are reserving their rights to do so. See J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., 151 A.D.3d 632, 58 N.Y.S.3d 38 (1st Dep't 2017), and the cases cited therein.

I therefore will overrule the insurers' confirmation objection. (And I will note that after the colloquy during oral argument with the insurers' counsel and counsel handling insurance issues in this case for the

Debtors, it appeared that most, if not all, of the insurers' objections may have been resolved in any event by the changes to the plan that I've already described.)

U.S. Trustee's Objection to Plan's Treatment of Certain Attorneys Fees and Expenses. In addition to its objection to the plan's settlement of the Debtors' and third parties' claims against the shareholder released parties, to be discussed later, the United States Trustee has objected to section 5.8 of the plan's treatment of certain attorneys fees and expenses.

The plan provides for compensation and reimbursement of "professionals," a defined term comprising professionals for the Debtors and the Official Unsecured Creditors Committee who are retained pursuant an order of the Court and paid out of the estates' assets for their postpetition work under section 330 of the Bankruptcy Code. The compensation and reimbursement of two other groups of professionals -- representing the ad hoc committee of government and other contingent litigation claimants (the "AHC") and the multi-state governmental entities group (the "MSGE") -- are also covered by orders of the Court that subject the estates' payments to them to notice and Court review.

Section 5.8 of the plan sets forth the treatment

of fee claims by other counsel, not counsel whose compensation is separately subject to approval by prior order of the Court. Section 5.8 effectuates a settlement regarding the payment from the National Opioid Abatement Trust (the "NOAT") and Tribal Abatement Fund Trust to be established under the Plan of counsel to beneficiaries of those trusts. In addition, section 5.8 provides for the payment of attorneys involved in the pursuit by hospitals of their claims; of the so-called NAS monitoring claimants' attorneys fees and expenses; of rate-payer attorneys' fees and expenses; of personal injury claimants' attorneys fees and expenses; and of payment for the public schools' attorneys fees and expenses.

The U.S. Trustee contends that the only way that the plan can provide for such payments is under section 503(b)(3) and (4) of the Bankruptcy Code. Section 503(b)(4) provides that "[a]fter notice and a hearing, there shall be allowed administrative expenses . . . [that is, expenses against the estate for postpetition claims], including the actual necessary expenses . . . [comprising] reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph 3 of this subsection based on the time, the

nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement of actual necessary expenses incurred by such attorney or accountant." 11 U.S.C. § 503(b)(4). That section refers one back to section 503(b)(3) of the Code, which requires that a creditor show that it made a "substantial contribution in a case under Chapter 11 of the Bankruptcy Code" to be entitled to the administrative expense.

The U.S. Trustee's objection is misplaced in two respects. First, the bulk of the fees covered by section 5.8 are not for postpetition work (and therefore not an "administrative expense" covered by section 503(b)(3) and (4)) but rather for prepetition work in raising and pursuing claims against the Debtors and to some extent the Sacklers, including in the multi-district litigation that was pending prepetition in the United States District Court for the Northern District of Ohio. Unsecured creditors' claims for collection of their prepetition costs, including of attorneys' fees and expenses, as well as rights under applicable non-bankruptcy law, such as on a "common benefit" basis, are enforceable in bankruptcy without the need to comply with subsections 503(b)(3) and (4) of the Bankruptcy Code, which, again, apply only to administrative expenses.

In re United Merchs. & Mfrs., Inc., 674 F.2d 134, 138 (2d Cir. 1982).

The U.S. Trustee's objection also is misplaced because the remaining fees to be paid under section 5.8 also are not being sought as an administrative expense payable on the plan's effective date (as would be required under section 1129(a)(9)(A) of the Bankruptcy Code if they were being sought as administrative expenses) but rather as part of a heavily negotiated compromise of those fees and the clients' obligation to pay them reached during the mediation in this case conducted by Kenneth R. Feinberg and Hon. Layn R. Phillips (ret.).

The settlements provided for in section 5.8 that resulted from the mediation are subject to this Court's review both under Bankruptcy Rule 9019 and, I believe -- although there are arguments to the contrary -- under section 1129(a)(4) of the Bankruptcy Code, as has been so recognized in this district. See In re Stearns Holdings, LLC, 607 B.R. 781, 793 (Bankr. S.D.N.Y. 2019); In re Sabine Oil & Gas Corp., 555 B.R. 180, 258 (Bankr. S.D.N.Y. 2016).

The U.S. Trustee relies upon a case that is clearly distinguishable, Davis v. Elliot Mgmt. Corp. (In re Lehman Bros. Holdings, Inc.), 508 B.R. 283 (S.D.N.Y. 2014), in which the district court noted that Congress specifically

precluded in Bankruptcy Code section 503(b)(3)(D) recovery by official creditors' committee members of their postpetition fees and expenses, and therefore any settlement of those expenses would have been an improper workaround of that provision. Id. at 288-91.

Mr. Feinberg's mediator's report [Dkt. No. 3339] makes it clear (and there is, in addition, unrefuted supporting testimony by Gary Gotto, John Guard, Peter Weinberger, and Jayne Conroy) that the compromised contingency fees provided for in section 5.8 -- again, almost all of which are for services rendered prepetition -- are reasonable and indeed significantly reduced from a non-bankruptcy range of generally 20 to 40 percent to the ranges set forth in Section 5.8.

As stated at paragraphs 23-25 of the mediator's report, the contingency fee resolutions as well as the common benefit assessments reached in the mediation are consistent with fee arrangements or assessments agreed upon in other similar mass-tort contexts and are reasonable. See also the trial declaration of Gary Gotto at paragraphs 18(g) and 25(g); the John Guard declaration at paragraphs 57 through 60, 73, and 77 through 78; the Weinberger declaration at paragraphs 20 through 27 and 31 through 32; and the Conroy declaration at paragraphs 11 through 15.

It has been argued that because these section 5.8 fees and expenses are not being paid by the Debtors but by the clients through the trusts that the clients have agreed will be the source of their recovery, they are not subject to this Court's review for reasonableness under the plain terms of Bankruptcy Code section 1129(a)(4) but are, rather, like the fees any claimant would pay its counsel. I conclude, however, that the thrust of section 1129(a)(4), evidencing Congress' desire that unreasonable fees and expenses not be allowed under the pressure of plan confirmation, is that the Court have the ultimate say on the reasonableness of these fees under section 1129(a)(4).

That reasonableness inquiry does not require an extensive review, however, if reasonableness can be otherwise established. In re Journal Register Co., 407 B.R. 520, 537-38 (Bankr. S.D.N.Y. 2009), citing Mabey v. Southwestern Elec. Power Co. (In re Cajun Elec. Power Coop.), 150 F.3d 503, 517 (5th Cir. 1998). Based on the uncontested declarations and mediator's report that I've previously cited -- and I note that the U.S. Trustee has made no effort to contest these, despite at least implicitly contending that the fees and expenses are improper or unreasonable -- I find that all but one of the contingency fees provided for in section 5.8 of the plan and the

mechanism for allocating them among counsel are reasonable. Indeed, the mediated settlement set forth in section 5.8 benefits the estates and creditors by materially reducing the fees and expenses that might otherwise be claimed from the clients and therefore indirectly reduces the claims against the estates.

There are, however, two sets of fees covered by section 5.8 that I cannot on this record make a reasonableness finding on, those of counsel to the personal injury ad hoc committee and of counsel to the school districts' ad hoc committee. I noted this issue during oral argument. These fees are not the reduced contingency fees that the parties and Mr. Feinberg as mediator negotiated and that I have analyzed based on the uncontroverted evidence as being reasonable but, rather, are based on counsels' hourly rates and perhaps in one instance a contingency fee that was not negotiated. I have not seen any time records or hourly rates charged by counsel billing at an hourly rate, nor have I seen the time spent relative to the contingency fee, nor do I have any testimony as to the reasonableness of the contingency fee, so I believe that I will need to make a reasonableness finding as to those counsel fees and expenses in the future under section 1129(a)(4).

The plan has already been amended to reflect this

conclusion raised during oral argument, with one wrinkle. It contemplates that the contingency fee portion of counsel for the school districts' fees will not be reviewed by the Court but, rather, by Mr. Feinberg. I'm not prepared to accept that mechanism. I will certainly consider Mr. Feinberg's views, as I have regarding the contingency fee compromises that I have approved, but I ultimately must make the reasonableness determination on notice to parties in interest, including to the U.S. Trustee, under section 1129(a)(4).

Objections by Creighton Bloyd, Stacey Bridges, and Charles Fitch. Creighton Bloyd, Stacey Bridges, and Charles Fitch in their individual capacities object that there was insufficient notice to those incarcerated in prison of the bar date for filing claims, notwithstanding the extensive notice testified to by Ms. Finegan.

There is a fundamental problem with these objections, however, in that all three of the objectors have filed a timely proof of claim in these cases and a timely confirmation objection. They therefore lack standing under Article III of the Constitution to pursue, and this Court lacks the power to decide, their objections because there is no remedy that the Court can grant for their complained-of wrong.

As stated in TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2202-03 (2021), to have standing, and for there to be a case and controversy, the party raising a matter with a federal court must have a personal stake in fact in obtaining a remedy, which clearly is lacking here. See also Kane v. Johns-Manville, Corp., 843 F.2d 636, 642-46 (2d Cir. 1988), which dealt with almost the same issue as raised by these objections, with the same result.

Mr. Bloyd also filed a second confirmation objection based on what he believes might be the consequences of the Debtors' guilty plea in their October 2020 criminal and civil settlement with the Department of Justice. Mr. Bloyd contends that people like him might have an individual right under the Mandatory Victims Restitution Act, 18 U.S.C. § 36633A, to proceeds to be paid by the Debtors to the United States under the DOJ settlement.

His counsel acknowledged at oral argument, though, that this issue is properly raised not here but at the Debtors' sentencing before the New Jersey District Court as contemplated by the settlement.

Even if that wasn't conceded, I conclude that any entitlement of Mr. Bloyd to a portion of the DOJ settlement proceeds arises not in the context of plan confirmation but, rather, properly after the Debtors make the DOJ settlement

payment. I also do not believe the issue affects the feasibility of the plan and note, finally, that the discretion of the district court under the MVRA to require a specific restitution fund is likely to be informed by the very large number of potential victims for whom the DOJ could be said to be acting, as well as based on the complexity of determining the number and amount of the victims' claims and the allocation to them of the settlement proceeds.

Mr. Bloyd also arguably has suggested that somehow the Debtors and the Department of Justice colluded in agreeing to the October 2020 settlement agreement by not specifically providing for a restitution fund under the MVRA, but this contention is not supported by the record.

Regarding the plan's treatment of the United States, the Debtors have established that the plan was proposed in good faith under section 1129(a)(3) of the Bankruptcy Code. There is no evidence of any attempt to improperly cut off rights that individual victims would have under the DOJ settlement and, indeed, the personal injury class was well and actively represented in the mediation in these cases conducted by Messrs. Feinberg and Phillips that resulted in the plan's allocation of value among public and private creditors, including the agreement to fund the

personal injury trusts.

It is well established in the Second Circuit that some creditors' failure to participate in a mediation does not render the results of a mediation improper or not in good faith if there was no conflict of interest. In re Drexel Burnham Lambert Group, 960 F.2d 285, 293 (2d Cir. 1992). The mediation between personal injury and other private claimants, on the one hand, and governmental claimants on the other over the allocation of funds to the personal injury trusts was in good faith, as shown by, among other things, the mediators' report and the ad hoc personal injury committee's alignment with all personal injury creditors. The extent of the vote of the non-NAS personal injury claimants' class, 95.7 percent in favor of the plan, also argues in favor of the good faith treatment of the personal injury creditors under the Plan in relation to the United States' and other types of creditors' recoveries. I therefore will overrule Mr. Bloyd's second objection to confirmation of the plan.

Certain Canadian Creditors' Objections. Certain Canadian municipalities and First Nations have objected to the plan on various grounds, all premised ultimately on their view that rather than be treated as general unsecured creditors in Class 11(c) of the plan, they must be

classified with the U.S. non-federal governmental creditors and Native American Tribes in Classes 4 and 5, respectively, and thus participate in the opioid abatement trusts created under the plan for those classes instead of receiving their pro rata share of the cash payment to Class 11(c).

It should be noted that these objectors have not contended that the value to be paid to them under the plan differs unfairly in value from that to Classes 4 and 5. But, in any event, they concede that if their votes were counted in Class 11(c), as opposed to in Classes 4 and 5, Class 11(c) would still have overwhelmingly accepted the plan. Thus the provision in section 1129(b)'s cramdown requirement that there be no unfair discrimination among similarly situated creditors in different classes does not apply. Instead, the objection is, if at all, properly couched under different provisions of the Bankruptcy Code.

In that regard, there was some suggestion during oral argument and in one sentence in the objection that the claims of the Canadian municipalities and First Nations should not have been allowed for voting purposes at $1.00, as provided in the Court's confirmation procedures order, along with all other contingent unliquidated claims, the objectors' implication being that if their claims had been liquidated they might have carried Class 11(c)'s vote. They

have made no request, however, to estimate their claims for voting purposes under section 502(c) of the Bankruptcy Code or to temporarily allow them in a different amount than $1 under Bankruptcy Rule 3018(a).[2]

Further, such temporary allowance in a uniform amount of mass tort claims such as those here in the sum of $1 for voting purposes is well recognized as fair. See In re Lloyd E. Mitchell, Inc., 373 B.R. 416, 428 (Bankr. D. Md. 2007), and the cases cited therein. The alternative, fixing the amount of hundreds of thousands of unliquidated disputed claims before voting on a plan (because of course once the claims liquidation process started, most, if not all, of the claimants would insist on their claims being liquidated) would take years, defeating the conduct and purpose of the bankruptcy case. Kane v. Johns-Manville Corp., 843 at 647-48.

Given that section 1129(b) doesn't apply to the

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[2] Indeed, based on my review of these Canadian municipalities and First Nations' proofs of claim, which rely on attached complaints against both non-Debtor Purdue Canada and other non-Debtors and against the Debtors that do not distinguish between the conduct of the Debtors and the non-Debtors, it is far from clear that the claims really are against the Debtors. To the extent they are against Purdue Canada or other non-Debtors, those claims are fully preserved under the plan. Nor are claims that are based on the shareholder released parties' conduct related to non-Debtors released or enjoined under the plan.

objecting Canadian claimants because of the class vote, the only remaining issue is whether the plan's separate classification of them in Class 11(c), rather than in the classes where they want to be classified, is proper.

A plan proponent has the right under the Bankruptcy Code to classify similar claims in separate classes if there is a reasonable basis to do so. See generally 7 Collier on Bankruptcy ¶ 1122.03[1][c] (16th Ed. 2021); see also In re LightSquared, Inc., 513 B.R. 56, 83 (Bankr. S.D.N.Y. 2014); In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 759 (Bankr. S.D.N.Y. 1992).

Section 1123(a)(1) of the Bankruptcy Code, which is incorporated into section 1129(a)(1), states that "[n]otwithstanding any otherwise applicable non-bankruptcy law, the plan shall designate, subject to section 1122 of this title, classes of claims." 11 U.S.C. § 1123(a)(1). Section 1122 provides only that, "except as provided in subsection (b) of this section [which is inapplicable here], a plan may place a claim in a particular class only if such claim or interest is substantially similar to other claims or interests in such class." 11 U.S.C. § 1122. It does not require all substantially similar claims be placed in the same class.

Here, there are reasonable bases for separately

classifying these objectors' claims from the U.S. public creditors and Native American Tribes: (x) the different regulatory regimes that the objectors operate under with regard to opioids and abatement, as well as (y) the fact that the allocation mediation conducted by Messrs. Feinberg and Phillips that resulted in the plan's division of the Debtors' assets and third-party claims among private and public claimants and then separately the public claimants' allocation of their share among themselves involved only U.S.-based public claimants with their own regulatory interests and characteristics.

There was no request by any of the objecting Canadian creditors to participate in that mediation. The record is also clear, and I can take judicial notice of the fact, as well, that those who did request to participate in the mediation, if they had a reasonable basis to do so, were generally invited into it, including, for example, the NAACP. One's failure to participate in a mediation should not detract from the settlement reached if the classification scheme is fair and rational. See Ad Hoc. Comm. of Non-Consenting Creditors v. Peabody Energy Corp. (In re Peabody Energy Corp.), 933 F.3d 918, 927-28 (8th Cir. 2019).

This is not the first time that U.S. and Canadian

creditors have been found to be properly classified separately. See Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, 661 (6th Cir. 2012, and In re W.R. Grace & Co., 729 F.3d 311, 329-30 (3d Cir. 2013), where Canadian claimants, including the Queen on behalf of Canada, were found to be separately classified properly because of the different types of recovery their claims would have under applicable law, a close analogy to the different regulatory schemes that would apply here to the NOAT and Native American Tribes Trust. The plan's classification scheme therefore is proper as it pertains to the objecting Canadian municipalities and First Nations.

These objectors also suggested that the plan was not proposed in good faith for purposes of section 1129(a)(3) of the Bankruptcy Code. But that objection is premised on the same classification argument overruled above. Again, given the plan's rational basis for separate classification and the lack of any evidence to show that the objecting creditors were improperly silenced or excluded from negotiations, I find that the plan has been proposed in good faith as to them.

These objectors also suggested that the Debtors have not satisfied the "feasibility" test under section 1129(a)(11) of the Bankruptcy Code. The uncontested

declaration of Mr. DelConte establishes, however, by showing projections for NewCo and discussing the assignability of the Debtors' insurance and insurance rights, that the plan satisfies section 1129(a)(11). The objecting Canadian municipalities and First Nations do not dispute this generally but contended at the confirmation hearing that their treatment under the plan would be sufficiently objectionable to the court presiding over the Canadian Companies Arrangement Act proceeding in Canada ancillary to those cases that it might not grant recognition of or enforce the plan in Canada.

Based on my understanding of the Model Law on Cross-Border Insolvencies, which is in effect in Canada as well as forming the basis of Chapter 15 of the Bankruptcy Code, I am reasonably comfortable, however, that the Canadian court will recognize and enforce the plan, although of course that is a decision for the Canadian court to make, and not view the plan as unduly discriminatory against Canadian creditors in the light of what they would reasonably recover from the Debtors if the plan were not confirmed, as well as the difference between the non-bankruptcy regulatory regime that governs the Canadian creditors from that applying to U.S. governmental units and Native American tribes.

I also believe that the "public policy" exception to recognition under the Model Law on Cross-Border Insolvencies would not be applied by the Canadian court given the narrow nature of that exception, although again, of course, that decision is left to the Canadian court.

Further, it appears based upon Mr. DelConte's declaration that while recognition in Canada is important and would bring clarity and finality to the claims of Canadian creditors against these Debtors, the absence of the Canadian CCAA court's recognition is not critical to the survival of NewCo under the plan and the Chapter 11 feasibility test therefore is satisfied in any event.

Besides raising the foregoing objections, the Canadian creditors object to the plan's release of third-party claims against the shareholder released parties. To the extent that they make the same arguments as others who raised this issue, I will address them collectively later.

In addition, however, the Canadian objectors have contended that because no money from the shareholder settlement is being specifically channeled to Class 11(c), Class 11(c) creditors like them should not be enjoined under the plan from pursuing whatever claims they may have against the shareholder released parties based on their U.S. conduct.

Upon the record before me, though, I conclude that the lack of specific channeling of any of the third-party claims settlement proceeds to Class 11(c) does not justify this objection. It is uncontested by the Canadian creditors that under the "best interests" liquidation analysis in the DelConte declaration, Class 11(c) would receive no recovery on their claims against the Debtors if, as I believe would occur, upon their carveout from the plan's third-party release provisions that are an essential quid pro quo to the shareholder released parties' settlement, the Debtors would liquidate. That settlement, in other words, enables Class 11(c)'s recovery to exist.

Further, there has been no indication by these claimants that the shareholder released parties would be liable to them based on their conduct related to the U.S. Debtors.[3] Indeed, as noted above, there is little indication that these creditors have any claims against the U.S. Debtors in the first place, let alone claims against the Sacklers covered by the release. The Sacklers' defenses to such claims, as well as the costs and impediments to collecting on any eventual judgment against them, will be discussed later in the context of a general analysis of the

[3] Again, the third-party claims release does not cover claims based on the shareholder released parties' conduct related to non-Debtors.

plan's third-party claims release. Suffice it for now that that any recovery by these Canadian objectors under the plan is inextricably tied to the plan's release of the shareholder released parties and their payment of the settlement amount that enables the recovery to Class 11(c) creditors, a recovery they would not receive in a Chapter 7 liquidation from the Debtors' estates and the shareholder released parties combined. Thus even without those proceeds being specifically channeled to Class 11(c), it is fair to the Canadian objectors to bind them to the release provisions in the plan.

Certain States' Classification Objection. Certain of the objecting states and the District of Columbia have also raised objections to confirmation besides their objection to the third-party claims release and injunction in the plan.

They have asserted, first, that the plan violates section 1122 of the Bankruptcy Code by classifying them in Class 4 along with their political subdivisions.

Given that classification, the objecting states and the District of Columbia are a small percentage of Class 4's 3.13% rejecting vote, compared to the class' 96.87% vote in favor of the plan. These objecting states and the District of Columbia obviously do not like being portrayed

in that way, and I do view them to some extent as representing their populations as a whole (although various political subdivisions of these objecting states actively support the plan, raising the question, which political entity is closer to its constituents?).

I do not accept, however, their blanket characterization that because they are states, the other public creditors, political subdivisions, and municipalities that are in Class 4 can be silenced as a matter of non-bankruptcy law based, as the objectors argue, on the parens patriae doctrine or "Dillon rule" with respect to some of the subdivisions' claims. As briefed by the AHC and MSGE, the vast majority of states have enacted "home rule" laws that override those doctrines.

As importantly, the objecting states and the District of Columbia have made no attempt to silence the other members of Class 4 by seeking to disallow their claims for lack of standing or to designate their votes under section 1126(e) of the Bankruptcy Code so that they wouldn't be counted.

The objectors acknowledge, moreover -- as stated on the record by their counsel -- that their claims have the same rights to the Debtors' assets as other general unsecured creditors, including the political subdivisions

that are in their class. That is, the states' claims are not priority claims, they are not secured claims, they are simply general unsecured claims like their political subdivisions'.

And under those circumstances, the states' claims are properly classified under Bankruptcy Code section 1122(a) with the other governmental entity claims in Class 4. As noted by the Third Circuit in In re W.R. Grace & Co., 729 F.3d at 326, which upheld a chapter 11 plan's classification of the State of Montana with private claimants also holding personal injury claims,

> "[t]o determine whether claims are 'substantially similar' [for purposes of section 1122(a)], 'the proper focus is on the legal character of the claim as it relates to the assets of the debtor.' In re AOV Indus., Inc., 792 F.2d, 1140, 1150 (D.C. Cir. 1986); see also In re Tribune Co., 476 B.R. 843, 855 (Bankr. D. Del 2012) (concluding that the phrase 'substantially similar' reflects 'the legal attributes of the claims, not who holds them') (internal quotation marks omitted); In re Quigley, 377 B.R. 110, 116 (Bankr. S.D.N.Y. 2007) ('Claims are similar if they have substantially similar rights to the debtor's' assets.') (emphasis and internal quotation marks omitted)."

See also In re Drexel Burnham Lambert Group, Inc., 138 B.R. at 757; 7 Collier on Bankruptcy ¶ 1122.03[3].

That is clearly the case here and, therefore, the claims can and should properly be classified together given the agreement by all of the states (with the exception of West Virginia) and territories along with the other members

of Class 4 to the allocation of distributions within Class 4 among themselves, as well to as the allocation of distributions to the public creditors, on the one hand, and the private creditors on the other, that was reached during the mediation conducted by Messrs. Phillips and Feinberg.

(It also is worth noting, although it has no bearing on the classification issue, that if the plan had separately classified the states and territories from the other public creditors (although that would have unduly complicated the universally agreed allocation of value as between the states and all of the other public entities in Class 4 and the public/private allocation under the plan), the percentage of states and territories accepting the plan would go to over 79 percent, still well above the 75 percent supermajority threshold in the analogous provision of Bankruptcy Code section 524(g).)

The objecting states and the District of Columbia also contend that the Court's order establishing confirmation procedures improperly allowed their claims for voting purposes at $1 (as it allowed all other opioid-related claims for voting purposes, which similarly have not been liquidated and would be disputed). Notwithstanding that the objectors have agreed to the allocation formula under the NOAT, and thus that their claims will never need to be

liquidated for the plan's distributions to be made on their claims, they contend that their claims must be liquidated before their votes can be counted.

But this objection should be denied for the same reasons as the similar objection made by the Canadian municipalities and First Nations objectors. These objectors have made no attempt to seek to estimate their claims or temporarily allow them for voting purposes in a different amount under section 502(c) of the Bankruptcy Code or Bankruptcy Rule 3018(a). And there is an obvious reason why they haven't. If such a request had been made, almost all, if not all, of the other claimants with unliquidated claims would have made a similar request, leading to lengthy, expensive, and, as shown by the parties' agreement to their treatment in Class 4 solely for opioid abatement under an agreed formula, unnecessary litigation over the amount of their claims. Under such circumstances, it is entirely appropriate to allow the claims for voting purposes in the sum of $1.00. Kane v. Johns-Manville Corp., 843 F.2d at 647-48; In re Lloyd E. Mitchell, Inc., 373 B.R. at 428.

The objectors also argue that they are being treated unfairly under the plan in relation to the United States, which, unlike them, is in large measure carved out of the plan's third-party claims release. This is not a

proper objection, however, under section 1123(a)(4) of the Bankruptcy Code, cited by the objectors, which states that a plan shall "provide the same treatment for each claim or interest of a particular class unless the holder of a claim or interest agrees to a less favorable treatment," 11 U.S.C. § 1123(a)(4), because the plan classifies the United States in different classes than the objectors.

Clearly also, that separate classification is appropriate. As discussed earlier, the Bankruptcy Code gives plan proponents the ability to classify similar claims in different classes if there is a reasonable basis to do so. 7 Collier on Bankruptcy ¶ 1122.03[1][a]. Here, there clearly is a rational basis to classify the United States separately from the other public creditors. Indeed, the United States has qualitatively different claims to the Debtors' assets in some respects, mandating its multiple separate classifications from general unsecured creditors. In addition to its general unsecured claims in Class 3, it has secured claims, which are treated as part of one of the aspects of the plan's settlements, it has a superpriority administrative expense claim under the October 2020 DOJ settlement, and it has priority claims. And, unlike the claimants in Class 4, the United States has already settled civil claims against the Sacklers for a specific payment

under its separate postpetition DOJ settlement agreement with the Sacklers. Finally, the United States' treatment under the plan is different than the treatment of the Class 4 claims; unlike them, it is not required to use its plan distributions for abatement, although it has agreed under the DOJ settlement to forego $1.775 billion of its superpriority claim if, as the plan provides, NewCo is established on the effective date to operate for the public benefit and the states and other public claimants in Class 4 agree to use their distributions for abatement.

Clearly, then, the United States' different rights and different treatment support its separate classifications from Class 4, nor is an unfair discrimination argument available under section 1129(b) of the Bankruptcy Code given that Class 4 has accepted the plan, thus negating the need for the Code's cramdown provision to apply.

West Virginia's Limited Objection to the NOAT Allocation Formula. The State of West Virginia does not object to any aspect of the plan other than its allocation in Class 4 and under the NOAT distribution procedures of the funds to be distributed to it for abatement of the opioid epidemic.

First, it contends that the plan has not been proposed in good faith for purposes of section 1129(a)(3) of

the Bankruptcy Code because of the NOAT's assertedly unfair allocation formula for the states. Under section 1129(a)(3), the Court shall confirm a plan only if the proponent shows that "the plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The Code does not define "good faith," but the courts have a fair consensus on its meaning in section 1129(a)(3). All courts emphasize, based on the section's plain terms, that the inquiry should primarily focus on whether the proposal of the plan was in good faith, not on whether the plan generally is in good faith or undertake an even more free ranging inquiry into fairness and equity. Many courts go further, to limit the section's application to whether the proposal of the plan was in good faith or instead infected with improper conflicts of interest or self-dealing. See, e.g., Garvin v. Cook Invs. NW, SPNWY, LLC, 922 F.3d 1031, 1035 (9th Cir. 2019) ("A contrary interpretation not only renders the words 'has been proposed' meaningless, but makes other provisions of § 1129(a) redundant."); see also 7 Collier on Bankruptcy ¶ 1129.02[3][a].

Generally, the Second Circuit has focused on the proposal of the plan. See Argo Fund Ltd. v. Bd. Of Dirs. of Telecom Arg., S.A. (In re Bd. of Dirs. of Telecom Arg.,

S.A.), 528 F.3d 162, 174 (2d Cir. 2008); Kane v. Johns-Manville Corp., 843 F.2d at 649; In re Koelbl, 751 F.2d 137, 139 (2d Cir. 1984). On the other hand, courts in this district, while focusing largely on the proposal of the plan, including on the process of plan development, have also considered whether the plan, "... will achieve a result consistent with the standards prescribed under the Bankruptcy Code." In re Ditech Holding Corp., 606 B.R. at 578, and the cases cited therein. See also In re Chemtura Corp., 439 B.R. 561, 608 (Bankr. S.D.N.Y. 2010); In re Quigley Co., Inc., 437 B.R. 102, 125 (Bankr. S.D.N.Y. 2010); In re Genco Shipping & Trading Ltd, 513 B.R. 233, 261 (Bankr. S.D.N.Y.); In re Breitburn Energy Partners LP, 582 B.R. 321, 352 (Bankr. S.D.N.Y. 2018).

As recognized by Judge Garrity in Ditech, those policies or objectives include preserving going concerns, maximizing property available to satisfy creditors, giving debtors a fresh start, discouraging debtor misconduct, the expeditious liquidation of claims and distribution of the bankruptcy estate to creditors and, where warranted, interest holders, and achieving fundamental fairness in the collective context of a bankruptcy case. 606 B.R. at 578.

Here, I have ample testimony by John Guard, from the office of the Attorney General of the State of Florida,

that the allocation of the NOAT among the states under the plan and the NOAT distribution procedures derived from good faith, arms' length negotiations by the states preceding the mediation by Messrs. Phillips and Feinberg and then continuing to completion during it. That testimony really is unassailable as to the plan's good faith on this issue. It highlighted that these difficult but ultimately nearly comprehensively successful negotiations (with the exception of West Virginia's disagreement) took into account the differing interests of the various states, which if not as weighty as those underlying the compromises at the Constitutional Convention, were similar: for example, the interests of states with small populations, though heavily impacted by opioids; the interests of states with large populations and therefore more people affected by opioids; the interest of states with different health and law enforcement resources; and the interests of states with different ways of reporting opioid-related deaths and other conditions of opioids' impact.

Mr. Guard testified credibly that while the negotiations were difficult, the states recognized and tried to address these differing interests in an overall allocation formula. He also testified credibly that no state was prepared to come even close to accepting the alternate

allocation proposal put forth by West Virginia but that states with characteristics similar to West Virginia agreed that the plan's allocation formula adequately addressed their concerns.

The states' unanimous agreement to accept their recovery in the form of money solely devoted to opioid abatement, and their nearly unanimous agreement on the allocation of that distribution among them is truly remarkable, and, as noted during the confirmation hearing by the Attorney General of West Virginia, likely will serve as a model for the allocation of future settlement proceeds from other opioid manufacturers and distributors among the states. Without that agreement, the goals of the Bankruptcy Code would have been jeopardized. Such a failure would have resulted in extensive litigation over the various states' claims, a lengthy delay in making distributions to abate the opioid crisis, and arguably a fallback to distributing the value under the plan not for abatement purposes but, rather, for general use by states and other public creditors.

Mr. Guard's testimony was supported by the cross-examination of West Virginia's expert, Charles Cowan, Ph.D. Mr. Cowan acknowledged that in publications that he wrote before being retained by the State of West Virginia for the purpose of showing why it should receive a larger allocation

of the NOAT distributions, he recognized that other methods of allocating money towards abatement could be fair and reasonable, as well, and that there was no specific "best" formula for allocating settlement funds to public creditors. He also acknowledged that the plan's allocation formula was an acceptable choice if West Virginia's proposal was not adopted by the Court. He acknowledged that his proposed allocation to West Virginia was outside the range of allocations under formulas that he earlier had written were reasonable, whereas West Virginia's allocation of distributions to the NOAT was within those ranges.

It was clear that the allocation formula proposed by Mr. Cowan also would lead to peculiar allocations of the NOAT funds for abatement, for example that states with substantially smaller populations would get substantially more funds than states with large populations. Thus the State of Washington would have a larger recovery than Texas, and West Virginia would have a larger recovery than Virginia, although they are neighboring states and West Virginia is losing population and Virginia's is growing.

Mr. Guard and Mr. Cowan agreed that West Virginia and certain other states have been disproportionately harmed by the opioid crisis, but their testimony also reflected that a state's population is an important element of any

allocation formula because it reflects the resources that a state will need to bring to bear for abatement. Their testimony established, moreover, that different states report opioid deaths and opioid disorders differently from each other, casting some doubt on the reliability of an "intensity" emphasis for an abatement allocation formula.

Lastly, the NOAT allocation formula does in certain ways recognize the interests of smaller states, including levels of intensity of harm.

I therefore find and conclude that the NOAT allocation was derived in good faith by arms' length and fair negotiations among the parties and satisfied Bankruptcy Code section 1129(a)(3).

I also find and conclude that the treatment of the states in Class 4, and through it by means of the good faith, fair, and uniform trust procedures and allocation formula for the NOAT, provides for the same treatment of each claim in Class 4 for purposes of section 1123(a)(4) of the Bankruptcy Code. As discussed in In re W.R. Grace & Co., "[a]lthough neither the Code nor the legislative history precisely defines the standards of equal treatment, courts have interpreted the 'same treatment requirement' [of section 1123(a)(4)] to mean that all claimants in a class must have the same opportunity for recovery." 729 F.3d at

327 (internal quotations and citation omitted). See also In re Cent. Med. Ctr., Inc., 122 B.R. 568, 575 (Bankr. E.D. Mo. 1990), which W.R. Grace cites for the proposition that "a plan that subjects all members of the same class to the same process for claim payment is sufficient to satisfy the requirements of Section 1123(a)(4)." 720 F.3d at 327.

The W.R. Grace court goes on to state, "Courts are also in agreement that § 1123(a)(4) does not require precise equality, only approximately equality," id., citing In re Quigley Co., 377 B.R. 110, 116 (Bankr. S.D.N.Y. 2007), and In re Multiut Corp., 449 B.R. 323, 334 (Bankr. N.D. Ill. 2011). The consequences of how and when the class members would be paid under W.R. Grace's plan did not produce a substantive difference in a claimant's opportunity to recover and were the result of, among other things, a comprehensive mediation and arms' length negotiations, and thus the plan satisfied section 1123(a)(4). In re W.R. Grace & Co., 729 F.3d at 328. The same analysis applies to the treatment of the NOAT allocation among the states in Class 4.

I was not going to reach the same conclusion with respect to a former element of the NOAT allocation and distribution procedures. One of the adjustments made for the benefit of states with smaller populations like West

Virginia in the NOAT allocation was a separate, so-called 1 percent fund, which all of the states, other than the small states that would participate in the fund, were going to contribute to, with, however, the exception of California.

I did not see sufficient evidence to justify California's being excepted from that contribution obligation to the 1 percent fund. However, since the discussion on the record during the confirmation hearing, California has agreed to contribute to the 1 percent fund. The one aspect of West Virginia's objection that I was going to grant has effectively been granted, therefore, by this agreement of the State of California.

Mr. Guard made it clear that all of the states recognized the huge impact that the opioid crisis has had on states like West Virginia and had tried to take that into account in negotiating the NOAT allocation. I too recognize that impact, but I believe that given the arms' length nature of the negotiation and the acceptable range of West Virginia's treatment even within the writings acknowledged by Mr. Cowan, its objection under Section 1129(a)(4) should be denied.

Pro se Objections/Good Faith. The remaining objections to the plan, other than objections based upon the plan's third-party release and injunction provisions and the

plan settlement with the Sacklers and their related entities, have been asserted by several parties who were not represented by counsel.

These objections are properly viewed in roughly four different categories. First, Ms. Butler-Fink, Ms. Villnave, Mr. Cobb, and Mr. Wright have stated in one form or another that the plan should not give the Sackler family "... immunity from criminal charges."

I completely agree, as does the plan. The plan does not contain a release of criminal conduct. That is crystal clear in the plan and always has been in these cases.

It is understandable that a person who is not a lawyer and looks at these cases from afar through one form of the media or another may have reached a different conclusion. In part that is because either through ignorance or choice, the plan has been described in the media and online as providing "immunity" to the Sacklers for crimes, including murder and illegal drug dealing. “Immunity” clearly suggests immunity from criminal charges; that's how one generally thinks of the word. But the plan simply does not grant such a release. It couldn't do it, and it doesn't.

Those who should know better, whether they are

reporters, law professors, or politicians, should not suggest otherwise. At best, suggestions that the plan would relieve the Sacklers of potential criminal liability reflect a lack of understanding about these cases; at worst, such suggestions are irresponsible and, frankly, cruel to those whom they mislead.

If anyone has engaged in criminal activity either before or during these cases, they are not relieved of the consequences of that liability under the plan. If any prosecutor wants to pursue such a claim against the released parties, they can.

Ms. Graham, Mr. Normile III, Mr. Burris, Ms. Willis, Ms. Ecke, Mr. West, and Ms. Farash have in one form or another contended that it is improper or unfair for the plan to provide only $700 million to $750 million in the aggregate for distribution on account of non-NAS personal injury claims, while the bulk of the recovery goes to, as one of the objectors stated, “the government, politicians and big businesses.”

I have said more than once during these cases, including to Ms. Ecke, who testified during the confirmation hearing, that one cannot put a price on a human life or an injury such as opioid addiction, and yet that's what courts do with respect to personal injuries. They take into

account a number of factors that are relevant legally, including potential defenses and intervening circumstances that defeat or dilute the claim, and ultimately the claimant must meet the burden of showing proximate cause. The dollar amount that courts reach if they find a claim for personal injury often does not seem like sufficient compensation. That is particularly the case where the wrongdoer is insolvent.

I did not have any specific valuation of personal injury claims in this case. What I do have is a lengthy and difficult arms-length mediation led by two of the best mediators not only in the United States but in the world, Messrs. Feinberg and Phillips. They are, I believe, in no way beholden to any type of claimant or unduly sympathetic to any type of claimant or any other party.

Mr. Feinberg, for example, had the incredibly difficult job of working out, by dealing with victims and their families, the proper allocation of the 9/11 fund. Both mediators have extensively dealt with personal injury claims over the course of their careers, and I believe they have been so successful because they are as sympathetic, if not more so, to individual victims as they are to states, hospitals, and other corporate entities.

The people representing the personal injury

claimants in the mediation were some of the most effective personal injury lawyers in the world, which means that they are aggressive, creative, knowledgeable and responsible in the pursuit of their clients' claims. I believe that, as set forth in the mediators' report, their negotiations with the other classes of creditors were at arms-length and in good faith. Dkt. No. 2548. I also do not see any conflict between their representation of their tens of thousands of clients in the mediation and the other tens of thousands of personal injury claimants in these cases, who collectively will receive the same type of treatment under the plan and the personal injury trust claims and distribution procedures.

I also carefully considered the trial declaration of Jayne Conroy, who is one of those personal injury lawyers and in fact with her colleagues was probably the main lawyer to pursue Purdue and the Sacklers over more than a decade on behalf of personal injury claimants. Because of that dogged work, she obtained a settlement for roughly 1,100 personal injury claimants, albeit many years ago. She described those clients in her declaration as those who could tie their injury to a prescription of one of Purdue's products, from which I inferred that they probably were among those most likely to obtain a recovery in a litigation,

notwithstanding all of the arguments that the defendants would throw back at them.

After deducting a reasonable contingency fee from that settlement, I believe on average the recovery under that settlement -- and because I don't know how the recovery was divided among the clients, I simply allocate it evenly to each client -- was approximately $13,500 per person, which is well within the anticipated range under the plan for allowed personal injury claims.

The uncontroverted declarations of Peter H. Weinberger, Gary A. Gotto, and Ms. Conroy describe the hard-fought litigation and negotiation process leading to the settlement contained in the plan for personal injury claimants, a settlement they support and one which Ms. Conroy testified reflects a "settlement premium" paid to obtain a comprehensive result.

The uncontroverted trial declaration of Deborah E. Granspan details the procedures under the personal injury trust for efficiently -- though consistently with the burden to prove one's claim -- establishing the amount of one's personal injury claim and obtaining a distribution. Her declaration was uncontroverted in describing a trust procedures mechanism that minimizes the difficulty and cost of presenting a claim for personal injury while maintaining

a sufficient degree of rigor over the burden of proof to ensure that as much of the money allocated to personal injury claimants can go promptly and directly to them instead of to lawyers.

I also have reviewed the declaration of Michael Atkinson on behalf of the Official Unsecured Creditors Committee, which attaches the Committee's letter in support of the plan and recognizes the Committee’s role in balancing the interests of personal injury creditors with those of the states and other entities that also assert claims, and strongly supports confirmation of the plan as a fair balance of those interests.

The plan vote of approximately 95.7 percent of the non-NAS personal injury class in favor of the plan strongly argues that the members of that class support the plan and the fairness -- although only in this setting where one allocates money from a limited pot based not on a moral view of the value of a human life or a person's health but, rather, upon the likelihood of such claims recovering in a litigation -- of the plan’s allocation of value among personal injury claimants and other creditors. Under the plan that settlement provides for funds to be paid early to personal injury creditors, ahead of the states and other governmental entities, and fair procedures that make it

relatively easy, though preserving the burden of proof, to obtain a recovery.

As I will discuss later, the plan's allocation of value to all other creditors to be devoted solely to abatement purposes will also provide value, though indirectly, to all surviving personal injury claimants.

In sum, then, the plan's treatment of personal injury claimants is a fair, mediated resolution of extremely difficult private/public allocation issues.

The next set of objections was made by Ms. McGaha, who also was a witness at confirmation, and Ms. VomSaal. Both raise legitimate concerns, as do all the objectors, although, as I said before, I believe the first group of objectors has been misled into thinking that the plan provides for a release of criminal conduct.

Ms. McGaha and Ms. VomSaal question why after the plan's effective date NewCo will continue to manufacture and sell opioids in any form, even though such sales would be lawful. Ms. McGaha also makes certain recommendations that could be viewed as abatement measures but are not necessarily included in the abatement policies and guidelines under the plan, such as the banning of long-term opioids or at least making different disclosures regarding them, changes in packaging, and the promotion of non-opioid

treatments for chronic pain and alternative, non-opioid therapies for pain.

I believe strongly that every constituency in these cases –- including the Official Unsecured Creditors Committee, the Debtors themselves, the United States, the states, the other governmental entities, the Native American tribes group, the ad hoc group of hospitals, the ratepayer and third-party payors groups, the NAS committees, and the ad hoc committee of personal injury claimants -- has wanted to ensure that the production and sale of this dangerous product be not only lawful but also conducted in a way that is cautious, subject to layers of oversight, and informed by the public interest at every step. That is the purpose of the plan's provisions dealing with NewCo: the NewCo governance covenants, the NewCo monitor, the NewCo operating agreement, and the NewCo operating injunction.

From the start of these cases, this was a primary focus of the Official Unsecured Creditors Committee. This has also been a focus since the start of the states and political subdivisions and I believe soon after the start of these cases of the other institutional creditors, such as hospitals and school districts. That is why with the exception of personal injury creditors all claimants in these cases have agreed to take their distributions in the

form of payments to be devoted solely to abatement of the opioid crisis.

The Debtors, too, have been focused on these goals, for example at the start of these cases volunteering a self-injunction pertaining to their legal manufacture and sale of these products, agreeing to the appointment of a monitor, and re-focusing their business in part to developing overdose and addiction treatments to be sold at or near cost. Those measures are described in Mr. Lowne’s trial declaration, as well as the fact declaration of Mr. DelConte. They also were discussed in Mr. Atkinson declaration and the attached letter from the Creditors Committee, and they are reflected in the provisions of the plan that I’ve just described.

Since before the start of these cases, this focus has not involved any input from the Sackler family or their related entities, because since before the bankruptcy petition date the Sacklers have not taken any role whatsoever on the Debtors’ Board or otherwise regarding the Debtors’ management.

The Bankruptcy Code does not require this focus, but in keeping with the broader view of section 1129(a)(3)’s good faith requirement, the parties in interest have required it, and I have encouraged them, so that at this

point I believe the measures that I have just described will set a standard not only for this company but for other companies that manufacture and distribute products like the Debtors' that are legal yet dangerous.

It is hard to imagine how any other company that engaged in this business or in the distribution of these types of products wouldn't also conclude that it was not only the right thing to do but also was in their interest to imitate these governance and operating constraints. They're not being imposed by a government; they're being imposed by this plan with the input of state and local representatives and the federal government and, importantly, representatives of the victims of Purdue's prior conduct. Again, these governance and operating constraints should serve as a model to similar companies as well as an implicit warning that if such companies do not take such care, if they rely instead only on the minimum that the F.D.A. or other federal or state law or regulations require, they may nevertheless, like Purdue, be found lacking if their products cause harm.

The plan's abatement programs themselves are the subject of substantial unchallenged testimony, including by Dr. Gautam Gowrisankaran and Dr. Rahul Gupta, and, with respect to the hospital class, William Legier and Dr. Gayle Galan. And the abatement initiatives reflect heavy input by

all of the states and non-state governmental entities. Again, to have reached agreement on these abatement metrics and mechanisms is an incredible achievement given the strong views that various parties have about what types of abatement are proper.

Dr. Gowrisankaran's unchallenged testimony described the clear multiplier effect of dedicating the bulk of the value to be distributed under the plan, including from the shareholder released parties, to abatement programs as opposed to individual payments that perhaps could be used for abatement but, as with prior national settlements such as the settlements with tobacco companies, also could be used for miscellaneous governmental purposes.

The foregoing testimony also shows, as do the abatement metrics themselves, that the plan contemplates abatement procedures that will take into account developments and lessons learned over time about what works and what doesn't. That incremental development is furthered by the plan's requirement for periodic reports on the use of the abatement funds, which then can be checked to see what succeeds and what doesn't and therefore how future NOAT distributions might best be reallocated.

The abatement procedures and metrics also include a consultation process taking into account the views of

local governments and people within local communities in a reasonable and fair way; that is, they are not simply imposed from the top down by the respective states.

Ms. McGaha and Ms. VomSaal don't identify a specific legal basis for their objections (which is understandable given that they are not represented by counsel). I have addressed them, however, in the light of Bankruptcy Code section 1129(a)(3)'s good faith requirement. Given all that I've just described, it is clear that the use of most of the value to be distributed under the plan for abatement purposes as specified is in good faith and, in fact, beneficial to those who have individual claims against the Debtors as well as the communities and states that also have claims. It is also clear that the plan's provisions for the governance and operations of NewCo, facilitate not only the purposes of the Bankruptcy Code but also the broader good. Within the constraints of federal law, including regulations and guidance from the F.D.A, the NewCo governance provisions go beyond that law where possible to ensure the safety or the safe use of the Debtors' products, including the development of products that would assist those who are trying to recover from opioid use disorder and provide cheap and accessible prevention mechanisms for overdoses.

To suggest otherwise, to suggest that somehow this was an ill-cooked and cooked-in-secret stew (which I don't believe the two objectors are contending but has been suggested publicly by those who I don't think have been following these cases, or if they have been following them should know better), is incorrect and dramatically so.

The last objection by certain of the pro se objectors whom I've already named contends that the civil settlement under the plan with the shareholder released parties –- the Sacklers and their related entities -- is unfair and should not be approved. That settlement would resolve the claims of (x) the Debtors' estates against those parties and (y) certain claims against the shareholder released parties based in large measure on the same conduct underlying certain of the Debtors' claims against the shareholder released parties and the third parties' claims against the Debtors.

It is my main task, notwithstanding the length of this ruling already, to consider whether that settlement of the Debtors' claims and related third-party claims against the shareholder released parties is proper under the Bankruptcy Code.

One point should be addressed first regarding this inquiry, and I discuss it now in part because it has been

raised by the pro se objectors, perhaps because of what they have read or heard in the media or from others.

Some assert that this Chapter 11 plan and the settlement in it is "the Sacklers' plan," or perhaps, artfully, it has been suggested that because it is proposed by the Debtors, and the Sacklers own the Debtors, the Debtors' plan is "the Sacklers' plan."

While I will separately examine whether the settlements with the Sacklers under the plan are fair, one thing is crystal clear, and anyone who contends to the contrary is, again, simply misleading the public: this is not the Sacklers' plan. The Debtors are not the Sacklers' company anymore. The Sacklers own the Debtors, but the Debtors are not run by the Sacklers in any way and have not been since before the start of these cases. There is literally no evidence to the contrary -- none. Although it was not necessary, because the record was clear, the examiner appointed in these cases confirmed it in his report. Dkt. No. 3285.

More importantly, and as recognized by the examiner, these cases were driven as much, if not more, by the Official Unsecured Creditors Committee and the other creditors in these cases who formed well-represented ad hoc committees, including committees of the 48 states and

territories that have claims against the Debtors (two states having settled those claims before the start of the bankruptcy cases) and strong representatives of non-state governmental entities and Native American tribes; personal injury claimants; victims of neonatal abstinence syndrome or their guardians, hospitals, ratepayers and third-party payors, and school districts.

These creditors essentially have represented the interests of all creditors of these Debtors, although of course other creditors were free as parties in interest to appear and be heard. And from the start of these cases, all of the Debtors' assets were dedicated to them. These creditor groups wanted more than anything to obtain as much value not only from the Debtors but also from the Sacklers, who were viewed by all as the opposition, the other side, the potential defendants, the payors. And it is clear that the Official Unsecured Creditors Committee, the states and territories, the other governmental entities and tribes, and the other ad hoc groups were completely independent from the Sacklers in their focus on that goal.

They were facilitated in achieving that goal by the two incredibly experienced and effective mediators I've already discussed, Messrs. Philips and Feinberg. And, further, even after a largely successful mediation of the

claims against the Sacklers -- claims by the Debtors' estates and claims assertable by others -- which ultimately resulted from the mediators' own proposal as to what would be a fair settlement that was accepted by all of the foregoing groups with the exception of the so-called nonconsenting state group of 24 states and the District of Columbia, I directed another mediation with another of the best mediators in the world, my colleague Judge Shelly Chapman. Based on her mediation report [Dkt. No. 3119], Judge Chapman held over 140 discussions before the mediation day set aside to see whether the remaining nonconsenting states could reach agreement with the Sacklers. That "day" lasted 27 hours. Id.

Judge Chapman, like Mr. Feinberg and former Judge Phillips, is a successful mediator because she does not browbeat people, although even if she wanted to, she could not browbeat the nonconsenting states' representatives. She, like Messrs. Feinberg and Phillips, is a successful mediator because she points out the risks and rewards of not reaching a settlement and of reaching a settlement. At the end of her mediation, fifteen of the states that had previously fought the Sackler settlement tooth and nail agreed to the modified settlement in the amended plan.

I'm saying this not to show my support for the

underlying settlement but to highlight again the arms-length negotiation of the plan and the fact that it is not a "Sackler plan" but a plan agreed to by 79 percent of the states and territories and well over 96 percent of the non-state governments, and actively supported by the Official Unsecured Creditors Committee and the other ad hoc committees, notwithstanding the incredible harm that the Debtors' products have caused their constituents.

Bitterness over the outcome of these cases is completely understandable. Where there has been such pain inflected, one cannot help but be bitter. But one also must look at the process and the issues in the light of the alternatives and with a clear understanding of the risks and rewards of continued litigation versus the settlements set forth in the plan. And it's that process to which I'll turn next.

Analysis of the Settlements with the Shareholder Released Parties. As I noted, the plan includes two settlements with the Sacklers and their related entities. It provides for the settlement of the Debtors' estates' claims -- that is, the Debtors' claims against the Sacklers and related entities for the benefit of the Debtors' creditors. (And the estates have substantial claims against the Sacklers. Indeed, one can argue that those claims are

the main claims against them.) Second, the plan provides for the settlement of certain third-party claims –- that is, claims that could be asserted by others -- against the Sacklers and their related parties, the "shareholder released parties" under the plan.

I will focus first on the settlement of the Debtors' estates' claims, but I will note before doing so that the plan is not just a plan that settles the estates' claims and certain third-party claims against the Sacklers related to those claims and the third parties' claims against the Debtors. In fact, the plan contains several other settlements interrelated to those settlements that would not be achievable if either of the settlements with the Sacklers fell away.

These include a settlement of the complex allocation between personal injury claimants, NAS-personal injury claimants and non-governmental entities, on the one hand, and claims by public, governmental entities on the other, a subject of months of mediation that I've already discussed. They also include a settlement of the allocation of value among the public creditors -- the states and nongovernmental entities and Native American tribes.

Remarkably, all parties with the exception of the personal injury claimants agreed in the mediation to use the

value that they would receive solely for abatement purposes, the multiplier-effect benefits of which I've already described. This includes the private, corporate entity claimants as well as the non-federal governmental claimants.

In addition, during these cases, the Debtors settled both civil and criminal claims of the federal government, and the plan encompasses those settlements, importantly including the United States' agreement to release $1.775 billion of its $2 billion superpriority administrative expense claim for the benefit of the other public creditors if, as is the case here, the plan meets the requirements of the DOJ settlement to establish an abatement structure and the corporate governance and other public purposes for NewCo that I have previously described.

Each of those settlements hinges on at least the amount of money to be distributed under the plan coming from the Sacklers and their related entities in return for (x) the Debtors' settlement and (y) the third-party claims settlement. Without the $4.325 billion being paid by the Sacklers under the plan and the other elements of the Sackler settlements, those other elements of the plan would not happen. The record is clear on that. The private/public settlement would fall apart and the abatement settlements likely would fall apart for lack of funding and

the inevitable fighting over a far smaller and less certain recovery with its renewed focus on pursuing individual claims and races to collection.

That still begs the question, though, is the $4.325 billion, coupled with the Sackler's other agreements, including the dedication of the two charities worth at least $175 million for abatement purposes, the Sacklers' agreement to a resolution on naming rights, their agreement not to engage in any business with NewCo, their agreement to exit their foreign companies within a prescribed time, their agreement to various "snap back" protections to ensure the collectability of their settlement payments, and their agreement to an unprecedented extensive document depository accessible to the public that will archive in a comprehensive way the Debtors' history, including as it relates to the development, production, and sale of opioids, sufficient? Obviously, more money from the Sacklers, if such were obtainable, would not unravel the settlements that I've already described.

Settlements and compromises of asserted or assertable claims by debtors' estates are a normal part of the process of reorganization in bankruptcy and are strongly favored over litigation. Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390

U.S. 414, 424 (1968). This is in part for the obvious reason that in bankruptcy the pie is not large enough to feed everyone. In bankruptcy the cost and delay factors in deciding whether to approve a settlement are more significant than in a non-bankruptcy context, as is an assessment of the merits of the claims that are being settled: the risks of losing a piece of the pie or having it go stale are magnified if from the start there is not enough to go around.

In determining whether to approve a settlement of a debtor's estate's claims, a bankruptcy court must make an informed independent judgment that the settlement is "fair and equitable" and "in the best interests of the estate." TMT Trailer Ferry, 390 U.S. at 424; In re Drexel Burnham Lambert Group, 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991). "In undertaking an examination of the settlement . . . this responsibility of the bankruptcy judge . . . is not to decide the numerous questions of law and fact raised . . . but rather to canvas the issues and see whether the settlement falls below the lowest point in the range of reasonableness." Nuevo Pueblo, LLC v. Napolitano (In re Nuevo Pueblo, LLC), 608 Fed. Appx. 40, 42 (2d Cir. 2015), quoting In re W.T. Grant Co., 699 F.2d 599, 608 (2d Cir. 1983); see also Weinberger v. Kendrick, 698 F.2d 61, 74 (2d

Cir. 1982) ("The Supreme Court could not have intended that, in order to avoid a trial, the judge must in effect conduct one."); E. 44th Realty, LLC v. Kittay, 2008 U.S. Dist. LEXIS 7337, at *22 (S.D.N.Y. Jan. 23, 2008). Nevertheless, a request to approve a settlement, including of course a major settlement like this in the context of a Chapter 11 plan, requires careful consideration and the right to an evidentiary hearing, and here warranted a six-day trial involving 41 witnesses.

Based on the framework laid out in TMT Trailer Ferry, courts in this Circuit have long considered the following factors in evaluating proposed settlements:

(1) The probability of success, should the issues be litigated, versus the present and future benefits of the settlement;

(2) the likelihood of complex and protracted litigation if the settlement is not approved, with its attendant expense, inconvenience and delay, including the difficulty of collecting on a judgment;

(3) the interests of the creditors, including the degree to which creditors support the proposed settlement;

(4) whether other interested parties support the settlement;

(5) the competence and experience of counsel

supporting, and the experience and knowledge of the court in reviewing, the settlement;

(6) the nature and breadth of the releases to be obtained by officers and directors or other insiders; and

(7) the extent to which the settlement is the product of arms-length bargaining. See generally, Motorola, Inc. v. Off. Comm. of Unsecured Creditors & JPMorgan Chase Bank, N.A. (In re Iridium Operating LLC), 478 F.3d 452, 464-66 (2d Cir. 2007).

The Iridium court also noted that how a settlement's distribution plan complies with the Bankruptcy Code's priority scheme may be the dispositive factor. That is, unless the remaining factors weigh heavily in favor of approving a settlement, if the settlement materially varies the Bankruptcy Code's priority scheme, the court should normally not approve it. That concern does not apply here, however. As I have noted regarding objections to classification and treatment under the plan, the plan does not vary the Bankruptcy Code's priority scheme or otherwise violate the Code's requirements for classification and treatment within a class.

I will address the elements of evaluating a settlement in a different order than listed by the Iridium court, noting first, however, that they are applied even

where part of the settlement involves not just the simple trade of money for a claim but, as here, also performance, such as ceasing to be involved with Purdue or agreement to the public document depository. See, e.g., DeBenedictis v. Truesdell (In re Global Vision Prods.), 2009 U.S. Dist. LEXIS 64213 (S.D.N.Y. July 13, 2009).

As discussed, the Sackler settlement was clearly and unmistakably the product of arm's-length bargaining conducted in two separate mediations by three outstanding mediators. It was preceded, moreover, by the most extensive discovery process that not only I have seen after practicing bankruptcy law since 1984 and being on the bench since 2002, but I believe any court in bankruptcy has ever seen.

The record is unrefuted regarding the incredible extent of discovery taken not only by the Debtors through their Special Committee and counsel, but also the Official Unsecured Creditors Committee in consultation with the non-consenting states group and the other states and governmental entities, in fact anyone who wanted to sign a standard nondisclosure agreement to permit discovery to proceed without extensive fights over confidentiality.

From the first hearing in these cases, I made it clear -- as was also recognized by Judge McMahon in Dunaway v. Purdue Pharm. L.P. (In re Purdue Pharm. L.P.), 619 B.R.

38, 58-59 (S.D.N.Y. 2020), in affirming the preliminary injunction that I entered -- that the Sacklers and their related entities must provide discovery beyond even the normally extensive discovery in bankruptcy cases as a condition to retaining the continued benefit of the injunction. And that discovery occurred.

I did not have to decide one discovery dispute on the record. Each of the chambers conferences with parties over discovery disputes led to the production of additional discovery. As a result of that process, approximately ten million documents were produced, comprising almost 100 million pages, an almost unfathomable record that nevertheless teams of lawyers for the creditor groups have pored through to find anything suggesting a claim against the shareholder released parties.

Thus any assertion that there has not been "transparency" in these cases, at least to those who negotiated the plan's settlements, who again in essence represented all of the creditors in these cases, is simply incorrect, and is particularly galling when asserted by any of the states that continue to object to the plan on this basis. They know what they had access to. They know how unprecedentedly extensive that information was.

The only argument that they can make is that the

public hasn't had access to such information. But of course if the discovery and information-sharing process had not been conducted as it was by the public's representatives, including the very states that make this argument, far less information would have been produced, most of which the public would never have had access to in any event, including if the settled claims instead went to trial or an examiner issued an examiner's report. Further, the objectors had the ability to probe the merits of the proposed settled claims, including their own claims, during the confirmation hearing, and objecting states took advantage of it to, among other things, extensively examine four members of the Sackler family and present the deposition testimony of a fifth.

The discovery record armed the parties in their negotiations in the mediations, and the mediations further fostered the arms-length bargaining in these cases.

The clearly arms-length nature of the negotiations also establishes that conflicts of interest or self-dealing do not taint the nature and breadth of the plan’s proposed release of the shareholder released parties, who certainly once were “insiders,” one element of the analysis of the Iridium factor focusing on such releases that otherwise will be discussed later when focusing on the plan’s proposed

release of third-party claims.

Applying the next <u>Iridium</u> factor -- the competency and experience of counsel supporting the settlement -- the Debtors were represented by very capable counsel and forensic and financial advisors that assisted the Debtors' Special Committee in discovering most of the the Debtors' claims against the Sacklers and their related entities. These claims, for over $11 billon of assertedly avoidable transfers, are described in the trial declarations of Richard Collura, Mark Rule, and David DeRamus, Ph.D and commented on by John Dubel in his trial declaration, as well as set forth in even greater detail in the report filed by the Debtors before the start of the mediation. Dkt. No. 654.

The Official Unsecured Creditors Committee also had very experienced and capable counsel and financial advisors, who led the Committee's own extensive analysis of potential estate claims, including vetting the Debtors' analysis of avoidable transfer claims. The Committee also thoroughly investigated the estates' claims against the Sacklers that are not in the nature of avoidable transfer causes of action but, rather, claims based on theories of alter ego, piercing the corporate veil, and breach of fiduciary duty/failure to supervise. Here it appears clear

that such claims would belong to the Debtors' estates, not individual creditors, because at least as far as the confirmation hearing record reflects, such claims would be based on a generalized injury to the estates and creditors rather than conduct directed only at certain creditors. See, e.g., St. Paul Fire and Marine Insur. Co. v. PepsiCo, Inc., 884 F.2d 688, 704-705 (2d Cir. 1989); Bd. of Trs. Of Teamster Local 863 Pension Fund v. Foodtown Inc., 296 F.3d 164, 169 (3d Cir. 2002).

Similarly, the counsel and advisors for the states and other governmental entities, all of whom were on the other side of the table from the Sacklers, were every match for the Sacklers' own able counsel. In many cases, in addition to their outside counsel, states' own attorneys general played an active role in the negotiations, such as, for example the AGs for Massachusetts and New York who after the second mediation, led by Judge Chapman, agreed to the modified settlement.

The next two Iridium factors are closely related: the interests of creditors, including the degree to which creditors support the proposed settlement, and whether other interested parties support the settlement.

Given the over 95 percent aggregate vote in favor of the plan; given the support by the Official Unsecured

Creditors Committee, over 79 percent of the states and territories, over 96 percent of the other governmental entities and Native American tribes, apparently in this context the United States -- although one can't really make heads or tails of the U.S. Trustee's objection, which is not based on participation in the cases' discovery process,[4] regarding the merits of the Debtors' settlement with the shareholder released parties –- approximately 96% of the personal injury and NAS personal injury claimants, and a supermajority of the other claimants; and given the paucity of objections to the plan's confirmation notwithstanding the size of the creditor body, it is clear that by an overwhelming margin the creditors support the settlements. They do so, again, after being fully informed in making that decision, or with their representatives being fully informed.

The next Iridium factor requires analysis of the likelihood of complex and protracted litigation if the settlement is not approved, with its attendant cost and delay, and, relatedly, the difficulty in collecting on a

[4] The U.S. Trustee did not participate in that discovery process and apparently took no independent discovery before the confirmation hearing to explore the merits of its factual objections to the plan. It also has offered no evidence for any of its fact-based objections to the plan, instead apparently assuming that it can nevertheless act credibly as an outside commentator on others' analysis of the settlements (which it mostly did not seek to challenge by cross examination).

judgment. I'll focus first on the difficulty of collecting on a judgment absent the settlement.

As often happens, parties who support a settlement, such as here the Official Unsecured Creditors Committee, the consenting states and other governmental entities, and the Debtors are careful not to describe in detail the reasons for their support that would show the potential weaknesses of their underlying claims or their views on how difficult it would be to collect on a judgment. They are legitimately concerned that the settlement won't be approved, in which case they would have given their opponents a regretted roadmap. This leaves the Court to draw reasonable inferences from the record, as well as its knowledge and experience regarding the legal issues bearing on the merits and collection. Here, that record is fairly extensive in the light of submissions by the Sacklers and those overseeing their wealth.

One might think at first that the issue of collectability weighs against the settlement. The record is uncontroverted that the Sacklers, as a family, are worth -- again, in the aggregate -- approximately $11 billion, reduced perhaps by $225 million agreed to be paid under the Sacklers' own postpetition civil settlement with the United States. The discovery process that I have described has

largely identified their assets and where and how they are held. And the preliminary injunction in these cases precluded the further transfer of their assets. So, assuming the entry of judgments against them instead of the settlement, one might reasonably believe that collecting significantly more than $4.325 billion, plus access to, or the dedication of, at least $175 million of charitable assets under the settlement, is readily achievable

The Sacklers are not a simple group of a few defendants, however. They are a large family divided into two sides, Side A and Side B, with eight pods or groups of family members within those divisions that have their own unique sources and holdings of wealth. As described in the trial declarations of Timothy Martin and Steven Ives, their assets are in fact widely scattered and primarily held (x) in purportedly spendthrift offshore trusts, (y) in purportedly spendthrift U.S. trusts, and/or (z) by people who themselves live outside of the territorial jurisdiction of the United States and might not have subjected themselves sufficiently to the U.S. for a U.S. court to get personal jurisdiction over them.

I want to be clear that I am not deciding that jurisdictional issue, nor whether the trusts where most of the Sackler family's wealth is held are in fact spendthrift

trusts that could not be invaded to collect a judgment, including in a possible bankruptcy case of a beneficiary of such a trust forced into bankruptcy by the pursuit of litigation.

A beneficial interest in a valid spendthrift trust may be excluded from a debtor's bankruptcy estate. Patterson v. Shumate, 504 U.S. 753, 757 (1992). As provided in Bankruptcy Code section 541(c)(2), "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under [the Bankruptcy Code]." 11 U.S.C. § 541(c)(2). That section directs one to applicable non-bankruptcy law, which may or may not be the law of the United States with regard to the Sacklers' foreign trusts, almost all of which are established under the law of the Bailiwick of Jersey.

Based on the trial declaration and examination of Michael Cushing, an expert in the law of the Bailiwick of Jersey and the enforceability of judgments against trusts organized under that law, there is a substantial question regarding the collectability from such a trust of even a U.S. fraudulent transfer judgment against the trust, let alone a judgment against a trust beneficiary, including for his or her conduct such as the beneficiary being an alter

ego of another entity, like Purdue, or otherwise legally responsible for Purdue's conduct.

For U.S. spendthrift trusts, on the other hand, generally applicable non-bankruptcy law provides that a transfer into such a trust that is fraudulent to creditors is recoverable for the benefit of creditors. See, e.g., Sec. Investor Prot. Corp. v. Bernard L. Madoff Sec. LLC (In re BLMS), 2021 Bankr. LEXIS 1769, at 13-19 (Bankr. S.D.N.Y. July 2, 2021); see also In re BLMIS, 476 B.R. 715, 728, n.3 (S.D.N.Y. 2012).

U.S. law also generally does not recognize self-settled trusts that in name only are spendthrift trusts. But again, many of the trusts here might well be governed by the law of the Bailiwick of Jersey, which according to Mr. Cushing's declaration -- which was not meaningfully controverted on these points -- strongly suggests that a different result might apply when enforcing a judgment against a beneficiary of such a trust. And none of the evidence at the confirmation hearing clearly showed that any of the trusts was self-settled.

Lastly, the summaries of the Sackler family's wealth reveal that much of it is not held in readily liquidated assets but rather in the shares of closely held businesses, including the foreign businesses they are

required to sell within seven years under the settlement.

Once more, I'm not deciding any legal issues that would affect the collectability of judgments against Sackler family members or their entities, but, given the record before me, as well as the agreement of substantially all of the parties in these cases to a settlement of the estates' claims against the Sacklers and their related entities after the due diligence that they have undertaken, I make the reasonable inference that the issue of collection if the settlement were not approved is in fact a significant concern.

Under the settlement, on the other hand, although the shareholder released parties are given several years to make their payments (in at least partial recognition, one infers, of the illiquid nature of many of their assets), (x) the shareholder settling parties have agreed to "snap back" provisions that enhance collectability upon a default and (y) the trustees and asset managers for the foreign trusts have agreed to seek, and believe they will obtain, the approval of the Jersey court to comply with the settlement.

As noted, Iridium also requires the Court to consider the cost and delay of continued litigation in comparison to the benefits of the proposed settlement. If the estate's claims against the Sacklers and their related

entities were not settled as provided in the plan, the cost and delay to the estates clearly would be substantial. That cost and delay would not be limited to the cost and delay of pursuing litigation claims against the family members and their related entities and collecting any ensuing judgments, which primarily would involve preparation for trials against multiple defendants (the discovery for which has mostly occurred) and the trials themselves, as well as judgment enforcement litigation and other collection costs in multiple jurisdictions. That cost and delay alone would be substantial, as it is reasonable to infer that the hundreds of prepetition lawsuits naming the Sacklers would resume and proceed alongside prosecution of the estates' claims against the Sacklers and related entities.[5]

Besides that cost and delay, moreover, is the cost and delay that would ensue from the unraveling of the other plan settlements that I have described. The confirmation hearing record strongly reflects that if the settlement of the Debtors' claims against the shareholder released parties were not approved, the creditor parties would be back

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[5] The preliminary injunction in these cases enjoined over 2,600 pending prepetition lawsuits against Purdue by governmental entities, hundreds of which named one or more Sackler family members as a co-defendant, and presumably most of the other actions would be amended to add Sackler family members as defendants, and other third parties also would attempt to pursue such claims, as well.

essentially to square one on allocating the value of the Debtors' estates, including any ultimate recovery on the estates’ litigation claims. And the creditors would be litigating against each other over the merits of their respective claims against the Debtors.

In that regard, the analysis in Mr. DelConte's second declaration, which contains the Debtors’ section 1129(a)(7) “best interests” liquidation analysis, is instructive. Under the most realistic scenarios described in that analysis, there would literally be <u>no</u> recovery by unsecured creditors from the estates in a Chapter 7 liquidation, which is, I believe, the most likely result if the settlements with the shareholder released parties were not approved, given the likely unraveling of the heavily negotiated and intricately woven compromises in the plan and the ensuing litigation chaos.

That projected outcome also reflects that in a liquidation scenario the United States' agreement in the DOJ’s October 2020 settlement with Purdue to forego $1.775 billion of its $2 billion superpriority administrative expense claim for the benefit of the plan’s abatement program would disappear. The United States would be entitled to all of that recovery first from the Debtors’ estates. And no one has controverted the trial declaration

of Joseph Turner, the Debtors' investment banker in which he gives a midpoint valuation of the Debtors' businesses as going concerns at $1.8 billion. Thus the estates would be litigating their own claims against the Sacklers and their related entities in that highly contested environment on a severely reduced budget with no assurance of administrative solvency.

That leaves the last Iridium factor, a comparison of the legal risks posed by continued litigation against the results of the settlement.

As with the issue of the difficulty of collection, the parties supporting the settlement have been careful not to bare their views of the defenses that the shareholder released parties would have to the estates' claims against them. However, I do have an extensive report and trial declarations as to the nature of the assertedly over $11 billion of avoidable transfers, when they occurred, what they comprised, and who they were made to. Those objecting to the settlement also had the opportunity to examine at length four members of the Sackler family at the confirmation hearing -- David Sackler, Richard Sackler, Mortimer Sackler, and Kathe Sackler -- and in addition submitted the deposition of Irene Sackler, including to attempt to show the strength of the estates' and third-

parties' claims against them based on their actions in their capacities as shareholders and members of Purdue's Board and, in three instances, in Purdue's management. Finally, I have extensive submissions by both sides of the Sackler family regarding the defenses that they would argue in the absence of the settlement in response to the claims asserted against them and their related entities.

In evaluating that evidence and those arguments I want to be clear again that I am not deciding anything close to the merits of those claims. This assessment could not, therefore, serve as collateral estoppel or res judicata. Nor do I particularly have any fondness or sympathy for the Sacklers.

I will note the following, however. The Sackler family -- or rather 77, I believe, of them -- received releases from most of the states in 2007. In addition, 2007 is about as far back under any theory that one could look to avoid a fraudulent transfer to the Sacklers or any of their related entities under U.S. law. Thus one would, both for estate claims and for third-party claims, be looking at primarily, if not exclusively, potentially wrongful actions by the Sacklers or their related entities or potentially avoidable transfers to them that took place only after 2007. This would limit claims against them, for example, based on

OxyContin's role since its introduction in 1999 to 2007 in dramatically increasing the use of opioids and related addictions and opioid use disorders.

Avoidable Transfers. As described in the trial declaration of Carl Trompetta and as generally acknowledged, over 40 percent of the asserted avoidable transfers to the Sacklers or their related entities went to pay taxes associated with Purdue, including large amounts to the IRS and the states that continue to object to the plan and, of course, intend to keep the tax payments. The fact that these payments went to pay taxes obviously relieved the Sacklers of an obligation. I do, however, have uncontroverted testimony from Jennifer Blouin that if the partnership structure of Purdue, with the taxes running through the Sacklers, was not in place, Purdue itself would have been liable for taxes in almost all of the amount of the tax payments to or for the benefit of the Sacklers and, therefore, arguably received fair consideration for those tax payments.

The Sacklers also would argue the applicability of various statutes of limitation to the fraudulent transfer claims that would limit the reach-back by the estates to most of the claims. The estates would have arguments to the contrary, based on rights that unique creditors like the

federal government would have to serve as a "golden creditor" under section 544(b) of the Bankruptcy Code, which provides that the Debtors "may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title," 11 U.S.C. § 544(b), although the Sacklers would argue that the purportedly "golden creditor's" current claims against the Debtors are not the claim it would have had when many of the transfers were made that would have enabled the creditor to avoid them.

The Sacklers would also argue that after the 2007 settlement between Purdue and the United States, Purdue paid manageable amounts in settlements of litigation claims related to opioid matters or of other litigation claims between 2008 and 2019 and that as recently as 2016 Purdue was receiving ratings from rating agencies that indicated it was financially healthy. They would contend, therefore, that except for the last year or so before the bankruptcy filing date, when only a small fraction of the roughly $11 billion of transfers occurred, Purdue was not insolvent, unable to pay its debts when they came due, or left with unreasonably small capital -- requirements to prove constructive fraudulent transfers. Finally, they would argue

that for these same reasons, and bolstered by at least some of the Sacklers' willingness to continue to invest large amounts of capital in Purdue in years after 2007, the Debtors would not be able to prove that most, if not all, of the transfers were intentionally fraudulent, either.

There are, on the other hand, statements in the record suggesting that at least some of the Sacklers were very aware of the risk of opioid-related litigation claims against Purdue and sought to shield themselves from the economic effect of such claims by causing Purdue to make billions of dollars of transfers to them and to shield their own assets, as well, from collection. Further, the estates would argue that the potential sheer size of opioid-related claims against Purdue was obvious several years before the second onslaught of litigation claims against it.

Alter Ego, Veil Piercing, and Breach of Fiduciary Duty/Failure to Supervise Claims. As discussed earlier, claims based on alter ego, piercing the corporate veil, and breach of fiduciary duty/failure to supervise theories would appear to stem from allegations against Sackler family members that they caused harm to the creditor body generally, or to the Debtors, in exercising their control of the Debtors and, therefore, would belong to the Debtors' estates rather than to individual creditors. As discussed

later, very closely related, indeed usually the same, factual allegations also underly the objecting states' third-party claims against Sackler family members.

In response to such claims, most Sackler family members would argue that they did not serve on Purdue's Board or in management during the relevant period and that no actions by them in their capacity as a shareholder of Purdue have been identified that would show liability for such claims. In response, the Debtors and others would contend that notwithstanding the large size of the Sackler family, the Sacklers acted in a coordinated way over investment and business strategies involving Purdue, with regular meetings of authorized family representatives. The Sacklers would argue, supported by the trial declaration of Lawrence A. Hamermesh that generally the ability to control a corporate entity and such actions as were identified at the confirmation hearing do not give rise to such liability, however. In response, the Debtors' estates would argue, as did the objecting states at the confirmation hearing, that Mr. Hamermesh's declaration speaks only in generalities regarding the law of corporate fiduciaries and does not address the actual actions of Sackler family members in controlling Purdue.

The Sacklers would also point out that after the

2007 settlements with the federal government and the states, the U.S. Department of Health and Human Services entered into a five-year corporate integrity agreement with Purdue to monitor its compliance with federal healthcare law, which was in effect from July 31, 2007 to July 30, 2012. That agreement is available as part of the record but also is public and a matter for judicial notice. In addition, in 2015, after Purdue implemented an "Abuse and Diversion Detection" program, the New York Attorney General required the program be subjected to annual reviews, which occurred from 2015 to 2018. The Sackers would argue that both the H.H.S.'s OIG monitor and those ADD reviews identified no improper actions by Purdue and therefore that as controlling shareholders or Board members they should not be liable for Purdue's improper actions to the extent they were inconsistent with those reviews. More generally they would argue that as Board members they would not have a fiduciary duty for actions by Purdue's management that were improper or unlawful unless they were aware of them or blindfolded themselves to them. Those who were not on the Board and did not individually control ownership of Purdue would argue that they were yet another step removed from such a duty. They would also point out the difficulty under applicable state law of piercing the corporate veil between a corporate

entity and its owners.

Of course trials on the merits might well establish, as some of the testimony that I heard from the Sacklers tended to show, that as a closely held company Purdue was run differently than a public company and that its Board and shareholders took a major role in corporate decision-making, including Purdue's practices regarding its opioid products that was more akin to the role of senior management.

Moreover, strong arguments could be made that the Sackler Board members and the shareholders as a whole not only understood the highly addictive nature of Purdue's opioid products -- which the Sackler witnesses acknowledged -- but also that F.D.A.-approved warning labels and modifications to the product and how it was sold that allegedly made it less likely to be abused were not preventing massive harm. The Sackler witnesses testified that their aim, especially after 2007, was to avoid Purdue's causing more harm from the sale of highly addictive products. But a jury might well conclude to the contrary that the Sacklers' evident desire to continue to drive profits from the products' sale blinded them to evidence of the fraud, kickbacks and other crimes to which Purdue pled guilty in the October 2020 DOJ settlement or that the pain-

relieving benefits of those products was still horribly out of balance with the harm caused, so that they could be held liable for such harm.

I believe that in a vacuum the ultimate judgments that could be achieved on the estates' claims (and the closely related third-party claims that are being settled under the plan) might well be higher than the amount that the Sacklers are contributing. But I do not believe that recoveries on such judgments would be higher after taking into account the catastrophic effect on recoveries that would result from pursuing those claims and unravelling the plan's intricate settlements. And as I said at the beginning of this analysis, there is also the serious issue of problems that would be faced in collection that the plan settlements materially reduce.

This is a bitter result. B-I-T-T-E-R. It is incredibly frustrating that the law recognizes, albeit with some exceptions, although fairly narrow ones, the enforceability of spendthrift trusts. It is incredibly frustrating that people can send their money offshore in a way that might frustrate U.S. law. It is frustrating, although a long-established principle of U.S. law, that it is so difficult to hold board members and controlling shareholders liable for their corporation's conduct.

It is incredibly frustrating that the vast size of the claims against the Debtors and the vast number of claimants creates the need for the plan's intricate settlements. But those things are all facts that anyone who is a fiduciary for the creditor body would have to recognize, and that I recognize.

A settlement is not evaluated in a vacuum, as a wish list. It takes an agreement, which means that if properly negotiated -- and I believe that's clearly the case here -- it generally reflects the underlying strengths and weaknesses of the opposing parties' legal positions and issues of collection, not moral issues or how someone might see moral issues.

It is not enough simply to say "we need more," or "I don't care whether we don't get anything; I'd rather see it all burned up before the Sacklers keep anything." One must focus on the foreseeable consequences of litigation versus settlement.

I must say that at the middle stage of these cases, before the mediation, I would have expected a higher settlement. And frankly anyone with half a brain would know that when I directed a second mediation, bravely undertaken by Judge Chapman, I expected a higher settlement, perhaps higher than the materially improved settlement that resulted

from that mediation. Nevertheless, extremely well-represented and dedicated parties on the prospective plaintiffs' side, knowing far more than I have laid out today about the strengths and weaknesses of the claims, costs, delay, and collection issues, agreed to this settlement as modified as a result of that second mediation.

Are the Sacklers paying a “settlement premium” in their settlements than they would pay in litigation, as Ms. Conroy suggested? Perhaps. As noted, Ms. Conroy as much as anyone has dedicated much of her professional career to pursuing Purdue and the Sacklers and has no reason to pull her punches now. In any event, I am not prepared, given the record before me, to risk that agreement. I do not have the ability to impose what I would like on the parties. Thankfully, no judge in our system is given that power. I can only turn down a request for approval of it and deny confirmation of the plan. Given this record, I'm not prepared to do that.

I will note, as far as the bona fides of the settlement are concerned, and notwithstanding my reservations, under this plan 100 percent of these Debtors, closely held by the Sacklers, is taken away from them and devoted to abating opioids' ill effects in one way or another.

In addition, the amount being paid is to my knowledge the highest amount that any shareholder group has paid for these types of claims. Throughout the history of litigation involving Purdue, the Sacklers themselves were not targets, except leading up to the relatively modest settlement payments by Purdue on their behalf to a number of states in 2007,[6] until roughly three years before the bankruptcy petition date. The entire negotiation process in these cases has magnified that focus on them and will be remembered for doing so.

While I wish that the amount were higher, as I believe everyone on the other side of the Sacklers does, the settlement is reasonable in the light of the standards laid out by the Supreme Court and the Second Circuit. And clearly both it and the process of arriving at it have not been in any shape or form a free ride for the Sacklers or enabled them to "get away with it."

If what people mean by "getting away with it" is being relieved of criminal liability, that obviously is not

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[6] The 2007 settlement between 26 states and the District of Columbia, on one side, and Purdue on the other called for a $19.5 million multi-state payment by Purdue to the states. Consent Judgement, Washington v. Purdue Pharma L.P., Cause No. 07-2-00917-2 (Sup. Ct. Wash. Thurston Cnty. May 3, 2007), http://www.atg.wa.gov/news/news-releases/washington-receive-share-195-million-settlement-oxycontin-maker#:~:text=FOR%20IMMEDIATE%20RELEASE%3A%20May%208%202007%20SEATTLE%20%E2%80%93,to%20doctors%20while%20downplaying%20the%20risk%20of%20addiction.

the case. And I believe, given all the factors that I've outlined, the Sacklers are paying a substantial and, under the circumstances of this case, justifiable amount, as well as agreeing to the other material aspects of the settlement that I have described.

I will note, finally, that as alluded to this morning by the Debtors' counsel, they have agreed to enforcement mechanisms that are quite rigorous as part of the settlement, so that the potential collection problems that I addressed are far lessened by the settlement if any released party doesn’t live up to it, including as to the ability to hide behind spendthrift trusts.

So, I will overrule the objections to the merits of the settlement of the Debtors’ estates’ claims against the shareholder released parties.

Analysis of Plan’s Release and Injunction of Third-Party Claims. That leaves the last issue for determination, which is the most complex issue legally: the propriety of the plan’s release and injunction of certain third-party claims against the shareholder released parties. The third-party claims that the plan would release and enjoin are very closely related on the facts to the estates’ claims for alter ego, veil piercing, and breach of fiduciary duty/failure to supervise settled under the plan. See

Dunaway v. Purdue Pharm. L.P., 619 B.R. at 50 (noting virtually identical allegations against Purdue and third-party claims against Richard Sackler, each stemming from conduct by Purdue allegedly under his control). My analysis of the merits of the plan's treatment of such third-party claims thus is in large measure informed by my analysis of the alternatives to the settlement of the estates' claims against the shareholder released parties that I've just finished. Before turning to the merits, however, multiple other grounds for the objections to the plan's nonconsensual release and injunction of third-party claims against the shareholder settling parties must be addressed.

I will note first that I have agreed with certain of those objections, namely as to the over-breadth of the releases in the plan as initially proposed. In the light of colloquy during the confirmation hearing, the current form of the plan has substantially narrowed those releases. As discussed in more detail later, the settling shareholder parties are now being released of true third-party claims only if they are opioid-related and then only for such claims where Purdue's conduct is at least in material part a legal element of the third-party claim.

Other released parties, including the Sacklers, are released from certain other third-party claims, as well

under the plan, but it is clear, given the plan’s revised definitions, that those releases cover claims that are truly derivative of the Debtors’ claims such that the releases simply prevent third parties from going after released parties through the back door when the Debtors have resolved the claims, or, to change the metaphor, from improperly adding a second fork with which to eat their share of the pie.

The first objection to the release of third-party claims against the shareholder released parties is premised on the Court’s asserted lack of subject matter jurisdiction to impose the release on those who do not consent to it.

It is axiomatic that federal courts, including bankruptcy courts, have only the jurisdiction given to them by the Constitution or Congress. Purdue Pharma L.P. v. Kentucky, 704 F.3d 208, 213 (2d Cir. 2013). Under 28 U.S.C. § 1334(b), however, this Court has broad jurisdiction over matters that are related to the Debtors' property and cases. Section 1334 of the Judicial Code provides that district courts have original jurisdiction (which is referred by standing orders to the bankruptcy courts under 28 U.S.C. § 157(a)-(a)) over "all cases under title 11" 28 U.S.C. § 1334(a), and "all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28

U.S.C. § 1334(b).

This includes the power to enjoin claims of third parties that have a conceivable effect on the Debtors' estates. As noted by the Supreme Court in Celotex Corp. v. Edwards, 514 U.S. 300, 307-08 (1995), which involved a preliminary injunction of a third-party's right to pursue a third-party claim, "Congress did not delineate the scope of 'related to' jurisdiction, but its choice of words suggests a grant of some breadth." The Court found bankruptcy jurisdiction because the third-party's pursuit of the enjoined claim would affect or impede the debtor's reorganization. Id. at 312.

In this Circuit, "a civil proceeding is related to a title 11 case if the action's outcome might have any conceivable effect on the bankrupt estate. If that question is answered affirmatively, it falls within the 'related to' jurisdiction of the bankruptcy court. Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate. While 'related to' jurisdiction is not limitless, it is fairly capacious and includes suits between third parties that have an effect on the bankruptcy estate. An action is related to bankruptcy if the outcome could alter the debtor's rights,

liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt's estate." SPV OSUS, Ltd. v. UBS AG, 882 F.3d 333, 339-40 (2d Cir. 2017) (internal quotations omitted), citing Celotex Corp. v. Edwards, 514 U.S. at 307-08; Parmalat Cap. Fin. Ltd. v. Bank of Am. Corp., 639 F.3d 572, 579 (2d Cir. 2001); In re Cuyahoga Equip. Corp., 980 F.2d 110, 114 (2d Cir. 1992).

In SPV OSUS, the court found bankruptcy jurisdiction over third-party claims based on the conceivable possible legal effect of an indemnification or contribution right against the debtor, although the party that might assert those rights had not filed a proof of claim in the case. 882 F.3d at 340-42. That decision is not alone. The Second Circuit has extensively dealt with bankruptcy jurisdiction over actions to stay or prevent the assertion of third-party claims in bankruptcy cases, the most informative of which for present purposes is In re Quigley Co., 676 F.3d 45 (2d Cir. 2012).

In Quigley the court undertook a lengthy analysis of bankruptcy jurisdiction over the preclusion of third-party claims. It did so because of the parties' confusion over the extent of such jurisdiction arguably injected by Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-

Manville Corp.), 517 F.3d 52 (2d Cir. 2008), rev'd sub nom. Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009), which Quigley refers to as Manville III. Manville III left the impression, at least with the third-party claimant in Quigley, that the only source for jurisdiction to enter a coercive release of third-party claims and an injunction to support it was if the claim was "derivative" -- that is, derivative of the debtor's rights and therefore affecting the res of the debtor's estate. 676 F.3d at 53-54.

The point was somewhat cleared up in the Circuit's next Manville case, Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.), 600 F.3d 135 (2d Cir. 2010), referred to as Manville IV in the Quigley opinion, but Quigley addressed the asserted limitation head on.

In Manville III, a party that had brought a third-party claim against an insurer, notwithstanding the Manville Chapter 11 plan's injunction of claims against the insurer, asserted that the bankruptcy court did not have jurisdiction to enjoin the claim because it alleged a violation of an independent legal duty owed by the defendant, rather than a claim that was derivative of the debtor's claim. Quigley, 676 F.3d at 54. The Circuit disagreed that Manville III imposed this imitation on jurisdiction. Id. at 54-55, adding, "because [the third-party's] mistake as to the

nature of the jurisdictional inquiry under 28 U.S.C. § 1334(a) and (b) stems from a misunderstanding of our case law's treatment of derivative liability in the context of bankruptcy jurisdiction, we discuss our previous cases addressing this subject in some detail." Id. at 55.

After analyzing MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir. 1988), the court held that there was no independent jurisdictional requirement that to be barred by a plan a third-party claim must be derivative of the estate's rights. Id. Rather, the claim must affect the debtor's estate, id. at 56, and "Manville III did not work a change in our jurisprudence. After Manville III, as before it, a bankruptcy court has jurisdiction to enjoin third-party non-Debtor claims that directly affect the res of the bankruptcy estate: As in Macarthur, the salience of Manville III's inquiry as to whether [the third party's] liability was derivative of the debtor's rights and liabilities was that, in the facts and circumstances of Manville III, cases alleging derivative liability would affect the res of the bankruptcy estate, whereas cases alleging non-derivative liability would not." Id. (internal quotations and citations omitted). However, "Manville III did not impose a requirement that an action must both directly affect the estate and be derivative of the debtor's rights and

liabilities for bankruptcy jurisdiction over the action to exist." Id. at 57 (emphasis in the original).

After noting that Manville IV was consistent with this view, the court summed up: "It thus appears from our case law that, while we have treated whether a suit seeks to impose derivative liability as a helpful way to assess whether it has the potential to affect the bankruptcy res, the touchstone for bankruptcy jurisdiction remains 'whether its outcome might have any conceivable effect on the bankruptcy estate.' Cuyahoga, 980 F.2d at 114. This test has been almost universally adopted by our sister circuits, see Celotex Corp. v. Edwards, 514 U.S. 308 n.6 . . . (1995) (collecting cases), which is some instances have found bankruptcy jurisdiction to exist over non-derivative claims against third-parties." Id., citing EOP-Colonnade v. Faulkner (In re Stonebridge Techs., Inc.), 430 F.3d 260, 263-64, 267 (5th Cir. 2005); Dogpatch Props., Inc. v. Dogpatch U.S.A., Inc. (In re Dogpatch U.S.A., Inc.), 810 F.2d 782, 786 (8th Cir. 1987).

Thus, "[a] suit against a third party alleging liability not derivative of the debtor's conduct but that nevertheless poses the specter of direct impact on the res of the bankrupt estate may just as surely impair the bankruptcy court's ability to make a fair distribution of

the bankrupt's assets as a third-party suit alleging derivative liability. Accordingly, we conclude that where litigation of [the claimant's] suits against [the third party] would almost certainly result in the drawing down of insurance policies that are part of the bankruptcy estate . . . the exercise of bankruptcy jurisdiction to enjoin these suits was appropriate." Id. at 58.

I conclude that the third-party claims that are covered by the shareholder release under the plan, as I will further narrow that release in this ruling, directly affect the res of the Debtors' estates, including insurance rights, the shareholder released parties' rights to indemnification and contribution, and the Debtors' ability to pursue the estates' own closely related, indeed fundamentally overlapping, claims, and thus that bankruptcy subject matter jurisdiction to impose a third-party claims release and injunction under the plan exists.

Certain of the objectors cite Callaway v. Benton, 336 U.S. 132 (1949), for the proposition that there is no such jurisdiction. That decision, however, preceded 28 U.S.C. § 1334(b)'s jurisdictional grant, which, as discussed in Celotex, SPV OSUS, and Quigley, significantly broadened the jurisdictional scheme that existed before the Bankruptcy Code's enactment. In re Dow Corning Corp., 255 B.R. 445,

486-87 (E.D. Mich. 2001) (distinguishing Callaway on this basis), vacated on other grounds, In re Dow Corning Corp., 280 F.3d at 648. See also Howard C. Buschman, III & Sean P. Madden, "Power and Propriety of Bankruptcy Court Intervention in Actions Between Non-debtors," 47 Bus. Lawyer 913, 914-19 (May 1992).[7] See generally, Lynch v. Lapidem Ltd. (In re Kirwan Offices S.A.R.L.), 592 B.R. 489, 504-07 (S.D.N.Y. 2018), aff'd Lynch v. Mascini Hldgs. Ltd. (In re Kirwan Offices S.A.R.L.), 792 Fed. Appx. 99 (2d Cir. 2019).

Depending on the kinds of third-party claims covered by a plan's release and injunction of such claims, I conclude, therefore, that the Court has jurisdiction to impose such relief, based upon the effect of the claims on the estate rather than on whether the claims are "derivative," although if they are derivative that is a good sign that they affect the estate. Quigley, 676 F.3d at 52.

The objectors have also contested that the release of third-party claims under a plan violates the third-party

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[7] I will note that another case that the objectors rely on, In re Aegean Marine Petroleum Network, Inc., 599 B.R. 717 (Bankr. S.D.N.Y. 2019), in questioning the Court's jurisdiction to impose the release of a third-party claim, which cites Callaway v. Benton but discusses neither SPV OSUS nor Quigley, nevertheless acknowledges that where there is "a huge overlap between claims that [a debtor] is making against the parent . . . [and] the parent did not want to settle the claims made by [the debtor] unless the overlapping third-party claims were also barred," a third-party release was justified. Id. at 727.

claimants' rights to due process. There are two aspects to this objection. The first is not accepted by courts in this Circuit, which is that such a release is an adjudication of the claim. It is not. It is part of the settlement of the claim that channels the settlement funds to the estate. See Macarthur Co. v. Johns-Manville Corp., 837 F.2d at 91-92; Lynch v. Lapidem, 592 B.R. at 504-05; see also In re Millennium Lab Holdings II, LLC, 575 B.R. 252, 273 (Bankr. D. Del. 2017) ("An order confirming the plan with releases does not rule on the merits of the state law claims being released."), aff'd 591 B.R. 559 (D. Del. 2018), aff'd 945 F.3d 126 (3d Cir. 2019), cert. denied, Loan Tr. v. Millennium Lab Holdings, 140 S. Ct. 2085 (2020).

The other aspect of the due process objection goes to the extent and quality of notice provided regarding the proposed release. Under the amended plan, it is now clear, however, that only holders of claims against the Debtors are being deemed to grant the shareholder release, and it is equally clear, as discussed earlier, that holders of such claims received due process notice of the plan's intention to provide a broad release of third-party claims against the shareholders and their related entities related to the Debtors.

As set forth in that widespread notice, including

the press releases, short form publication notices, and short form notices sent, the proposed release was far broader than it is today in the amended plan. To argue that because it was more complicated then it somehow violated due process is equally incorrect.

The issue of what process is due requires a court to ask whether the notice was reasonably calculated under the circumstances to apprise interested parties of the pendency of the plan's proposed release and afford them an opportunity to present their objections. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). See also Elliott v. GM, LLC (In re Motors Liquidation Co.), 829 F.3d 135, 158 (2d Cir. 2016). As noted in Motors Liquidation, this requirement equally applies in bankruptcy proceedings, where whether notice satisfies due process turns upon what is reasonably known by the debtor of the party who would be affected by the action for which the debtor is seeking permission.

Based upon Ms. Finegan's testimony, holders of claims received sufficient notice of the proposed release. (Indeed, the media separately fostered the assumption, though incorrect, that the release was even broader, including of criminal liability.) And in fact there were multiple objections to the plan based upon its proposed

third-party release. The Debtors' compliance with the procedures described by Ms. Finegan, which also were well within the dictates of Bankruptcy Rule 3016 (which requires the prominent display of such release language in a proposed plan) was more than sufficient for due process purposes. See, e.g., Macarthur Co. v. Johns-Manville Corp., 837 F.2d at 94; Finova Cap. Corp. v. Larson Pharma., Inc., 2003 U.S. Dist. LEXIS 26681, at *26-27 (M.D. Fla. Oct. 6, 2003), aff'd Finova Capital Corp. v. Larson Pharma., Inc., 425 F.3d 1294 (11th Cir. 2005); In re Retail Grp., Inc., 2021 Bankr. LEXIS 547, at *51-57 (Bankr. E.D. Va. May 28, 2021); In re Otero Cty. Hosp. Ass'n, Inc., 551 B.R. 463, 471-72 and 478-79 (Bankr. D.N.M. 2016).

If someone can make the case after the fact that the notice that Ms. Finegan testified to was in fact not provided, or that they did not receive actual notice of the confirmation hearing and proposed release although the Debtors were aware of their specific claim, they would have the right to return and argue that they did not receive due process, as in Motors Liquidation, 829 F.3d at 135, but as far as the record before me is concerned, notice of the confirmation hearing and the plan's proposed third-party

claims release satisfied due process.[8]

The next objection is based on a bankruptcy court's alleged lack of constitutional power to issue a final order confirming a plan that contains a third-party claims release, as opposed to an alleged lack of bankruptcy jurisdiction to approve confirmation of such a plan under section 1334(b) of the Judiciary Code.

This issue was not addressed by the courts until fairly recently, but it has been resolved at length in two opinions that I will simply cite because their logic cannot be improved upon to establish that a proceeding to determine whether a Chapter 11 plan that contains such a release should be confirmed not only is a core proceeding under 28 U.S.C. § 157(b), but also is a fundamentally central aspect of a Chapter 11 case's adjustment of the debtor/creditor relationship and, therefore, "constitutionally core" under Stern v. Marshall, 564 U.S. 462 (2011), and its progeny. See In re Millennium Lab Holdings II, LLC, 945 F.3d 126, as well as the lower court opinions in that case, Opt-Out Lenders v.

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[8] On a somewhat related point, certain objecting states asserted that the creation by some of the Sacklers of a website that described their defenses to liability constituted an improper solicitation. The objectors ignore, though, that throughout the solicitation period they publicly proselytized their objections to the plan's release, which was widely described in the media. Neither activity violated my order approving the disclosure statement for the plan and confirmation procedures.

Millennium Lab Holdings II, LLC, 591 B.R. at 559; In re Millennium Lab Holdings II, LLC, 575 B.R. at 252.

Also on point is Lynch v. Lapidem, 592 B.R. 506, 509-12. See also In re Quigley Co., 676 F.3d at 51-52.

In its affirmance of Lynch v. Lapidem, the Circuit did not reach Judge McMahon's determinations regarding the existence of bankruptcy subject matter jurisdiction and the bankruptcy court's power to issue a final order under Article III of the Constitution with respect to this type of injunction. Lynch v. Mascini Holdings, Ltd., 792 Fed. Appx. at 102-04. Her logic was impeccable, however, in the context of, as here, a request for confirmation of a Chapter 11 plan, which is a proceeding central to the bankruptcy court's adjustment of the debtor/creditor relationship and "arising in" a case (as it would "have no existence outside of the bankruptcy," In re Motors Liquidation Co., 829 F.3d at 151), and "under" the Bankruptcy Code (11 U.S.C. §§ 1129 and 1123) for purposes of 28 U.S.C. § 1334(b). That traditional context is to be distinguished from a request under Fed. R. Bankr. P. 7065, incorporating Fed. R. Civ. P. 65, for a preliminary injunction of third-party claims, which Judge McMahon found in Dunaway v. Purdue Pharm. L.P., 619 B.R. at 55-57, to be based on only 'related to' jurisdiction under 28 U.S.C. § 1334(b).

Having addressed the jurisdictional, due process, and Stern v. Marshall objections, one still must decide, though, whether the Court has statutory or other power to confirm a plan with a third-party claim release and injunction pertaining to the shareholder released parties, as well as the merits of the settlement that is the quid pro quo for that release and injunction.

Almost every circuit has addressed those issues. The clear majority (the First, Second, Third, Fourth, Sixth, Seventh, Eleventh, and D.C. Circuits) have determined that such releases and injunctions under a plan are authorized in appropriate, narrow circumstances. See Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 984-85 (1st Cir. 1995); Deutsche Bank A.G. v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136, 141 (2d. Cir. 2005), and the cases cited therein from the Second Circuit, including the Macarthur Co. v. Johns-Manville Corp., 837 F.2d at 93-94, and In re Drexel Burnham Lambert Group, 960 F.2d at 293; In re Millennium Lab Holdings II, LLC, 945 F.3d at 133-40; Nat'l Heritage Found., Inc. v. Highbourne Found., Inc., 760 F.3d 344, 350 (4th Cir. 2014), cert. denied, 135 S. Ct. 961 (2015), and Menard-Sanford v. Mabey (In re A.H. Robins Co.), 880 F.2d 694, 700-02 (4th Cir. 1989); In re Dow Corning Corp., 280 F.3d at 656-58; Airadigm Communs. v. FCC

(In re Airadigm Communs., Inc.), 519 F.3d 640, 655-59 (7th Cir. 2008), and In re Ingersoll, Inc., 562 F.3d 856 (7th Cir. 2009); SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying), 780 F.3d 1070, 1076-79 (11th Cir. 2015), cert. denied, Vision-Park Props. V. Seaside Eng'g & Surveying, 577 U.S. 823 (2015); and In re AOV Indus., Inc., 792 F.2d 1140, 1153 (D.C. Cir. 1986).

Three circuits are on record that third-party claims releases are improper for a court exercising bankruptcy jurisdiction to approve. See Bank of New York Tr. Co., NA v. Off. Unsecured Creditors' Comm. (In re Pacific Lumber Co.), 584 F.3d 229, 252 (5th Cir. 2009); Resorts Int'l v. Lowenschuss (In re Lowenschuss), 67 F.3d 1394, 1401-02 (9th Cir. 1995); In re W. Real Estate Fund, 922 F.2d 592, 600 (10th Cir. 1990).

The following can be said about them, or the line of cases from those three courts, however. First, they are fundamentally based on the view that section 524(e) of the Bankruptcy Code precludes the grant of such a release. That section provides in relevant part, "[D]ischarge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity, for such debt." 11 U.S.C. § 524(e). This statutory reading has been effectively refuted, however. See, e.g., In re Airadigm

Communns.: ("If Congress meant to include such a limit [in section 524(e)], it would have used the mandatory terms 'shall' or 'will' rather than the definitional term 'does.' And it would have omitted the prepositional phrase 'on, or for, . . . such debt,' ensuring that 'the discharge of the debt of a debtor *shall* not affect the liability of another entity' -- whether a debtor or not. See 11 U.S.C. § 34 (repealed Oct. 1, 1979) ('The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankruptcy shall not be altered by the discharge of such bankruptcy.') (prior version of § 524(e)). Also, where Congress has limited the powers of the bankruptcy court, it has done so clearly.") 519 F.3d at 656; In re Dow Corning Corp., 280 F.3d at 657 (section 524(e) "explains the effect of a debtor's discharge. It does not prohibit the release of a non-debtor"). See also Macarthur Co. v. Johns-Manville Co., 837 F.2d at 91, and Lynch v. Lapidem, 592 B.R. at 504-05, which distinguish a bankruptcy discharge or a final determination on the merits from a settlement of claims.

Second, the Fifth Circuit observed in Pacific Lumber that "non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets" in cases concerning "global settlements of mass claims against the debtors and co-liable parties," 584 F.3d

at 252, citing a similar observation by the Fifth Circuit in Feld v. Zale Corp., 62 F.3d 746, 760-61 (5th Cir. 1995), thus suggesting that in a context like the plan before this Court, the Fifth Circuit might reach a different result.

I will note, further, that notwithstanding its reliance on Bankruptcy Code section 524(e) as precluding any third-party claim release, which the Ninth Circuit in Lowenschuss, 67 F.3d at 1401-02, and In re Am. Hardwoods, 885 F.2d 621, 623 (9th Cir. 1989), equated with a discharge, the Ninth Circuit has more recently held that a release of third-party claims based on actions taken in or related to the bankruptcy case could, in appropriate circumstances, be imposed in a plan, although such post-bankruptcy, pre-confirmation claims would be subject to the discharge, as well. Blixseth v. Credit Suisse, 961 F.3d 1074, 1081-85 (9th Cir. 2020).

Fourth, both Am. Hardwoods, 885 F.2d at 624-25, and W. Real Estate Fund, 922 F.2d at 599, recognized the propriety of imposing a preliminary injunction of third-party claims to "facilitate the reorganization process," leading one to ask why couldn’t such a stay become permanent if it was crucial to a reorganization process involving massive numbers of overlapping estate and third-party claims, in contrast to the peripheral third-party claims in

those two decisions, simply because it was opposed by a small number of objecting creditors, or just one?

In any event, W. Real Estate Fund, has been interpreted by a court in the Tenth Circuit as not standing for the proposition that section 524(e) of the Bankruptcy Code precludes all third-party releases but rather that section 105(a) of the Bankruptcy Code and other applicable bankruptcy law might, in appropriate circumstances, justify a release of third-party claims under different circumstances. In re Midway Gold, 575 B.R. 475, 505 (Bankr. D. Colo. 2017).

The minority circuits' reliance on Bankruptcy Code section 524(e) to preclude third-party claims releases under a plan, is also inconsistent with section 524 as a whole. Section 524(g) of the Bankruptcy Code specifically provides for certain third-party releases if certain conditions are met in a plan that addresses asbestos liabilities, including the affirmative vote of the affected class by a super-majority of 75 percent of those voting.

But more importantly, section 524(h)(1) of the Bankruptcy Code expressly provides that section 524(g) does not mean that plans that were confirmed before the enactment of that section that are generally in conformity with it are unlawful. 11 U.S.C. § 524(h)(1). The legislative history to

the amendment makes the same point:

> "[S]ection [524(h)] contains a rule of construction to make clear that the special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan of reorganization. Indeed, Johns-Manville and UNR firmly believe that the court in their cases had full authority to approve the trust injunction mechanism. And other debtors in other industries are reportedly beginning to experiment with similar mechanisms. The Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind. The Committee has decided to provide explicit authority in the asbestos area because of the singular and cumulative magnitude of the claims involved. How the new statutory mechanism works in the asbestos area may help the Committee judge whether the concept should be extended into other areas."

H.R. Rep. 103-834, 103d Cong., 2nd Sess. 12; 140 Cong. Rec. H10765 (Oct. 4, 1994).

A similar floor statement by Senator Heflin at 140 Cong. Rec. S14461-01 (Oct. 6, 1994) reads, "Finally, Mr. President, with respect to the senator's specific question, this Section applies to injunctions in effect on or after the date of enactment. What that means is, for any injunction that may have been issued under a court's authority under the Code prior to enactment, such an injunction is afforded statutory permanence from the date of enactment forward, assuming that it otherwise meets the qualifying criteria described earlier."

It appears clear, therefore, under well-reasoned caselaw as well as the Code itself that section 524(e) is not a statutory impediment to the issuance or enforcement of a third-party claim release under a plan in appropriate circumstances.

That raises the issue, however, what is the statutory or other source of power for such a release? This issue also has been addressed at the appellate level. See In re Airadigm Communs., Inc., where after determining that section 524(e) does not bar a third-party claims release, the Seventh Circuit stated,

> "The second related question dividing the circuits is whether Congress affirmatively gave the bankruptcy court the power to release third parties from a creditor's claims without the creditor's consent, even if 524(e) does not expressly preclude the releases. A bankruptcy court 'appl[ies] the principles and rules of equity jurisprudence,' Pepper v. Litton, 308 U.S. 295, 304 (1939), and its equitable powers are traditionally broad. United States v. Energy Resources Co, Inc., 495 U.S. 545, 549 (1990). Section 105(a) [of the Bankruptcy Code] codifies this understanding of the bankruptcy court's powers by giving it the authority to effect any 'necessary or appropriate' order to carry out the provisions of the bankruptcy code. Id. at 549; 11 U.S.C. § 105(a). And a bankruptcy court is also able to exercise these broad equitable powers within the plans of reorganizations themselves. Section 1123(b)(6) [of the Bankruptcy Code] permits a court to 'include any other appropriate provision not inconsistent with the applicable provisions of this title.' 11 U.S.C. § 1123(b)(6). In light of these provisions, we hold that this 'residual authority' permits the bankruptcy court to release third parties from

> liability to participating creditors if the release is 'appropriate' and is not inconsistent with any provision of the Bankruptcy Code."

519 F.3d at 657. See also In re Dow Corning Corp., 280 F.3d at 656-58; Lynch v. Lapidem, 592 B.R. at 511 ("[T]hird-party releases contained in a confirmed plan are subject to 11 U.S.C. §§ 1129(a)(1), 1123(a)(5) & (b)(6), 105, and 524(e). In other words, those releases flow from a federal statutory scheme. This statutory scheme reflects Congress's exercise of its preemption powers, which permit the abolition of [rights] to attain a permissible legislative object. Congress possesses exceedingly broad power [t]o establish uniform laws on the subject of [b]ankruptcies throughout the United States. By way of the Bankruptcy Code, Congress authorized wholesale preemption of state laws regarding creditors' rights and has delegated this preemptive power to the bankruptcy courts."); Adam J. Levitin, "Toward A Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime", 80 Am. Bankr. L.J. 1, 79-80, 83-84 (2006) (finding source for third-party releases and injunctions under a plan in federal common law as much as, if not more, than under section 105(a) of the Bankruptcy Code coupled with sections 1123(a)(5) and (b)(6)).

All courts considering whether to approve a third-party claims release under a plan have noted that such power

is subject to considerable scrutiny and may be exercised only in limited, rare cases. See, e.g., In re Metromedia Fiber Network, Inc., 416 F.3d at 143, and the cases cited therein. In deciding whether this Chapter 11 plan presents such a case, it is worthwhile to look first at the types of claims that courts find are properly subject to such a release. In re Quigley Co., 676 F.3d 45, again provides guidance, because it extensively addressed "derivative" claims not only in the context of subject matter jurisdiction, discussed earlier, but also when considering the types of third-party claims that can properly be released and enjoined under a plan, albeit in interpreting Bankruptcy Code section 524(g).

"Derivative claims" are widely understood to be claims by a third party that asserts injury to the corporate entity and requests relief that if granted would go to the corporate entity. See Donahue v. Bulldog Invs. Gen. P'ship, 696 F.3d 170, 176 (2d Cir. 2012).

The Second Circuit has spent substantial time interpreting what constitutes a true derivative claim, one that, though asserted by a third party, properly belongs to the debtor's estate, as opposed to being recoverable by the third party. In such disputes, the courts generally ask whether the relief sought by the third party would really

address only a secondary harm to that which flows primarily to the estate. See Marshall v. Picard (In re Bernard L. Madoff Inv. Secs. LLC), 740 F.3d 81 (2nd Cir. 2014); Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.) 855 F.3d 84 (2nd Cir. 2017). This inquiry supports the strong bankruptcy policy in favor of the ratable recovery by all similarly situated creditors from the debtor's estate, which as a concomitant principle requires that claims that purport to be independent of a remedy held by the debtor's estate but in fact arise from harm to the debtor be reserved only for the estate's benefit.

This is the type of claim that is included within the non-opioid third-party claims release under the plan. That release, as defined in the plan's "non-opioid excluded claim" definition, excludes "any cause of action that does not allege (expressly or impliedly) any liability . . . that is derivative of any liability of any Debtor or any of their Estates."

If, in fact, those types of claims were the only claims to be released, we would not be talking about a "third-party claims" release of the shareholder released parties. We would be talking about a release that clarifies and protects the estates from backdoor attacks through the assertion of purported third-party claims, that, in fact,

are estate claims to be shared ratably with the estate's creditors.

Instead, true third-party releases involve claims that are independent of the debtor's estate's claims at least on a legal basis, if not as a factual basis. See, e.g., In re Drexel Burnham Lambert Group, 960 F.2d at 288, 293 (release of securities laws claims against officers and directors proper); Macarthur Co. v. Johns-Manville Corp., 837 F.2d at 90-92 (claims of co-insured and direct claims of personal injury claimants against debtor's insurance properly enjoined as part of plan's resolution of claims against insurers); Cal. Dep't of Toxic Substances Control v. Exide Holdings, Inc. (In re Exide Holdings, Inc.) 2021 U.S. District LEXIS 138478 (D. Del. July 26, 2021) (claims against plan funders as potentially responsible parties properly enjoined as part of resolution of debtor's cleanup obligations); Cartalemi v. Karta Corp. (In re Karta Corp.) 342 B.R. 45, 50, 56-57 (S.D.N.Y. 2006) (claims against non-debtor affiliates and their fiduciaries).

But obviously not all independent legal claims are properly covered by such a release if based on simply having some relationship to the debtor, a clear example being a third party's guaranty of a debtor's obligation. Quigley helps to sort out the degree of the necessary relationship.

There, the party relying upon a plan's third-party claims release argued that because the claim against it would not have arisen but for the debtor, because the debtor distributed its products, it should be covered by the release. 676 F.3d at 59-60. The claimant argued otherwise, and the Circuit agreed with it. Id. at 60-61.

The court concluded that a "but for" test creates too much of an "accidental nexus" to the bankruptcy estate and that instead the third-party claim, to be subject to the plan's release and injunction, must arise "as a legal consequence" of the debtor's "conduct or the claims asserted against it must be a legal cause of or a legally relevant factor to the third party's alleged liability." Id. at 60; see also id. at 61 (channeling authority limited "to situations in which the third party's relationship with the debtor is legally relevant to its purported liability [to the claimant]"). See also Cont'l Cas. Co. v. Carr (In re W.R. Grace & Co.), 900 F.3d 126, 136-37 (3d Cir. 2018) (claim need not be directly derivative of the debtor's rights; instead, "[t]he proper inquiry is . . . to determine whether the third-party's liability is wholly separate from the debtor's liability or instead depends on it").

Again, the discussion in Quigley, as well as in W.R. Grace, came in the context of interpreting the limits

of Bankruptcy Code section 524(g)'s release and injunction of third-party claims; however, the need to limit third-party claims releases and injunctions generally to such closely related, though independent, claims is a consistent theme throughout the case law, and it is reasonable therefore to be guided by the section 524(g) cases. See, e.g., In re Karta Corp., 342 B.R. at 55-57 (relying on identity of interest between debtors and non-debtor released parties); In re Dow Corning Corp., 280 F.3d at 658 (noting identity of interest between the debtor and third-party claimants).

To properly be subject to a third-party claims release under a plan, therefore, the third-party claim should be premised as a legal matter on a meaningful overlap with the debtor's conduct. Otherwise, the release would be too broad and would cover, for example, a claim against one of the Sacklers, some of whom are doctors, for negligently prescribing OxyContin to a patient. On the other hand, given a causal legal dependence on the Debtor's conduct, or a legally meaningful relationship with the debtor's conduct, a third-party claim is sufficiently close to the claims against the debtor to be subject to settlement under the debtor's plan if enough other considerations support the settlement.

So, while I firmly believe that I have subject matter jurisdiction, that the Debtors have satisfied due process, that I have the power to issue a final confirmation order under Article III of the Constitution, and that there is a sufficient source of power in the Bankruptcy Code itself, in sections 105(a) and 1123(a)(5) and (b)(6), as well as in the Court's inherent equitable power, I will require section 10.7(b) of the plan, which provides for the release of third-party claims against the shareholder released parties, to be further modified to state that a Debtor's conduct, or a claim asserted against the Debtor, must be a legal cause of the released claim, or a legally relevant factor to the third-party cause of action against the shareholder released party, for the third-party claim to be subject to the release.

On the other hand, having read the objecting states' complaints against the Sacklers, which, as noted not only by me but also by Judge McMahon in Dunaway v. Purdue Pharm. L.P., 619 B.R. at 50, essentially dovetail with the facts of the claimants' third-party claims against the Debtors, such third-party claims would be properly covered by such a revised release and injunction.

This still leaves whether under the remaining applicable standards and the facts of these cases the plan's

third-party claims release in favor of the shareholder released parties should be imposed. Those standards vary among the circuits. In In re Metromedia Fiber Network, Inc., the Second Circuit listed a number of circumstances in which courts have exercised their power to impose such a release under section 105(a) of the Bankruptcy Code, observing that non-debtor releases have been approved when the release is "important" to the plan, the estate receives substantial consideration in return, the enjoined claims would be channeled to a settlement fund rather than extinguished, the released claims would otherwise indirectly impact the debtors' reorganization by way of indemnity or contribution, and the plan otherwise provided for the full payment of the enjoined claims. 416 F.3d at 141-42.

The court went on to state, however, that "this is not a matter of factors or prongs" and further that "[n]o case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique." Id. at 142. It also cautioned that such releases can be abused, especially if they are for insiders, and need to be supported by sufficient findings by the bankruptcy court. Id.

The Third Circuit has used a similar set of factors with perhaps one important difference. As

summarized in In re Exide Holdings, Inc., 2021 U.S. Dist. LEXIS 138478, at *44-45: "To grant non-consensual releases a court must assess 'fairness, necessity to the reorganization' and [make] specific actual findings to support these conclusions. Cont'l Airlines, 203 F.3d at 214. These considerations might include whether: '(i) the non-consensual release is necessary to the success of the reorganization; (ii) the releasees have provided a critical financial contribution to the debtor's plan; (iii) the releasees' financial contribution is necessary to make the plan feasible; and (iv) the release is fair to the non-consenting creditors, i.e. whether the non-consenting creditors received reasonable compensation in exchange for the release.' In re Spansion, Inc., 426 B.R. 114, 144 (Bankr. D. Del. 2010)."

The Fourth, Sixth, and Eleventh Circuits have applied a similar multifactor test: there is an identity of interest between the debtor and the third-party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the debtor's estate; the non-debtor has contributed substantial assets to the reorganization; the injunction is essential to the reorganization -- namely, the reorganization hinges on the debtor being free from indirect

suits against parties who would have indemnity or contribution claims against the debtor; the affected class or classes have voted overwhelmingly to accept the plan; the plan provides a mechanism to pay for all, or substantially all, of the claims in the class or classes affected by the injunction; the plan provides an opportunity for those claimants who choose not to settle to recover in full; and the bankruptcy court made a record of specific factual findings that support its conclusions. Behrmann v. Nat'l Heritage Found., Inc., 663 F.3d 704, 712 (4th Cir. 2011) (noting, however, that not all factors are required in each case); In re Dow Corning Corp., 280 F.3d at 658; In re Seaside Eng'g & Surveying, 780 F.3d at 1079.

The Seventh Circuit has used a broader standard, although also noting the potential for abuse, as well as the fact-based nature of the inquiry: whether the release is narrowly tailored, not blanket, whether there has been a finding that the release was an essential component of the plan, whether it was the fruit of long-term negotiations, and whether it was achieved by the exchange of good and valuable consideration that will enable unsecured creditors to realize distributions in the case. In re Ingersoll, Inc., 562 F.3d at 865.

Again, according to Metromedia Fiber, none of

these factors is dispositive, but they do need to be considered, the release must be supported by factual findings in the record, and the release must be requested in the context of unique circumstances and necessary to the plan.

Certainly the circumstances of these cases are unique. Every Chapter 11 case has its own difficulties, but I believe these cases are the most complex, given the issues before the parties and ultimately the Court, that I have handled, and frankly that the courts under Chapter 11 have handled. At least that view is shared by the parties to these cases, who were represented by very capable and experienced counsel.

The release of the shareholder released parties under the plan as amended also is narrowly tailored and as discussed above will need to be further narrowed.

Again for reasons that I've already stated, it is also clear that the monetary contributions by the Sacklers and their related entities are critical to confirmation of the plan. Without the settlement payments, I find that the plan would unravel, including the complex interrelated settlements that depend upon the payments being supplied under the settlement in addition to the non-monetary consideration under it.

Not every shareholder released party is necessarily going to make a specific payment under the plan, but the Sackler family members are obligated to cause the payments to be made, and the relationships among the shareholder released parties are sufficiently close to lead to the conclusion that the aggregate settlement payment hinges on each being released. Understandably the shareholder released parties are not going to agree to provide the consideration under the settlement without receiving the shareholder release in return.

The plan also has been overwhelmingly accepted, including by the classes affected by the third-party claims release, by well above the 75 percent supermajority in section 524(g) of the Bankruptcy Code. Indeed, over 95 percent of the large number of creditors voting have accepted the plan, including in the objectors' classes.

It is also clear that the amount being paid under the settlement is substantial. As I noted earlier, not only is it substantial in dollar terms, I believe that it is the largest amount that shareholders have ever paid in such a context of these types of third party claims and closely related claims for piercing the corporate veil, alter ego, and breach of fiduciary duty/failure to supervise. Moreover, the non-monetary consideration under the

settlement also is substantial, including the agreement to allocation by charities to opioid abatement valued at least at $175 million, resolution of naming rights, and the public document depository.

Objectors have argued that in the light of either the aggregate amount of claims asserted against Sacklers or the aggregate amount of their wealth, the settlement sum is not substantial. I've considered those points carefully. The Sackler settlement does not provide anything close to enough to pay for all or substantially all of the asserted claims of the classes affected by the third-party claims release. The United States' claim alone, for example, will recover only a small fraction of its allowed claim, and it is fair to assume that if the other claims were liquidated they, too, would not be paid in full. In addition, the settlement, although clearly substantial in dollars, leaves the Sackler family members in the aggregate with substantial wealth.

On the other hand, neither a defendant's wealth nor the amount of claims asserted against it should dictate the fairness of a settlement without considering the claims' merits, the costs and delay of continued litigation, and risks relating to the collectability of any eventual judgments.

More relevant than the prospect of full payment, therefore, is the Third Circuit's focus on the fairness of the settlement to the third-party claimants. In re Exide Holdings, Inc., 2021 U.S Dist. LEXIS 138478, at *44-45.[9] That issue can be assessed in two ways: first, the Court's analysis, based on the evidence, of the factors for and against the settlement and, second, based on the process leading to the settlement -- that is, whether it was conducted at arms-length by well-informed and well-represented parties whose interests were aligned with the third parties whose claims would be released, as well as whether those parties and the overwhelming number of parties affected by the settlement, support it.

I therefore have analyzed the fairness of the settlement from the perspective of the third-party claimants in comparison to the likely result if they were instead able to separately pursue their third-party claims.

This analysis in large measure overlaps the

[9] Courts have analogized the power to compel a third-party claims release under a plan to the equitable doctrine of marshalling. In re Dow Corning Corp., 280 F.3d at 656; In re A.H. Robbins Co., 880 F.2d at 701 ("A creditor has no right to choose which of two funds will pay his claim. The bankruptcy court has the power to order a creditor who has two funds to satisfy his debt to resort to the fund that will not defeat other creditors."). This approach similarly focuses the Court on the value of the third-party claim, taking into account all relevant factors, not just the size of the asserted claim or the target's net worth in a vacuum.

analysis of the merits of the Debtors' estates' settlement of certain of their claims against the shareholder released parties. This is because, as noted, the third-party claims being released under the settlement are based on essentially the same facts as the Debtors' veil piercing, alter ego, and breach of fiduciary duty/failure to supervise claims.

Having considered the complaints filed against the Debtors and certain of the Sacklers by the objecting states, their claims ultimately derive from the Debtors' conduct to the extent that as a legal matter one or more of the Sacklers can be said to have directed it or have had the knowledge and power to have directed it but failed to do so. As far as the gravamen or the proof that would need to be shown, I've not gone through every state's applicable law on this point, but I will note that the main cases that they have cited -- Grayson v. Nordic Const., Co., 599 P.2d 1271 (Wash. 1979), and State v. Ralph Williams, N. W. Chrysler Plymouth, Inc., 553 P.2d 423, 439 (Wash. 976) -- found individual liability based upon the controlling shareholder's personal direction, including fraud committed by the corporation through the shareholder, of many of the unlawful acts and practices taken by the corporation.

The Sacklers therefore would raise the same defenses to these claims (to the extent that they would

belong to the third party claimants instead of to the Debtors) as they would to the estates' closely similar claims: all would argue that many of the claims pre-date 2007 and are barred by prior settlements or statutes of limitations; most of the shareholder released parties would argue that they never served on Purdue's Board, did not otherwise engage in decision-making for Purdue, and that their ability to control Purdue, if they exercised their shares along with their family members, does not, standing alone, suffice to ascribe liability; and the Sacklers who were on Purdue's Board would argue that the evidence does not show their involvement sufficiently in Purdue's wrongful conduct, such as the conduct admitted by it in the October 2020 DOJ settlement, and would point in support to the OIG and ADD certifications, although as I've discussed, they still face substantial legal risk on such claims.

As I've also discussed, moreover, there are serious collection issues pertaining to any judgment against shareholder released parties. These issues are exacerbated by the inevitable competition not only among all of those who assert third-party claims against the shareholder released parties (and it is noteworthy that none of these claims has been identified as being based on wrongful conduct specifically aimed at the claimant, as opposed to at

all claimants), but also from the estates' claims. Indeed, as noted, the estates' fraudulent transfer avoidance claims, which the third-party claimants clearly would not be able to pursue on their own behalf, probably would have the best chance of material success among all of the claims against the shareholder released parties.

The issue of collection is two-fold. First, because of the dispersal of the Sacklers' wealth, including (x) among many different people or family groups, including outside of the U.S. and (y) in allegedly spendthrift trusts, including, again, outside of the U.S., recovery on judgments would be difficult, especially since the generally well-recognized fraudulent transfer exception to the integrity of U.S. spendthrift trusts would not be available to creditors that would not have standing to pursue fraudulent transfers for themselves because they would be pursued by the estates for the benefit of all creditors.

Second, as I've discussed, without the releases the plan would unravel and the Debtors' cases would likely convert to cases under Chapter 7 of the Bankruptcy Code. I've already found that in a liquidation, unsecured creditors would probably recover nothing from the Debtor's estates, as set forth in the unrefuted liquidation analysis by Mr. DelConte. Under that analysis, even in the less

likely “best case” scenario, they would receive no more than their pro rata share of $699 million, which would be small.

I've already gone through the dilutive effect resulting from conversion of these cases to Chapter 7. Claims that under the plan are to be resolved by agreed multi-billion-dollar payments for abatement, and thus do not require being determined on the merits, would then be contested, as would the personal injury claims. The contests would be extraordinarily expensive and time-consuming, and, after being determined, the resulting claims would likely not only receive zero from the Debtors’ estates but also, because of their collective size, only a small pro rata share of any recovery from the shareholder released parties.

Collectively, the states and territories filed proofs of claims in these cases aggregating at least $2.156 trillion. The share of that sum for the objectors who have attacked the plan’s third-party claims release is roughly 450 billion, or less than 21 percent. If you factor in the other, non-state claimants, many of which, like the City of Seattle, would clearly assert third-party claims, too, as well as the Debtors’ estates’ claims against the Sacklers and their related entities, the dilutive effect upon any individual third-party claimant’s recovery from the

shareholder released parties is clear. And I have no doubt that a Chapter 7 trustee and at least the other governmental entities would pursue similar claims against the shareholder released parties (in addition to a Chapter 7 trustee's pursuit of the estates' avoidance claims). They would never permit the objecting states, which are similarly situated to them, to win a litigation race.

I therefore conclude that if I denied confirmation of the plan, the objectors' aggregate net recovery on their claims against the Debtors and the shareholder released parties would be materially less than their recovery under the plan.

This conclusion is strongly supported by the second, process-related inquiry into the fairness of the settlement from the third-party claimants' perspective that I have identified. As discussed earlier, the negotiations of the Sackler settlement were clearly arms-length. The Sacklers were on one side, and everyone else was on the other. The Sacklers and their related entities were required to provide extraordinary disclosure regarding (x) their conduct related to Purdue and (y) their assets and liabilities, at least as much, and often more, than would be reasonably expected if they themselves sought bankruptcy relief (which for many of the Sacklers and most of their

related entities would not be under the U.S. Bankruptcy Code). The parties investigating and negotiating against the Sacklers were very well represented and aligned with the objectors; indeed, in addition to the Official Unsecured Creditors Committee, those parties were fellow state attorneys general and other governmental representatives, many of whom have been in the forefront pursuing Purdue and its shareholders for years. Lastly, the settlement was negotiated in not one but two mediations conducted by superb mediators.

Arguably the "best interests" analysis under section 1129(a)(7) of the Bankruptcy Code overlaps with the foregoing assessment of the fairness of the plan's third-party claims release to the objectors. The objectors have argued that the plan does not satisfy section 1129(a)(7) of the Code because in a Chapter 7 liquidation of the Debtors they would have two sources of recovery -- from the Debtors' estates and separately from the shareholder released parties.

I have said that section 1129(a)7) "arguably" applies to this objection because the section's plain meaning may well not contemplate it. As previously quoted, section 1129(a)(7) provides that for the holder of a claim that has not accepted its treatment under a plan, such

holder must be projected to "receive or retain under the plan on account of such claim . . . property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date." 11 U.S.C. § 1129(a)(7) (emphasis added). As a matter of grammar, therefore, the comparison required by section 1129(a)(7) apparently is between the amount that the objecting creditor would receive under the plan on account of its claim and what it would "so" receive -- that is, also on account of its claim -- if the debtor were liquidated under chapter 7. It would not, therefore, require analysis of the claimant's rights against third parties.

I recognize that the interpretation of section 1129(a)(7) by two of my colleagues, whom I greatly respect, was to the contrary in In re Ditech Holding Corp., 606 B.R. at 610-14, and In re Quigley Co., 437 B.R. at 145. In deciding, however, that when conducting the "best interests" test the court should take into account a claimant's recovery from a third-party source that is precluded by the plan if one can make a reasoned determination of the recovery on that third-party claim, neither of those decisions addresses the plain meaning argument that I've just described (and, moreover, the applicability of section

363(o) of the Bankruptcy Code in a Chapter 7 liquidation when it was found inapplicable under the plan[10] in the Ditech case would have placed the focus on third-party claims in a way absent here).

I have not limited my ruling, though, to the foregoing plain meaning interpretation. I have instead assessed, based on the record of the confirmation hearing, what I believe would be recovered by the objectors if the Debtors were liquidated in Chapter 7, both on account of their claims against the Debtors and on account of their third-party claims. And based on that assessment, I have concluded that under the plan they would recover at least as much as their recovery in a hypothetical Chapter 7 case, indeed materially more.

In Quigley, 437 B.R. at 145, and Ditech, 606 B.R. at 615, the courts stated that the hypothetical recovery from non-debtor sources should be included in the "best interests" analysis if it was neither speculative nor incapable of estimation. The Debtors have argued that here such a recovery would be too speculative.

In Quigley the court relied on various admissions

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[10] Section 363(o) of the Code, which Ditech found did not apply in a Chapter 11 plan context though it would in Chapter 7, id. at 595, expressly preserves the types of third-party claims that the plan would have released. 11 U.S.C. § 363(o).

by the debtor regarding an over 20-year history of settlements of similar claims that such a recovery, which would be barred by the plan, was not speculative. 437 B.R. at 146. In Ditech, the court concluded that the debtors had not carried their burden to show that the claims that would be barred under the plan in return for a small pro rata distribution from a settlement fund could not be estimated or that the fund was a reasonable settlement, in part because the limited evidence offered by the debtors suggested to the contrary. 606 B.R. at 620-21. The objecting states have suggested that a similar failure of proof exists here given the absence of expert testimony regarding the value of the third-party claims against the shareholder released parties.

It is true that there was no such expert testimony, but given the evidence regarding the strengths and weaknesses of the claims, including the cost of pursuing them, the risks of collection, and the dilutive effect of all of the other litigation that would be pursued by all of the other creditors in these cases, including all of the other states and governmental entities who are otherwise agreeing to the plan that would have the same types of third-party claims, as well as the Chapter 7 trustee on behalf of the estate, I conclude that no additional evidence

is required.

Unlike in Quigley, there is a paucity of any post-2007 settlement history here of third-party claims against the Sacklers and their related entities, with the exception of the Sacklers' postpetition payment of $225 million to the United States in respect of the civil claims that were the subject of their postpetition settlement with the DOJ; the Sacklers' settlement shortly before the bankruptcy petition date with the State of Oklahoma for $75 million;[11] and the fact that the Sacklers paid nothing to the Sate of Kentucky but obtained a release under Purdue's $24 million December 2016 settlement with the State of Kentucky,[12] which amounts reasonably compare to the proposed recoveries of the objecting states under the plan. And unlike in Ditech, no one has tried to hide the Sacklers' settlement history.

In this context, the merits of the plan's settlement of the third-party claims can properly be undertaken by the Court not only in the light of that history but also the other evidence that I have already

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[11] Attorney General Hunter Announces Historic $270 Million Settlement with Purdue Pharma, Office of the Oklahoma Attorney General (May 28, 2019), http://oag.ok.gov/articles/attorney-general-hunter-announces-hitoric-270 -million-settlement-purdue-pharma-200-million.
[12] Settlement Agreement and General Release, Commonwealth of Kentucky, ex rel. Jack Conway, Attorney General, and Pike County, Kentucky v. Purdue Pharma, L.P., et al., Civil Action No. 07-Cl-013303 (Ky. Ct. App. Dec. 22, 2015) (N0. 1606).

discussed at length.[13] Accordingly, for the same reasons that that the plan's settlement/third-party claims release of the shareholder released parties is fair to the objectors, the plan also meets Bankruptcy Code section 1129(a)(7)'s "best interests" test under a broad construction of that test. Having a second fork in the pie does not help, it hurts because of the resulting "battle of the century" among the creditor parties, as well as the Chapter 7 trustee.

The last argument made by the objecting states, as well as the City of Seattle, is that the plan's nonconsensual third-party release and injunction violates their sovereignty and police power.

There is, however, no such bar or exception under the Bankruptcy Code.

In certain carefully delineated instances, the Bankruptcy Code and the Judicial Code recognize the police power of states and other governmental units, but only in those limited contexts. Thus, in section 362(b)(4) of the Code, Congress provided a limited exception to the automatic

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[13] It is worth noting that, unlike here, both Quigley, 437 B.R. at 126-29, and Ditech, 606 B.R. at 624-25, found that the proposed settlements of the third-party claims at issue were not negotiated by those whose interests were aligned with the third-party claimants and that this flaw meant that the plan either was not in good faith for purposes of section 1129(a)(3) of the Bankruptcy Code or that the settlement was not fair and reasonable.

stay under section 362(a) "of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police or regulatory power, including enforcement of a judgment other than a monetary judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's . . . police or regulatory power." 11 U.S.C. § 362(b)(4). By its own terms, however, section 362(b)(4) does not except governmental units' actions to enforce a monetary judgment from the automatic stay under section 362(a); nor does the exception apply to governmental units' actions to obtain or enforce a lien against the estate. See Ohio v. Kovacs, 469 U.S. 274, 283 n.11 (1985); SEC v. Brennan, 230 F.3d 65, 71-72 (2d Cir. 2000); 3 Collier on Bankruptcy ¶ 362.05[5][b].

Similarly, 28 U.S.C. § 1452(a) precludes the removal, which is generally permitted under that section when the district court has bankruptcy jurisdiction under 28 U.S.C. § 1334, of a claim or cause of action in a civil proceeding to enforce a governmental unit's police or regulatory power.

The scope of the "police or regulatory power" in those exceptions has not been decided definitively by the Second Circuit. As noted in the thorough discussion in

People of Cal. V. GM L.L.C. (In re GM L.L.C. Ignition Switch Litig.) 69 F.Supp.3d 404 (S.D.N.Y. 2014), the definition of police power for purposes of these exceptions has always recognized a distinction between "whether the governmental action relates primarily to the government's pecuniary interest in the debtor's property or to matters of public health and welfare." Id. at 410 (internal quotation and citation omitted). After Bd. of Governors of Fed. Reserve Sys. v. MCorp. Fin., Inc., 502 U.S. 32, 40 (1991), courts' focus turned from assessing whether the governmental unit was truly intending to deter harmful conduct rather than seeking to benefit the government financially, to an objective inquiry into the purpose of the law that the governmental unit was attempting to enforce. In re GM L.L.C. Ignition Switch Litig., 69 F. Supp. 3d at 410-12. Thus the fact that a governmental unit seeks a money judgment is not enough to take its claim out of the police power exception, and at least for many of the governmental objectors' causes of action against shareholder released parties, therefore, the "police power exception" would apply.

But, again, that exception is a limited one. It is well recognized -- indeed the 10th Circuit states that it is a matter of hornbook law -- that actions excepted from the automatic stay, including under the police or regulatory

power, may be subject to injunctive relief under section 105(a) of the Bankruptcy Code. In re W. Real Estate Fund, 922 F.2d at 599; In re Commonwealth Cos., Inc., 913 F.2d 518, 527 (8th Cir. 1990). See also 3 Collier on Bankruptcy ¶ 362.05[5][d]; H.R. Rep. 95-595 95th Congress 1st Sess. (September 8, 1977) ("Subsection (b) lists five exceptions to the automatic stay. The effect of an exception is not to make the action immune from injunction.").

And where police and regulatory power or state sovereignty generally is not specifically recognized in the Bankruptcy Code, Congress' power under Art. I cl. 8 of the Constitution to enact uniform bankruptcy laws overrides it. See, e.g., Cty. of San Mateo v. Peabody Energy Corp. (In re Peabody Energy Corp.), 958 F.3d 717, 724-25 (8th Cir. 2020) (chapter 11 plan discharges governmental units' public nuisance claim); see also In re Fed'l-Mogul Global, 684 F.3d at 364-65, 367-70; In re Airadigm Communs., Inc., 519 F.3d at 653-54. Plan injunctions have previously been imposed over governmental units' police or regulatory power. See, e.g., In re Exide Holdings, Inc., 2021 U.S. Dist. LEXIS 138478, at *51 (California Department of Toxic Substances Control enjoined from pursuing claims against plan funder); see also In re Airadigm Communs., Inc., 519 F.3d at 557 (third-party claims release of plan funder applied to

F.C.C.); cf. In re Dow Corning Corp., 280 F.3d at 648 (plan's third-party claims release could be applied to United States as claimant under Medicare Secondary Payer Program and Federal Medicare Recovery Act; remanded for findings in accordance with opinion). Such an injunction is most clearly within the ambit of traditional bankruptcy power when it pertains primarily to the collection of money on claims that overlap claims against a debtor's estate, not to enforcement of states' rights otherwise to regulate conduct.

The objecting states' and Seattle's police power and parens patriae arguments therefore should be considered only in evaluating the fairness of the settlement to them as governmental units, not as a bar to the settlement. Given the limited scope of the plan's release of the shareholder released parties and those parties' agreement to no longer be involved with the Debtors or NewCo except to perform the settlement, as a practical matter the plan only limits the objecting states' remedies against the shareholder released parties to collect money on account of their past conduct. As to that limitation, moreover, all of the states, including the objecting states, have agreed to the public/private allocation and the NOAT allocation under the plan for abatement purposes. Indeed, during the

confirmation hearing, counsel for the objecting State of Washington lauded the constructive nature of the NOAT allocation and the plan’s proposed abatement procedures guidelines. Further, I have found that if the objecting governmental units were carved out of the release, the plan would fail, the Debtors would likely liquidate, and the objectors would collect materially less money from the Debtors and the shareholder released parties in the aggregate, as would the other states and governmental entities and non-public unsecured creditors who support the plan’s confirmation.

The objecting states and Seattle nevertheless contend that the plan deprives them of establishing a sufficient civil remedy for the released claims. And sending a message to others who might similarly be shown to have improperly engaged in conduct that would subject them to liability certainly can be a valid aspect of the police power.

Should that interest, though, defeat a plan that 79 percent of their sister states support, more than 96 percent of the other governmental entities and Native American Tribes support, and more than 95 percent of the other claimants support? Should that interest deprive the other creditors of their assessment of the merits of the

settlement, with which this Court's analysis agrees?

As noted earlier, moreover, the plan does not just address claims against the Debtors and the Sacklers for money. It not only deprives the Sacklers of all their interest in the Debtors and requires them to cause the delivery of $4.5 billion to the creditors, primarily for abatement purposes. It not only has been negotiated in a context that has subjected them to national opprobrium. It also addresses their naming rights and includes the Sacklers and the Debtors' agreement to provide the comprehensive public document depository, including waivers of the attorney-client privilege, for future analysis by the federal government, states, and others.

Ms. Conroy, who has been pursuing Purdue and the Sacklers for as long and as diligently as anyone, in fact testified that the document depository is perhaps the most important aspect of the settlement, even more important than the billions of dollars being paid by the shareholder released parties. It is especially important given the public interest raised by the objecting states. It will provide far more transparency to the conduct of Purdue and those it did business with and those who regulated it, including perhaps some of these very objectors, including the state of Connecticut where Purdue's headquarters is

located, as well as, of course, the federal government, than would renewed litigation and any eventual trials against various members of the Sackler family.

The record to be established by the public document depository is important for the continued pursuit of lawsuits against other parties in this industry, and it will guide legislatures and regulators about how to better address other companies with lawful products that also are incredibly dangerous.

Similarly, the plan's mandated use of most of its anticipated distributions for abatement purposes, the parties' agreement on parameters for abatement, and the required periodic reporting on those efforts should guide the public's consideration of the efficacy of abatement measures going forward.

The aspects of the plan that regulate NewCo's future governance and conduct also, as I've noted, should provide a model for further self-regulation of similar companies or regulation by governmental entities.

I conclude therefore that the objectors' expressed public interests in opposing the settlement are outweighed by the foregoing considerations.

Each of the four members of the Sackler family who testified during the evidentiary hearing was asked if they

would apologize for their role and conduct related to Purdue. Their reactions, typically for an unhappy family, varied. None would give an explicit apology, which I suppose is understandable given the legal risks faced, although I will note that in a somewhat similar context I have received a profound apology to victims of misconduct.

One of the witnesses, Richard Sackler, did not accept any level of responsibility. The other three with differing degrees of emotion stated their regret for what their companies had done. A forced apology is not really an apology. So we will have to live without one unless apologies follow the plan's confirmation.

The writer Stendahl wrote that most people do not forgive, they just forget. But given the nature of this settlement, including the document depository, forgetting should be impossible unless by choice. To me, the elements of the settlement, taken together, more than justify the admittedly serious implications of overriding the objecting states' and Seattle's rights.

So, assuming that the changes to sections 5.8 and 10.07(b) of the plan that I outlined will be made, as well as one other change that I will address in a moment, I will confirm the plan. I do so agreeing with the Official Unsecured Creditors Committee and everyone else on the other

side of the table from the Sackler family, including the Debtors, that I wish the plan had provided for more, but I will not jeopardize what the plan does provide by denying its confirmation.

The other change to the plan that I believe is required involves section 11.1(e), which provides that those who would prosecute a cause of action against released parties based on its being a "non-opioid excluded claim," which by definition truly is not a derivative claim, nevertheless must obtain leave from the bankruptcy court to do so. The provision is intended to protect the estates and released parties from having to go to other courts to litigate whether someone is usurping the estates' claims and thus violating the release.

Consistent with my remarks to counsel for certain Canadian municipalities and First Nations during the confirmation hearing, that provision should be clarified to apply only to a causes of action that colorably are derivative and therefore would belong to the Debtors' estates. Thus, for example, if a cause of action seeks to avoid a fraudulent transfer made by a non-Debtor, the plaintiff should not have to obtain permission under section 11.1(e) from the bankruptcy court to bring it.

I will enter an order confirming the plan if it is

amended as required hereby, which order can generally be in the form of proposed confirmation order previously circulated to the parties and provided to chambers.

Dated: White Plains, New York
September 17, 2021

/s/Robert D. Drain
United States Bankruptcy Judge

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Case No. 19-23649-rdd
4 - x
5 In the Matter of:
6
7 PURDUE PHARMA L.P.,
8
9 Debtor.
10 - x
11
12
13 United States Bankruptcy Court
14 300 Quarropas Street, Room 248
15 White Plains, NY 10601
16
17 November 17, 2020
18 10:09 a.m.
19
20
21 B E F O R E :
22 HON ROBERT D. DRAIN
23 U.S. BANKRUPTCY JUDGE
24
25 ECRO: UNKNOWN

1 which they have already pledged to dedicate 100 percent to
2 the opioid crisis, exactly as I told you was our goal at the
3 first day hearing 427 days ago and with which you and many
4 others, including these same objectors, have agreed again
5 and again.
6 I respectfully suggest that the Debtors have far,
7 far more than satisfied their burden of demonstrating that
8 the settlement, both for what it accomplishes and what it
9 sends is in the best interest of these estates.
10 THE COURT: Okay.
11 MR. HUSNICK: Your Honor, with respect to order of
12 operations, if it makes sense since I'm pretty confident the
13 DOJ is in full support of the motion, and I know that the
14 Court always wants to hear from supporters first and then,
15 you know, the order may get complicated after that, you
16 know, given that, you know, there's an objector. If it
17 makes sense, we thought it might make sense for the DOJ to
18 go next. But obviously, again, as the old saying, I'm just
19 a guy and you're the Court, so whatever, of course, is the
20 Court's preference.
21 THE COURT: No, that's fine. I'm happy to hear
22 from Mr. Fogelman, although he's already confirmed that the
23 order as proposed is acceptable, even though it modifies
24 arguably the terms of the agreement. I have a logistical
25 issue too. This hearing's gone longer than I anticipated,

1 and there's a technical issue with CourtSolutions that we
2 have to reset if it's on for more than four hours. So at
3 some point in the next 10 minutes or so, we're going to have
4 to do something to that end, but I could hear from Mr.
5 Fogelman in the meantime.
6 MR. FOGELMAN: Thank you, Your Honor. This is
7 Larry Fogelman on behalf of the United States. Can Your
8 Honor hear me clearly?
9 THE COURT: Yeah, I can hear you fine.
10 MR. FOGELMAN: Great. May it please the Court, in
11 the face of the national public health emergency stemming
12 from opioids, the United States has deployed extensive
13 resources to combat this crisis, which claims tens of
14 thousands of Americans lives each year. The broad efforts
15 of the United States include the use of criminal and civil
16 tools under federal law to hold actors accountable for their
17 unlawful actions, including manufacturers, distributors,
18 pharmacies, and physicians.
19 We are here today because the United States has
20 reached a milestone event in its nationwide effort to
21 address the opioid epidemic, the global resolution of our
22 criminal and civil law enforcement investigations into
23 Purdue, arguably the most significant manufacturer of
24 opioids in the country. Given the unique task of the United
25 States to enforce federal law and to ensure public health,

1 the resolution has twin aims: to hold wrongdoers accountable
2 and to facilitate resources for treatment and care of those
3 affected by opioid use disorder.
4 The government's criminal and civil resolutions
5 with Purdue hold Purdue accountable for its conduct and are
6 structured to ensure that remedial actions are taken towards
7 combatting the opioid crisis on a nationwide basis.
8 Debtors' 9019 motion should be approved as it is not only in
9 the best interest of the estate, it is in the best interest
10 of the public in fighting this national health emergency.
11 First, the global resolution holds Purdue
12 accountable to the public for its misconduct. Most
13 significantly, the global resolution requires Purdue Pharma,
14 L.P. to plead guilty to three felony counts for defrauding
15 the United States and violating the anti-kickback statute
16 from 2009 to 2017.
17 The resolution also requires Purdue to admit
18 publicly to the facts underlying its criminal misconduct,
19 and it brings to light the government's factual conclusions
20 from its civil investigation. Further, the United States
21 requires that Purdue will host a document repository
22 available to the public relating to the criminal charges and
23 civil violations.
24 Second, the global resolution is a critical step
25 in remediating this nationwide crisis. Of the government's

1 $2 billion criminal forfeiture claim, $1.775 billion will be
2 credited to the states, local governments and tribal
3 authorities for their critical work in abating this
4 epidemic. The government's $3.544 billion criminal fine and
5 $2.8 billion civil damages will be treated as general
6 unsecured claims.
7 Your Honor, we have a cleareyed view that in a
8 case with trillions of dollars of claims and a company with
9 assets worth a tiny fraction of the dollar value of those
10 claims, the recovery on unsecured claims might well be less
11 than one cent on the dollar. Essentially then, we are
12 applying the vast bulk of the government's recovery as a
13 credit to the abatement plan.
14 The UCC has commented on the, quote, "favorable
15 financial terms of the proposed DOJ resolution," unquote,
16 which in its view, quote, "will result in significant value
17 being available to distribute to the Debtors other creditors
18 and abate the opioid crisis," unquote. The UCC further
19 observes that, quote, "resolution of the United States claim
20 is a vital step toward the Debtors' ultimate restructuring
21 given the proposed settlement... ameliorates the threat of
22 dilution posed by a staggering DOJ claim," unquote.
23 In reaching this resolution, the United States
24 felt it was incredibly important that the credits of the
25 estate, which include the states, thousands of local

1 governments, trial authorities, and victims of opioid use
2 disorder, receive the vast majority of the United States'
3 potential recoveries in this case to permit those entities
4 to put those funds towards the important and critical work
5 of abatement of this crisis.
6 This global resolution achieves that goal as 88.75
7 percent or 1.775 of the $2 billion of funds in our criminal
8 asset forfeiture deal goes towards abatement.
9 Based on our criminal investigation, the U.S.
10 would be within its rights to assert at least a $3.5 billion
11 forfeiture claim, as reflected in our proof of claim, and at
12 least a $6.2 billion penalty. But instead of aggressively
13 pressing these claims through a prosecution, the government
14 believes that these funds would be better used if put
15 towards the abatement objectives of federal, state and
16 tribal governments that they had achieved in the mediation.
17 MR. HUSNICK: Mr. Fogelman, can you take a breath
18 for just one second. Your Honor, I'm getting messages that
19 the dial-in line for people who are --
20 THE COURT: Yeah, this is what I was addressing
21 earlier. I apologize for this. You're all going to have to
22 hang up and redial in again. CourtSolutions can only go for
23 four hours at a time and then, I guess, it poops out, so
24 this is probably a good time for people to stretch their
25 legs too. Why don't you redial in so that you're redialed

1 in by 2:00 p.m. Okay?
2 MR. HUSNICK: Thank you, Your Honor.
3 THE COURT: All right, I'm going to hang up at
4 this point. Mr. Fogelman, you can pick up at that point.
5 MR. FOGELMAN: Thank you, Your Honor.
6 (Recess)
7 THE COURT: Hello, everyone. This is Judge Drain.
8 Were back on the record in in re Purdue Pharma, L.P. I
9 apologize for having to take the break. Technology is like
10 certain people. They can't take more than four hours of
11 court time in one stretch. So, again, I just want to remind
12 you all to keep your phones on mute unless you're speaking,
13 and I think we broke when Mr. Fogelman was still speaking on
14 behalf of the U.S. and the DOJ. So, Mr. Fogelman, if you're
15 back on the line, you can keep going.
16 MR. FOGELMAN: Thank you, Your Honor. For the
17 record, this is Larry Fogelman on behalf of the United
18 States. Just prior to the break, I'd been making the point
19 that, instead of aggressively pressing our criminal
20 prosecution, the government believes that the funds at issue
21 would be better used by putting them towards the abatement
22 plan at state and local governments and tribal authorities.
23 And I want to make two points about how this credit fits
24 into DOJ's previously stated policy interests.
25 First, it's worth understanding our resolution in

1 the context of DOJ's written anti piling on policy about
2 coordinating corporate resolutions in parallel proceedings
3 arising from the same misconduct. Under that policy, which
4 we published in 2018, we endeavor, as appropriate, to
5 coordinate with and consider the amounts paid to state and
6 local authorities that are seeking to resolve a case with a
7 company for the same misconduct. The goal of the policy is
8 achieving an equitable result.
9 That policy applies across DOJ's enforcement
10 actions, including this one, where many state and local
11 authorities have proceedings against the Debtor arising from
12 its opioid marketing and distribution practices. That's why
13 here, in this case, and through this settlement, we are
14 prepared to see the vast bulk or our asset forfeiture
15 recovery go towards this critically important abatement plan
16 advanced by the states, local governments, and tribal
17 authorities.
18 Second, and more specific to the opioid context,
19 this resolution is very much consistent with DOJ's filings
20 more than two years ago in the multi-district federal
21 litigation over opioids. For example, in April 2018, when
22 we filed a motion to participate in settlement discussions,
23 and as a friend of the court, we explain that the United
24 States has a significant stake in combatting the opioid
25 epidemic, which has implications for the proper allocation

1 of any monetary settlements of claims. It's that same stake
2 in combatting the opioid epidemic that we are endeavoring to
3 address through this settlement.
4 We recognize that the goal of nearly every
5 interested party in this case, including the court, is for
6 nearly all the proceeds of the bankruptcy to go to opioid
7 abatement programs, and the United States is a strong
8 advocate and partner in achieving that goal. Indeed, we
9 made the decision to permit a credit against our forfeiture
10 claim because of our beliefs in the extraordinary value
11 those funds will have if they are used towards abatement.
12 Similarly, with those interests in mind, we wanted to ensure
13 that the future company's mission benefits the American
14 people. Thus, it was incredibly important to the United
15 States that the future company would be a public benefit
16 company, or a structure with a similar mission.
17 We say this against the backdrop of the United
18 States' recognition that Oxycontin has benefits when used
19 appropriately. This PBC structure can ensure that Oxycontin
20 is distributed in a manner as safe as possible without
21 diversion. Equally important, the PBC structure will enable
22 the future company to have the fiduciary flexibility to use
23 the proceeds in a manner that go towards further abating the
24 opioid crisis and taking into account long-term public
25 health interests. Critically, we wanted to ensure that the

1 new company is not required to maximize profits over lives;
2 that the new company has a robust charter and mission; and
3 that the proceeds will be used for the benefits of those
4 individuals and communities suffering from the opioid
5 crisis.
6 Again, while the aforementioned mission is
7 critical to the United States, given our unique role in
8 addressing this crisis, we wanted to ensure that Purdue's
9 other important governmental constituencies, the states,
10 local governments, and tribal authorities, have the
11 necessary flexibility to achieve the goal that we all share.
12 That's why we use the term "PBC or entity with a similar
13 mission" in our settlement papers. We look forward to
14 working cooperatively with the Debtor and other creditor
15 groups to come up with the most effective structure for
16 post-emergent Purdue.
17 With regard to timing, Your Honor, we did include
18 in our papers the requirement that the 9019 motion be
19 brought within 7 days. And it's also a requirement of our
20 papers that, within 7 days after the court approves the
21 9019, the parties will seek to have the plea heard in
22 District Court in New Jersey. Thus, built into this
23 agreement was our desire to get this deal to the finish
24 line. We want Purdue to allocate to the three felonies that
25 are the subject of the plea agreement, and we want that to

1 happen as soon as possible. We would be prejudiced if this
2 doesn't go forward. The U.S. would have lost months of time
3 that could have been used prosecuting and liquidating its
4 claims. We shouldn't be penalized for opting to potentially
5 negotiate our claims and submit them to the court.
6 In sum, Your Honor, the United States' role on
7 this case is far greater than its role as a creditor of the
8 bankruptcy entity. Rather, we are tasked with serving the
9 broader public health interest, and we take that role
10 incredibly seriously. As part of that broader role, we
11 wanted to ensure that our resolution with the company
12 achieved the goals of the United States, while affording
13 every interested party in this case the ability to work
14 towards solving this crisis. We believe our deal does that.
15 Our deal is both in the best interest of the Estate as well
16 as the best interest of the public, and we ask that the
17 court approve this 9019 motion. Thank you, Your Honor.
18 THE COURT: Okay, thank you. I guess I will take
19 Mr. Huebner up. If anyone else wants to speak in favor of
20 the settlement, they can. Of course, I know who has
21 objected. I'm assuming that those who have not objected are
22 prepared to let the settlement be approved, but if anyone
23 wants to speak, briefly, in support of the settlement, they
24 should feel free to.
25 MR. ECKSTEIN: Your Honor, this is Kenneth

**IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re:	: **Chapter 11**
	:
PURDUE PHARMA L.P., ***et al.*****,**	: **Case No. 19-23649 (RDD)**
	:
Debtors.[1]	: **(Jointly Administered)**
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**FINAL DECLARATION OF CHRISTINA PULLO
OF PRIME CLERK LLC REGARDING THE SOLICITATION
OF VOTES AND TABULATION OF BALLOTS CAST ON THE
FIFTH AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF
PURDUE PHARMA L.P. AND ITS AFFILIATED DEBTORS**

I, Christina Pullo, declare, under the penalty of perjury:

1. I am a Managing Director and the Head of Corporate Actions at Prime Clerk LLC ("Prime Clerk"),[2] whose principal offices are located at One Grand Central Place, 60 East 42nd Street, Suite 1440, New York, New York 10165. I am over the age of eighteen years and not a party to the above-captioned action. Unless otherwise noted, I have personal knowledge of the facts set forth herein.

2. On July 26, 2021, I submitted the *Preliminary Declaration of Christina Pullo of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Fifth*

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[1] The Debtors in these cases, along with the last four digits of each Debtor's registration number in the applicable jurisdiction, are as follows: Purdue Pharma L.P. (7484), Purdue Pharma Inc. (7486), Purdue Transdermal Technologies L.P. (1868), Purdue Pharma Manufacturing L.P. (3821), Purdue Pharmaceuticals L.P. (0034), Imbrium Therapeutics L.P. (8810), Adlon Therapeutics L.P. (6745), Greenfield BioVentures L.P. (6150), Seven Seas Hill Corp. (4591), Ophir Green Corp. (4594), Purdue Pharma of Puerto Rico (3925), Avrio Health L.P. (4140), Purdue Pharmaceutical Products L.P. (3902), Purdue Neuroscience Company (4712), Nayatt Cove Lifescience Inc. (7805), Button Land L.P. (7502), Rhodes Associates L.P. (N/A), Paul Land Inc. (7425), Quidnick Land L.P. (7584), Rhodes Pharmaceuticals L.P. (6166), Rhodes Technologies (7143), UDF LP (0495), SVC Pharma LP (5717) and SVC Pharma Inc. (4014). The Debtors' corporate headquarters is located at One Stamford Forum, 201 Tresser Boulevard, Stamford, CT 06901.

[2] All capitalized terms used by not otherwise defined herein have the meanings ascribed to them in the Plan or Disclosure Statement Order (each as defined below), as applicable.

Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors [Dkt. No. 3327] (the "Preliminary Voting Declaration") with respect to the solicitation of votes and the preliminary tabulation of Ballots cast on the *Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors* dated June 3, 2021 [Dkt. No. 2982] (as may be amended, supplemented, or modified from time to time, including all exhibits and schedules thereto, the "Plan"). Since the filing of the Preliminary Voting Declaration, Prime Clerk finalized the tabulation of Ballots casts on the Plan. This declaration (the "Final Voting Declaration") replaces and supersedes the Preliminary Voting Declaration in its entirety.

3. Except as otherwise noted, all facts set forth herein are based on my personal knowledge, knowledge that I acquired from individuals under my supervision, knowledge obtained from the Debtors or their counsel, and my review of relevant documents. I am authorized to submit this Final Voting Declaration on behalf of Prime Clerk. If I were called to testify, I could and would testify competently as to the facts set forth herein.

4. This Court authorized Prime Clerk's retention as the claims and noticing agent to the above-captioned debtors and debtors in possession (collectively, the "Debtors") pursuant to the *Order Authorizing Retention and Appointment of Prime Clerk LLC as Claims and Noticing Agent for the Debtors*, dated September 18, 2019 [Dkt. No. 60], and as administrative advisor to the Debtors pursuant to the *Order Authorizing Employment and Retention of Prime Clerk LLC as Administrative Advisor* Nunc Pro Tunc *to the Petition Date* [Dkt. No. 531], dated November 21, 2019 (together, the "Retention Orders"). The Retention Orders authorize Prime Clerk to assist the Debtors with, among other things, the processing of Claims, the service of solicitation materials, and the tabulation of votes cast to accept or reject the Plan.

Service and Transmittal of Solicitation Packages and the Tabulation Process

5. Pursuant to the *Order Approving (I) Disclosure Statement for Fifth Amended Chapter 11 Plan, (II) Solicitation and Voting Procedures, (III) Forms of Ballots, Notices, and Notice Procedures in Connection Therewith, and (IV) Certain Dates with Respect Thereto*, dated June 3, 2021 [Dkt. No. 2988] (the "Disclosure Statement Order"), the Court established procedures to solicit votes from, and tabulate Ballots submitted by, holders of Claims entitled to vote on the Plan, which were attached as Exhibit 1 to the Disclosure Statement Order (the "Solicitation and Voting Procedures"). Prime Clerk adhered to the Solicitation and Voting Procedures outlined in the Disclosure Statement Order and, among other things, distributed Solicitation Packages (including Ballots) to parties entitled to vote on the Plan. These efforts included the use of the Solicitation Directive approved by the Court as part of the Disclosure Statement Order. I supervised the solicitation and tabulation performed by Prime Clerk's employees.

6. Pursuant to the Disclosure Statement Order and Solicitation and Voting Procedures, the Court established March 10, 2021 as the record date (the "Voting Record Date") for determining which creditors were entitled to vote on the Plan. It is my understanding that pursuant to the Plan and the Solicitation and Voting Procedures, only holders of Claims as of the Voting Record Date in the following classes were entitled to vote to accept or reject the Plan (the "Voting Classes"):

[Chart of Voting Classes Included on Following Page]

Plan Class	Class Description
3	Federal Government Unsecured Claims
4	Non-Federal Domestic Governmental Claims
5	Tribe Claims
6	Hospital Claims
7	Third-Party Payor Claims
8	Ratepayer Claims
9	NAS Monitoring Claims
10(a)	NAS PI Claims
10(b)	Non-NAS PI Claims
11(c)	Other General Unsecured Claims

No other classes were entitled to vote on the Plan.

7. In accordance with the Solicitation and Voting Procedures, Prime Clerk worked closely with the Debtors' advisors to identify the holders of Claims in the Voting Classes as of the Voting Record Date who were entitled to vote, and to coordinate the distribution of Solicitation Packages to these holders. It is my understanding that pursuant to the Solicitation and Voting Procedures, to be entitled to vote a Claim in one of the Voting Classes (and as long as no other superseding tabulation rule applies), a claimant was required to file a proof of claim (i) by the applicable bar date (i.e., possess a "timely filed" Claim) and (ii) before the Voting Record Date. Additionally, only the noncontingent, liquidated, and undisputed portion of the asserted Claim was entitled to vote. The Solicitation and Voting Procedures further provide that an amending Claim in a Voting Class that was filed after the applicable bar date and before the Voting Record Date that amends a timely filed Claim is to be tabulated consistent with the Solicitation and Voting Procedures. Finally, pursuant to the Solicitation and Voting Procedures, any Claims (amended or otherwise) filed after the Voting Record Date shall not be considered for tabulation purposes.

8. Based on my review of the official register of Claims for purposes of the solicitation process and as advised by Prime Clerk employees under my direction, Prime Clerk received over 615,000 timely filed proofs of claim. More than 550,000 of those proofs of claim, approximately 90% of the total, were unliquidated. Approximately 65,000 proofs of claim (approximately 10% of the total filed proofs of claim) asserted a Claim in a liquidated amount, with such asserted liquidated claims aggregating to over $40 trillion (excluding a single proof of claim asserting $100 trillion in damages). Below is a chart setting forth the number of Claims classified within each Voting Class:

Plan Class	Class Description	Number of Claims
3	Federal Government Unsecured Claims	6
4	Non-Federal Domestic Governmental Claims	7,645
5	Tribe Claims	401
6	Hospital Claims	1,197
7	Third-Party Payor Claims	467,121
8	Ratepayer Claims	31
9	NAS Monitoring Claims	3,439
10(a)	NAS PI Claims	6,553
10(b)	Non-NAS PI Claims	130,488
11(c)	Other General Unsecured Claims	1,313

9. A detailed description of Prime Clerk's distribution of Solicitation Packages is set forth in Prime Clerk's *Affidavit of Service of Solicitation Materials* [Dkt. No. 3319] and *Supplemental Affidavit of Service of Solicitation Materials* [Dkt. No. 3351].

10. In accordance with the Solicitation and Voting Procedures, Prime Clerk received, reviewed, determined the validity of, and tabulated the Ballots submitted to vote on the Plan. Each Ballot submitted to Prime Clerk was date-stamped, scanned (if received in physical form), assigned

a ballot number, entered into Prime Clerk's proprietary voting database, and processed in accordance with the Solicitation and Voting Procedures. To be included in the tabulation results as valid, a Ballot must have been (i) properly completed pursuant to the Solicitation and Voting Procedures, (ii) executed by the relevant holder entitled to vote on the Plan (or such holder's authorized representative), (iii) returned to Prime Clerk via an approved method of delivery set forth in the Solicitation and Voting Procedures, and (iv) received by Prime Clerk by 4:00 p.m. (prevailing Eastern Time) on July 16, 2021 (the "Voting Deadline"), except to the extent such Voting Deadline was extended by the Debtors in their sole discretion.[3]

11. All Ballots cast by holders of Claims entitled to vote in the Voting Classes and received by Prime Clerk on or before the Voting Deadline (or such later date as extended by the Debtors in their sole discretion) and determined to be valid based on the standards outlined above have been tabulated pursuant to the Solicitation and Voting Procedures. In accordance with the Solicitation and Voting Procedures, Prime Clerk performed a review of the votes submitted to isolate any potential duplicate votes, including, but not limited to, Eligible Clients that may have submitted votes through more than one law firm's Master Ballot and/or Eligible Clients that submitted a vote directly to Prime Clerk as well as through a law firm's Master Ballot on account

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[3] It is my understanding that, in accordance with the Solicitation and Voting Procedures, the Voting Deadline was extended by the Debtors from July 14, 2021 at 4:00 p.m. (prevailing Eastern Time) to July 16, 2021 at 4:00 p.m. (prevailing Eastern Time) for all holders of Claims entitled to vote in the Voting Classes, and further extended by the Debtors to July 19 at 4:00 p.m. (prevailing Eastern Time) for holders of Claims within Classes 3, 4, and 5. The above referenced Voting Deadline extensions are detailed within the *Notice of Extension of Voting Deadline* dated July 13, 2021 [Dkt. No. 3166] and the *Notice of Extension of Voting Deadline* dated July 15, 2021 [Dkt. No. 3231].

Additionally, at the direction of the Debtors, Prime Clerk included in the voting results for Class 10(b) Non-NAS PI Claims a Master Ballot that was submitted after July 16, 2021 at 4:00 p.m. (prevailing Eastern Time) but before July 19, 2021 at 4:00 p.m. (prevailing Eastern Time), notwithstanding that the law firm that submitted such Master Ballot did not submit a Solicitation Directive to Prime Clerk in accordance with the Solicitation and Voting Procedures. This Master Ballot contained 4,168 votes to accept the Plan and 28 votes to reject the Plan.

of the same Claim. Prime Clerk identified and removed from the tabulation any instances in which more than one vote was submitted on account of the same Proof of Claim.[4]

12. The final tabulation of votes cast by timely and properly completed Ballots received by Prime Clerk is attached hereto as **Exhibit A**.

13. At the request of Debtors' counsel, attached as **Exhibit B** is a tabulation of voting results for a hypothetical voting class comprising all forty-eight (48) states that cast votes.[5]

14. Pursuant to the Solicitation and Voting Procedures, attached hereto as **Exhibit C** is a report of Irregular Ballots (as defined in the Solicitation and Voting Procedures) excluded from the final tabulation. **Exhibit C** delineates each Irregular Ballot and provides the reason for such Irregular Ballot's exclusion from tabulation.[6]

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[4] Separately, Prime Clerk identified certain instances in which Prime Clerk received votes on account of multiple Claims otherwise eligible to vote that were filed by (or on behalf of) claimants with identical names (e.g., two or more claims filed for "Jane Doe" cast a vote) (the "Same Name Votes"). At the Debtors' instruction, Prime Clerk included all Same Name Votes in the tabulation.

[5] Alternatively, if the hypothetical voting class comprised forty-eight (48) states as well as the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, the territory of Guam, and the Commonwealth of the Northern Mariana Islands (all of which cast votes), the voting results would be 42 claims accepting (79.25%) and 11 claims rejecting (20.75%) in both amount and number of those voting.

[6] At the direction of the Debtors, Prime Clerk has redacted from **Exhibit C** the names of any States that submitted votes that were ultimately excluded from the final tabulation and listed on the report of Irregular Ballots. In lieu of identifying each such State by name, Prime Clerk has included the unique identification number assigned to the State's submitted ballot.

To the best of my knowledge, information and belief, I declare under penalty of perjury that the foregoing information concerning the distribution, submission and tabulation of Ballots in connection with the Plan is true and correct.

Dated: August 2, 2021

/s/ Christina Pullo
Christina Pullo

Exhibit A

Purdue Pharma L.P., *et al.*
Exhibit A - Final Voting Results

Class	Class Description	Number Accepting	Number Rejecting	Amount Accepting	Amount Rejecting	Class Voting Result
		%	%	%	%	
3	Federal Government Unsecured Claims	No Ballot submitted by a holder entitled to vote in the class				Deemed to Accept[7]
4	Non-Federal Domestic Governmental Claims	4,770	154	$4,770.00	$154.00	Accept
		96.87%	3.13%	96.87%	3.13%	
5	Tribe Claims	201	8	$201.00	$8.00	Accept
		96.17%	3.83%	96.17%	3.83%	
6	Hospital Claims	895	119	$895.00	$119.00	Accept
		88.26%	11.74%	88.26%	11.74%	
7	Third-Party Payor Claims	42,570	2,942	$42,570.00	$2,942.00	Accept
		93.54%	6.46%	93.54%	6.46%	
8	Ratepayer Claims	31	0	$31.00	$0.00	Accept
		100%	0%	100%	0%	
9	NAS Monitoring Claims	3,220	7	$3,220.00	$7.00	Accept
		99.78%	0.22%	99.78%	0.22%	
10(a)	NAS PI Claims	4,237	83	$4,237.00	$83.00	Accept
		98.08%	1.92%	98.08%	1.92%	
10(b)	Non-NAS PI Claims	58,196	2,600	$58,196.00	$2,600.00	Accept
		95.72%	4.28%	95.72%	4.28%	
11(c)	Other General Unsecured Claims	250	18	$31,775,120.20	$1,171,269.04	Accept
		93.28%	6.72%	96.44%	3.56%	

[7] It is Prime Clerk's understanding that Section 3.3 of the Plan provides: "With respect to each Debtor, if a Class contains Claims eligible to vote and no Holder of Claims eligible to vote in such Class votes to accept or reject this Plan by the Voting Deadline, this Plan shall be presumed accepted by the Holders of Claims in such Class."

Exhibit B

Purdue Pharma L.P., *et al.*

Exhibit B - Final Voting Results of Hypothetical Voting Class Comprising U.S. States

Class Description	Number Accepting	Number Rejecting	Amount Accepting	Amount Rejecting	Class Voting Result
	%	%	%	%	
States Only	38	10	$38.00	$10.00	Accept
	79.17%	20.83%	79.17%	20.83%	

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
PURDUE PHARMA L.P., *et al.*,	**Case No. 19-23649 (RDD)**
Debtors.[1]	**(Jointly Administered)**

DECLARATION OF RICHARD A. COLLURA

[1] The Debtors in these cases, along with the last four digits of each Debtor's registration number in the applicable jurisdiction, are as follows: Purdue Pharma L.P. (7484), Purdue Pharma Inc. (7486), Purdue Transdermal Technologies L.P. (1868), Purdue Pharma Manufacturing L.P. (3821), Purdue Pharmaceuticals L.P. (0034), Imbrium Therapeutics L.P. (8810), Adlon Therapeutics L.P. (6745), Greenfield BioVentures L.P. (6150), Seven Seas Hill Corp. (4591), Ophir Green Corp. (4594), Purdue Pharma of Puerto Rico (3925), Avrio Health L.P. (4140), Purdue Pharmaceutical Products L.P. (3902), Purdue Neuroscience Company (4712), Nayatt Cove Lifescience Inc. (7805), Button Land L.P. (7502), Rhodes Associates L.P. (N/A), Paul Land Inc. (7425), Quidnick Land L.P. (7584), Rhodes Pharmaceuticals L.P. (6166), Rhodes Technologies (7143), UDF LP (0495), SVC Pharma LP (5717) and SVC Pharma Inc. (4014). The Debtors' corporate headquarters is located at One Stamford Forum, 201 Tresser Boulevard, Stamford, CT 06901.

Pursuant to 28 U.S.C. § 1746, I, Richard A. Collura, hereby declare as follows under penalty of perjury:

1. On June 15, 2021, I submitted an expert report entitled the *Expert Report of Richard A. Collura, CPA, CIRA, CFE, CFF*, which attached and incorporated by reference in its entirety the *Cash Transfers of Value Analysis* (together, the "**Collura Expert Report**"). JX-0513 – JX-0516 is a true and accurate copy of the Collura Expert Report and appendices thereto. The Collura Expert Report is based on the identification and quantification of transfers of value on or after January 1, 2008 made as cash distributions, compensation, legal expenses and benefits provided to or for the benefit of the Sackler Family members.

2. Nothing that I have learned since the submission of my report has changed any of my opinions expressed therein. I reserve the right to revise my opinions in light of my ongoing review of materials, including data, documents, and depositions or other testimony that may subsequently come to light.

3. In accordance with my understanding of paragraph 4.h of the *Third Amended Order Granting Debtors' Motion for Order Establishing Confirmation Schedule and Protocols* [Docket No. 3347], I respectfully submit this Declaration and the Collura Expert Report attached hereto as my direct testimony on behalf of the Debtors.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 5, 2021

By *\/s/ Richard A. Collura*
Richard A. Collura

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
PURDUE PHARMA L.P., ***et al.*****,**	**Case No. 19-23649 (RDD)**
Debtors.[1]	**(Jointly Administered)**

EXPERT REPORT OF RICHARD A. COLLURA, CPA, CIRA, CFE, CFF

June 15, 2021

I. Qualifications

1. I am a Managing Director of AlixPartners, LLP ("AlixPartners"), a financial advisory services firm that maintains offices at 909 Third Avenue, New York, New York 10022. AlixPartners was retained as financial advisor to Purdue Pharma L.P. ("PPLP") and its subsidiaries ("Purdue") and Purdue Pharma Inc. ("PPI") that are debtors in possession in the above-captioned chapter 11 cases (collectively, "Debtors" or "Debtors in Possession"), each of which filed a

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voluntary petition for relief under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of New York on September 15, 2019.

2. I have 25 years of experience providing forensic accounting, investigative, expert witness, litigation consulting, and auditing services. I have worked with counsel to represent and advise companies, boards of directors, audit and special committees, debtors, creditors' committees, lenders, trustees, and equity holders throughout all phases of investigations, litigation and dispute matters, and bankruptcy cases. I have worked across a wide variety of industries, including energy, financial services, healthcare, insurance, manufacturing, media and communications, non-profit organizations, real estate, and retail, among others.

3. I have provided expert witness, forensic accounting and litigation-related services in large, complex bankruptcy cases and distressed company situations involving claims against insiders, preference and fraudulent conveyance actions, cash tracing and flow of funds analyses, assessments of solvency, valuation disputes, breach of fiduciary duty claims, intercompany and inter-creditor disputes, equitable subordination and loan recharacterization claims, alter ego and veil piercing claims, theory of de facto merger, and the quantification of damages.

4. Throughout my career, I have conducted many large-scale, high-profile forensic accounting and fraud investigations. I have helped uncover financial and accounting fraud schemes, and assisted in the pursuit of asset recoveries. I have also worked with counsel to conduct fact-finding investigations, including accounting analysis for mergers and acquisitions, analyzing the activity in intercompany accounts, and identifying undisclosed related party transactions.

5. My experience includes investigating allegations involving fraudulent financial reporting and accounting fraud, cash disbursements and fictitious vendor schemes, accounts

receivable aging schemes, employee expense reimbursement schemes, and misappropriation of assets. In addition, I have uncovered sophisticated financial, accounting, and fraud schemes that assisted in the identification and pursuit of significant claims against alleged wrongdoers, many of which resulted in substantial recoveries for interested parties. I have also worked closely and effectively with law enforcement agencies, such as the Department of Justice, Federal Bureau of Investigation, and Securities and Exchange Commission.

6. I have advised on a wide range of commercial litigation matters involving residential mortgage-backed securities litigation, general contract disputes, purchase price disputes, partnership and shareholder disputes, fraudulent financial and accounting reporting, accounting malpractice, evaluating compliance with contractual agreements, evaluating compliance with generally accepted accounting principles and generally accepted auditing standards, and lender liability claims.

7. Prior to AlixPartners, I was a Managing Director at Zolfo Cooper, LLC, which was acquired by AlixPartners in 2018. Previously, I worked in Protiviti's Litigation, Restructuring and Investigations practice, and FTI Consulting's Forensic and Litigation Consulting practice. I started my career working as an auditor at Ernst & Young LLP. I hold a B.S. in accounting from Fordham University. I am a Certified Public Accountant, Certified Insolvency and Restructuring Advisor, Certified Fraud Examiner and am certified in financial forensics by the American Institute of Certified Public Accountants. I attach my Curriculum Vitae as Appendix B, which includes relevant information related to my experience and professional credentials. My Curriculum Vitae includes the one case I have testified as an expert in the last four years, *In re Mission Coal Company, LLC, et al.,* Chapter 11 Case No. 18004177 (TOM), United States Bankruptcy Court, Northern District of Alabama, and the one publication I have authored in the

previous ten years, *Tracing Trust Funds in a Commingled Bank Account: A Deep Dive into Applying the Lowest Intermediate Balance Test*, American Bankruptcy Institute's Fraud Committee newsletter (September 2016). AlixPartners has billed the Debtors at our standard hourly billing rates for our professional services rendered in connection with preparing the December 16, 2019 report of the Special Committee of the Board of Directors of PPI [Dkt. 654] (the "Cash Transfers Report") and this report (the "Collura Report"). My standard billing rate of $1,080 per hour was charged to the Debtors for preparing the Cash Transfers Report in 2019. My standard billing rate of $1,090 per hour was charged to the Debtors for work related to the Cash Transfers Report in 2020. My standard billing rate of $1,125 per hour was charged to the Debtors for preparing the Collura Report in 2021.

II. Assignment

8. Counsel to the Debtors, Davis Polk & Wardwell LLP, and the Special Committee of the Board of Directors of PPI, directed AlixPartners to perform a comprehensive value analysis of cash transfers (the "Cash Transfers of Value Analysis"). The Cash Transfers of Value analysis was based on the identification and quantification of transfers of value on or after January 1, 2008 made as cash distributions, compensation, legal expenses and benefits provided to or for the benefit of the Sackler Family members. I served as the Managing Director with lead responsibility for supervising and managing our experienced team's comprehensive forensic review performed in connection with preparing the Cash Transfers of Value Analysis. Our forensic accounting investigation and the preparation of the Cash Transfers Report required approximately 6,500 hours to complete over the course of seven months.

9. The objectives of the Cash Transfers of Value Analysis were to identify and quantify all transfers of value from (1) Purdue; (2) PPI; and (3) Coventry Technologies, L.P.,

Rhodes Associates L.P., Rhodes Technologies, Inc., Rhodes Technologies, Rhodes Pharmaceuticals Inc., and Rhodes Pharmaceuticals L.P. (collectively "Rhodes"), to parent entities, shareholders and/or members of the Sackler Family (as set out in Appendix B of the Cash Transfers Report) and/or any other entity in which beneficial owners or members of the Sackler Family own a controlling interest (collectively, "Affiliated Entities," including independent associated entities ("IACs")).

III. Summary of Opinions

10. In preparing the Cash Transfers Report, my team and I identified and quantified six categories of cash transfers of value by Purdue, PPI and Rhodes on or after January 1, 2008. A summary of the cash transfers in each of the relevant categories is set out below.

11. The full findings and results of the Cash Transfers of Value Analysis are set forth in the Cash Transfers Report. I incorporate by reference the entirety of the Cash Transfers Report, a true and accurate copy of which is attached as Appendix A.

12. **Total Net Cash Distributions Paid to or for the Benefit of the Affiliated Entities and/or Taxing Authorities**: The total net cash distributions paid by Purdue and Rhodes to or for the benefit of the Affiliated Entities and/or taxing authorities on or after January 1, 2008 were $10.4 billion. The cash distributions generally flowed up from Purdue or Rhodes through holding companies and then to the ultimate recipient entity.

13. **Compensation Paid to or for the Benefit of the Sackler Family Members**: Purdue paid approximately $371,400 in payroll compensation to or for the benefit of the Sackler Family members on or after January 1, 2008.

14. **Legal Expenses Incurred on Behalf of the Sackler Family Members**: Since January 1, 2008 forward, Purdue had a corporate indemnity policy (the "Corporate Indemnity

Policy") whereby Purdue agreed to pay legal expenses for Purdue's Directors, Officers and other Named Agents (as defined in the policy) when those expenses were related to actions taken in an official capacity. The total legal expenses incurred by Purdue on behalf of the Sackler Family members pursuant to the Corporate Indemnity Policy on or after January 1, 2008 were $17.6 million.

15. **Pension Benefits Paid to the Sackler Family Members**: Total pension benefits paid to the Sackler Family members pursuant to Purdue's defined benefit plan ("Purdue's Pension Plan") on or after January 1, 2008 were $3.0 million. These payments were made out of the trust assets of Purdue's Pension Plan, which were held separately from Purdue's assets.

16. **Travel and Expense Reimbursements to or for the Benefit of the Sackler Family Members**: Purdue paid $1.9 million in travel and expense ("T&E") reimbursements to or for the benefit of the Sackler Family members on or after January 1, 2008. Airline charges represented the largest category of T&E reimbursements. In August 2019, at Purdue's request, PRA L.P. repaid Purdue for approximately $634,000 of these T&E reimbursements for a variety of reasons, including the difficulty in confirming that these reimbursements were properly chargeable to Purdue, resulting in a net payment by Purdue of approximately $1,276,116.

17. **Fringe Benefits Provided to the Sackler Family Members**: Certain Sackler Family members received fringe benefits from Purdue in the form of company paid cellular phones, fleet vehicles, and salary/benefits for personal employees. Purdue was fully reimbursed for the fleet vehicle costs and personal service employee benefits by the Sackler Family members in the ordinary course on a periodic basis. Purdue was not contemporaneously reimbursed for the use of company issued cellular phones. However, in August 2019, PRA L.P. repaid Purdue, at

Purdue's request, the full amount (approximately $477,351) of the costs associated with the Sackler Family members' use of company issued cellular phones on or after January 1, 2008.

IV. Cash Transfers Report

18. As set out above, the objectives of the Cash Transfers of Value Analysis were to identify and quantify all transfers of value from Purdue, PPI, and Rhodes to Affiliated Entities, including IACs.

a. Methodology and Assumptions

19. In preparing the Cash Transfers Report, my team and I identified and quantified cash transfers of value—the categories of which are described in paragraphs 12 through 17 above—by Purdue, PPI and Rhodes on or after January 1, 2008 through September 30, 2019, to the extent such transfers were made.

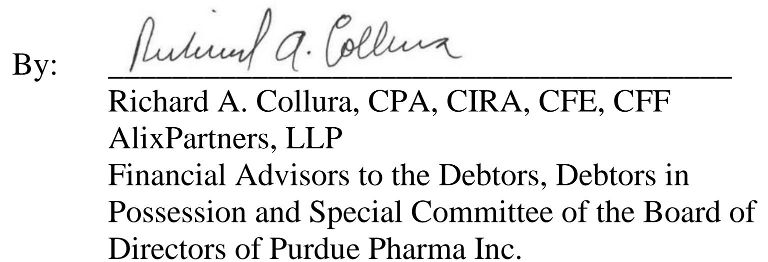
20. My team and I were onsite at Purdue's headquarters in Stamford, CT for seven months. During the course of our forensic accounting investigation, we gathered substantial amounts of accounting, financial and corporate records, and reviewed and analyzed, among other things, organizational charts of entities owned by the Sackler Families, Purdue's SAP accounting system, audited financial statements, internal financial and accounting statements and records, payroll records, pension benefit records, and travel and expense reimbursement reports and records. We conducted meetings and interviews of 19 employees of Purdue, TXP Services, Inc. ("TXP"), and One Stamford Realty L.P. ("One Stamford Realty"). A more detailed description of the various procedures and analyses performed can be found in the Cash Transfers Report.

21. In order to form our conclusions in the Cash Transfers Report, we reviewed and analyzed the information and documentation obtained from Purdue, PPI, Rhodes, TXP, and One Stamford Realty. The specific sources of information relied upon in forming my opinions and

conclusions are set out in Appendix A to the Cash Transfers Report. (*See* Dkt. 654 at 317.) These materials have been produced and a detailed list of the materials is appended to the Collura Report as Appendix C.

22. As the Managing Director with overall engagement responsibility for the AlixPartners' team that prepared the Cash Transfers Report, I believe that the conclusions set forth therein are true and accurate at the time given, and remain true and accurate.

Dated: June 15, 2021

By: 

Richard A. Collura, CPA, CIRA, CFE, CFF
AlixPartners, LLP
Financial Advisors to the Debtors, Debtors in Possession and Special Committee of the Board of Directors of Purdue Pharma Inc.

Appendix A

Cash Transfers Report

AlixPartners

Cash Transfers of Value Analysis

December 16, 2019

Purdue/Rhodes Net Cash Distributions – Findings

2. Total Net Cash Distributions paid by Purdue and Rhodes to or for the benefit of the Affiliated Entities on or after January 1, 2008 are included in the table below.

dollars in '000s	Purdue Net Cash Distributions					Rhodes Net Cash Distributions				
Year	Purdue US Partner Cash Distributions	Purdue Ex-US Cash Distributions [2]	Purdue Investment in Associated Companies [1]	Purdue Tax Distributions	Purdue Total Cash Distributions	Rhodes US Partner Net Cash Distributions	Rhodes Tax Distributions	Eliminate Purdue Cash Distributions to Rhodes	Rhodes Total Net Cash Distributions	Total Net Cash Distributions
2008	$ 752,120	$ –	$ 76,107	$ 540,203	$ 1,368,430	$ –	$ 10,400	$ (1,500)	$ 8,900	$ 1,377,330
2009	898,949	–	111,576	710,916	1,721,441	–	8,803	(19,301)	(10,498)	1,710,943
2010	859,950	112,381	–	653,842	1,626,173	–	14,207	(14,200)	7	1,626,180
2011	553,552	113,306	–	555,949	1,222,807	25,000	3,346	(20,000)	8,346	1,231,153
2012	439,342	122,394	–	459,522	1,021,258	6,000	10,745	(39,000)	(22,255)	999,003
2013	298,319	234,447	–	400,849	933,615	–	9,366	(20,000)	(10,634)	922,981
2014	127,505	232,023	–	435,569	795,097	–	46,962	(10,000)	36,962	832,059
2015	128,788	297,019	–	366,111	791,918	–	11,328	–	11,328	803,246
2016	154,074	247,358	–	249,273	650,705	–	6,199	–	6,199	656,904
2017	199	–	–	186,541	186,740	–	140	–	140	186,880
Subtotal 2008-2017	**$ 4,212,798**	**$ 1,358,928**	**$ 187,683**	**$ 4,558,775**	**$ 10,318,184**	**$ 31,000**	**$ 121,496**	**$ (124,001)**	**28,495**	**$ 10,346,679**
Addit onal Non-Purdue Distribut on Identified in Reconciliation to State Complaints [3]	30,000	–	–	–	30,000	–	–	–	–	30,000
Total as Adjusted	**$ 4,242,798**	**$ 1,358,928**	**$ 187,683**	**$ 4,558,775**	**$ 10,348,184**	**$ 31,000**	**$ 121,496**	**$ (124,001)**	**$ 28,495**	**$ 10,376,679**

– Cash Distributions generally flowed up from Purdue to and through PRA L.P., and were either invested in IACs, or continued to flow up through other holding companies to trusts established for the benefit of the Sackler Family members or to taxing authorities. Refer to Exhibit E and F for our flow of funds and tracing analyses for Purdue and Rhodes, respectively.

– We did not find any instances where distribution amounts alleged in the State Complaints during a particular time period exceeded distributions amounts reported in Purdue's Internal Distribution Analysis for that same time period. Refer to Exhibit G for more details.

– Net Cash Distributions contain credits in the amount of $154.2 million for funds reinvested in Purdue by PRA L.P., and $17.2 million for tax refunds received by Purdue.

– Purdue did not make any Cash Distributions after 2017.

– Rhodes paid $70,000 in Tax Distributions in 2018, which are not included in the amounts above. Rhodes did not make any Cash Distributions after 2018.

[1] Purdue recorded $187.7 million in Ex-US Distributions as Investment in Associated Companies, which represented cash that flowed to a wholly owned entity of Purdue and then to an Ex-US Affiliated Entity.
[2] 2017 Cash Distributions do not include $312.6 million of loans to PRA L P., all of which have since been repaid in full with interest.
[3] Additional Non-Purdue Distribution reflects a 2010 distribution made by Millsaw Realty L.P., formerly a subsidiary of Purdue, to Beacon Company and Rosebay Medical Company L.P., apparently made at the direction of Purdue. This amount was identified in the reconciliation to the State Complaints. Refer to Exhibit G for more details regarding this reconciliation.

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
PURDUE PHARMA L.P., *et al.*,	)	Case No. 19-23649 (RDD)
Debtors.[1]	)	(Jointly Administered)

STIPULATION AND AGREED ORDER BY AND AMONG THE DEBTORS AND THE CANADIAN GOVERNMENTAL CLAIMANTS PURSUANT TO SECTION 105 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 3006 AND 9019

This Stipulation and Order (the "**Stipulation and Order**") is entered into as of July 27, 2021, by and between Purdue Pharma L.P. and the other debtors in its above-captioned chapter 11 cases (the "**Debtors**" and the "**Chapter 11 Cases**," respectively) and the provincial governments of British Columbia, Alberta, Saskatchewan, Ontario, Nova Scotia, New Brunswick, Newfoundland and Labrador, Prince Edward Island, Quebec, and Manitoba (the "**Canadian Governmental Claimants**") (the Debtors and the Canadian Governmental Claimants, collectively, the "**Parties**"). The Parties agree, subject to the approval of the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**"), as follows:

---

[1] The Debtors in these cases, along with the last four digits of each Debtor's registration number in the applicable jurisdiction, are as follows: Purdue Pharma L.P. (7484), Purdue Pharma Inc. (7486), Purdue Transdermal Technologies L.P. (1868), Purdue Pharma Manufacturing L.P. (3821), Purdue Pharmaceuticals L.P. (0034), Imbrium Therapeutics L.P. (8810), Adlon Therapeutics L.P. (6745), Greenfield BioVentures L.P. (6150), Seven Seas Hill Corp. (4591), Ophir Green Corp. (4594), Purdue Pharma of Puerto Rico (3925), Avrio Health L.P. (4140), Purdue Pharmaceutical Products L.P. (3902), Purdue Neuroscience Company (4712), Nayatt Cove Lifescience Inc. (7805), Button Land L.P. (7502), Rhodes Associates L.P. (N/A), Paul Land Inc. (7425), Quidnick Land L.P. (7584), Rhodes Pharmaceuticals L.P. (6166), Rhodes Technologies (7143), UDF L.P. (0495), SVC Pharma L.P. (5717) and SVC Pharma Inc. (4014). The Debtors' corporate headquarters is located at One Stamford Forum, 201 Tresser Boulevard, Stamford, CT 06901.

PROCEDURAL HISTORY

A. On September 15, 2019 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief pursuant to Chapter 11 of Title 11 of the United States Code (the "**Bankruptcy Code**") in the Bankruptcy Court and have remained in possession of their properties and in the management of their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

B. By order dated September 19, 2019 in the proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") bearing Court File No. CV-19-627656-00CL) (the "**CCAA Proceeding**"), the Ontario Superior Court of Justice (Commercial List) (the "**Canadian Court**") recognized the Chapter 11 Cases as a "foreign main proceeding" as defined in Part IV of the CCAA.

C. On February 3, 2020, the Bankruptcy Court entered the *Order Establishing (I) Deadlines for Filing Proofs of Claim and Procedures Relating Thereto, (II) Approving the Proof of Claim Forms, and (III) Approving the Form and Manner of Notice Thereof* pursuant to Federal Rules of Bankruptcy Procedure 2002, 3003(c)(3), and 9008 (ECF No. 800) (the "**Bar Date Order**"), and, on June 3, 2020, entered the *Order (I) Extending the General Bar Date for a Limited Period and (II) Approving the Form and Manner of Notice Thereof* (ECF No. 1221) (the "**Supplemental Bar Date Order**"), which established a general bar date for the timely filing of claims of Thursday, July 30, 2020 at 5:00 p.m. Eastern (the "**General Bar Date**").

D. The Canadian Governmental Claimants each filed proofs of claim against the Debtors in advance of the General Bar Date, appearing at numbers 144370, 144375, 144376, 144377, 144379, 144380, 144386, 144392, 144398, and 144412 on the claims registry in the Chapter 11 Cases (collectively, the "**Canadian Proofs of Claim**").

E. On March 15, 2021 the Debtors filed the *Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors* (ECF No. 2487) (as amended, supplemented or otherwise modified from time to time, the "**Plan**").[2]

RECITALS

WHEREAS, the Debtors and the Canadian Governmental Claimants have agreed to certain clarifications regarding the scope and impact of the releases set forth in the Plan, in consideration for which the Canadian Governmental Claimants have agreed to withdraw the Canadian Proofs of Claim as of right and release the Debtors and their Related Parties (solely in their capacities as Related Parties of the Debtors) from any and all Claims, obligations or liabilities related to or arising from the Canadian Proofs of Claim, subject to the terms and conditions of this Stipulation and Order, provided that such release shall not extend to Purdue Pharma Inc., a Canadian corporation, Purdue Frederick Inc., a Canadian corporation, and Purdue Pharma (Canada) and each of their Related Parties in their capacities as such (collectively, "**Purdue Canada**") and the Shareholder Released Parties solely with respect to any Continuing Claims (as defined below).

WHEREAS, the statutory predicates for this Stipulation and Order are section 105(a) of the Bankruptcy Code and Rules 3006 and 9019 of the Federal Rules of Bankruptcy Procedure. The Bankruptcy Court has authority to approve this Stipulation and Order.

WHEREAS, entry into this Stipulation and Order and the resolution of the Canadian Proofs of Claims contemplated hereby is in the best interests of the Debtors, their estates, their creditors and other parties in interest.

ACCORDINGLY, IT IS HEREBY STIPULATED AND AGREED, that:

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Plan filed in the Chapter 11 Cases on June 3, 2021 [ECF No. 2982], as may be amended or supplemented.

1. The preceding recitals are incorporated into this Stipulation and Order by this reference.

2. Nothing in (a) any plan of reorganization confirmed in the Chapter 11 Cases, (b) the Shareholder Settlement Agreement or (c) any order of the Bankruptcy Court confirming, amending or modifying a plan in the Chapter 11 Cases (any such order, a "**Confirmation Order**") shall release or enjoin any Continuing Claims[3], and all such Claims and Causes of Action are expressly reserved. For greater certainty, the Parties agree that to the extent a Claim or Cause of Action is asserted in Canada against a Shareholder Released Party and/or former director or officer of a Debtor, the knowledge of that individual regarding the Debtors' Opioid Related Activities may be asserted against that individual and form part of the Claim or Cause of Action in Canada, and any such assertion shall be without prejudice to all defenses of the applicable Shareholder Released Party or former officer or director to such assertion. The Debtors shall not seek an order from the Canadian Court in the CCAA Proceeding recognizing a Confirmation Order, including, without limitation, an order defining the scope of any release or injunction of any Claims or Causes of Action (a "**Confirmation Recognition Order**") unless such Confirmation Recognition Order includes a declaration confirming the foregoing terms of this paragraph.

3. To the extent that either a plan of reorganization confirmed in the Chapter 11 Cases or any document or agreement contemplated by or entered into pursuant to or in connection with such plan (including, without limitation, the Shareholder Settlement Agreement) does not comply

[3] "**Continuing Claims**" means any Claims or Causes of Action held by a Canadian Governmental Claimant, by the federal government of Canada or by the governments of any of the territories of Canada (collectively, the "**Canadian Governments**") against any non-Debtor person or entity (including, without limitation, and for greater certainty, Purdue Canada and/or each Shareholder Released Party) that (x) arise out of or relate to the conduct of any corporations, companies, partnerships and other entities formed under the laws of Canada or its provinces affiliated or associated with any of the Debtors, including, without limitation, Purdue Canada and (y) are not based upon any conduct of the Debtors, including any Opioid-Related Activities of the Debtors.

with the preceding paragraph, the Debtors agree that the release of, or injunction with respect to, any Continuing Claims set forth therein shall not be binding on the Canadian Governmental Claimants, the federal government of Canada or the governments of any of the territories of Canada and the Debtors shall not seek recognition by the Canadian Court of the Confirmation Order in respect of such plan in the CCAA Proceeding to such extent.

4. Conditioned upon approval of this Stipulation and Order by the Bankruptcy Court and this Stipulation and Order becoming a final and non-appealable order, subject to the terms of this Stipulation, and in exchange for the foregoing (the adequacy of which consideration is confirmed), all Canadian Proofs of Claim shall thereafter be deemed immediately withdrawn as of right pursuant to Bankruptcy Rule 3006, with no further notice or action of any kind required by any party, and the Canadian Governmental Claimants fully release the Debtors and their Related Parties (solely in their capacities as Related Parties of the Debtors), solely for actions taken in their respective capacities as such, from any Claims, obligations or liabilities in any way related to or arising from the Canadian Proofs of Claim and all corresponding litigation, but excluding, for greater certainty, all Continuing Claims. For the avoidance of doubt, the releases contained in this paragraph 4 are without limitation to any releases provided for in the Plan other than to the extent such releases in the Plan extend to Continuing Claims. By executing this Stipulation, the Parties and the Shareholder Released Parties agree that the Bankruptcy Court has jurisdiction to consider and approve this Stipulation, including, without limitation, all of its terms and conditions. Nothing in this Stipulation and Order shall be cited by any third party for purposes of limiting or expanding the Bankruptcy Court's jurisdiction over any Claims or releases provided for in the Plan not otherwise addressed herein.

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Case No. 19-23649-rdd
4 - x
5 In the Matter of:
6
7 PURDUE PHARMA L.P.
8
9 Debtor.
10 - x
11 United States Bankruptcy Court
12 Tele/Video Proceedings
13 300 Quarropas Street, Room 248
14 White Plains, NY 10601
15
16 August 17, 2021
17 10:08 AM
18
19
20
21 B E F O R E :
22 HON ROBERT D. DRAIN
23 U.S. BANKRUPTCY JUDGE
24
25 ECRO: JUSTIN WALKER

1 Q Now, the model -- and the model that you used in this
2 report is nowhere described in your pre-litigation
3 allocation white paper, right?
4 A That's correct.
5 Q This is something you came up with for litigation,
6 right?
7 A This was something I came up with for litigation, yes.
8 Q And in your white paper, the allocation factors you
9 used were two health expenses -- two health expense series,
10 three law enforcement and judicial, the number of opioids
11 prescribed, and the number of deaths resulting from
12 overdose. Is that right?
13 A That's one of several, yes.
14 Q Okay. And again, that's different from the allocation
15 model that you have now presented today, right?
16 A That's correct.
17 Q And you have fair hypotheticals in your Fair White
18 Paper, do you not?
19 A I do.
20 Q And you didn't use any of the intensity or severity
21 measures in those models that you are offering in your
22 report, right?
23 A Correct.
24 Q And just to complete this subject, the model that
25 you've proposed has not been proposed by anyone else, has

1 it?
2 A Not that I'm aware.
3 Q Okay. And in developing this model, you didn't call up
4 any experts and ask for any input, did you?
5 A No.
6 Q Okay. Let's talk now about the issue of the importance
7 of putting in place a plan now. You understand the
8 importance of consensual resolution in bankruptcy matters,
9 right?
10 A Yes.
11 Q And you understand the importance of an abatement
12 program in the context of this case, do you not?
13 A I do.
14 Q And would you agree that hundreds of thousands of
15 people have died since 1996 on account of opioid addiction
16 and abuse?
17 A I do.
18 Q And the more time that this problem festers without
19 additional spending on opioid abatement, the worse the
20 problem will become, right?
21 A Relative to no resolution, yes, I agree.
22 Q And settlement provides certainty, at least this
23 settlement provides certainty and immediate commencement of
24 spending on abatement, does it not?
25 A I don't actually know that. And it's a -- I think

1 you're asking me to describe something that I would call a
2 legal conclusion. I don't know how rapidly it comes into
3 play.
4 Q That's fine. You also issued a PowerPoint or published
5 a PowerPoint in June 2019, correct?
6 A No. We discussed this before. I didn't issue the
7 PowerPoint.
8 Q Well, you're saying you didn't issue it because there
9 are three authors, right?
10 A Well, no. Actually, it's because the parent company
11 that hosted the conference issued it by taking three papers
12 and combining them.
13 Q Okay. Well, let's just go to -- can you pull out that
14 document, which is Exhibit 389? And let me know when you
15 have the document.
16 A I am there. Thank you.
17 Q Okay. And can you turn to Slide 12? Let me know when
18 you're there.
19 A I am there, thank you.
20 Q And by the way, you prepared this slide, did you not?
21 A I did.
22 Q Can you read the first bullet for the court?
23 A "Spending more NOW in the effective way will reduce
24 future damages."
25 Q And you capitalized one of the words in that bullet,

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
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21 B E F O R E :
22 HON ROBERT D. DRAIN
23 U.S. BANKRUPTCY JUDGE
24
25 ECRO: UNKNOWN

1 No party has contested or possibly could contest that these
2 agreements, when tensely negotiated, indeed brutally
3 negotiated, over a period of years by sophisticated counsel
4 on all sides, and with over a year -- a year of assistance,
5 from three of the most highly respected mediators in the
6 country, the Honorable Layn Phillips, and Mr. Kenneth
7 Feinberg, the Honorable Shelley Chapman, whose selection was
8 supported by the objectors.
9 These are not someone else's mediators.
10 Mr. Feinberg and Judge Phillips are the mediators
11 we all agreed on and jointly presented to the Court. With
12 respect to negotiations, Your Honor, the testimony is thick
13 and uncontroverted. Mr. Atkinson, Mr. Guard, and Mr. Gotto
14 all testified about the negotiations. We also heard from
15 Mr. Weinberger and Ms. Conroy who have spent over twenty
16 years suing Purdue and the Sacklers.
17 The UCC described all this in their letter
18 facilitated by tens of millions of legal documents conducted
19 in a no-stone-left-unturned investigation into these issues.
20 And, of course, Your Honor, a 4.275-billion-dollar number
21 which came out Phase 2 mediation was the joint proposal of
22 the mediators. It didn't come from the Debtors. It didn't
23 come from the UCC. It didn't come from the AHC, didn't come
24 from the NCSG. It came from the mediators after almost a
25 year of full-time work on these pieces.

1 And, of course, the final number, 4.325 billion
2 dollars with further material concessions came from the
3 third mediator, a sitting federal judge.
4 So let's turn to Factor Six, which is the only one
5 that is left. The nature and breadth of the releases
6 obtained by officers and directors, which in this case, of
7 course, we'll expand to include released parties, not just
8 officers and directors.
9 Your Honor, no one ever would suggest that these
10 releases are not broad. Of course they are broad, but they
11 are the only way these cases can be resolved for many
12 reasons. The objecting states are singularly focused on the
13 fact that the Sacklers will not pay 4.325 billion without
14 the finality that come from broad, binding third-party
15 releases. But this is only one of the very many reasons
16 that the plan must have third-party releases and could never
17 go effective without them because, Your Honor, even if the
18 Sacklers agreed to pay over four billion dollars and still
19 be sued for hundreds of billions of dollars, the plan dies.
20 This has been totally misunderstood by so many parties.
21 It's time to hopefully make it clear.
22 Why would the plan never, ever work, irrespective
23 of the wishes of the Sacklers without third-party releases?
24 One, fundamental fairness and equal treatment.
25 Let us consider arguendo, a world in which the objecting

1 states or other material creditors are allowed to opt out
2 from the third-party releases. The nine objecting states
3 and the District of Columbia have filed proofs of claim
4 alleging under penalty of perjury over 439 billion dollars
5 in damages against Purdue and based on their theory, by
6 extension, against the Sacklers.
7 Let us assume that they recover only 5 percent of
8 the 439 billion dollars they say they are owed and they get
9 judgments for 22 billion dollars. Even if the Sacklers
10 somehow could pay both this 22 billion dollars, which is
11 only 5 percent of the claims they've sworn they have, and
12 also the 4.326 billion for the whole rest of the country,
13 that would mean that only nine states and D.C. get 22
14 billion dollars, while 38 states, 614,000 creditors and
15 every other Ad Hoc Group is supposed to share only 4.325
16 billion dollars. That does not and could not ever work for
17 anyone.
18 But, of course, it's much worse than that because
19 the Sacklers don't have 26.325 billion dollars to pay 22 and
20 then another 4.325.
21 So in this hypothetical opt-out scenario, even if
22 the objecting states only get judgment for five cents of
23 what they claim they are owed, everything will fail and
24 collapse if the Sacklers can't pay the settlement.
25 And to add insult to the extraordinary collective

1 national injury, if any of the objecting states were
2 successful, they might be able to assert judgment liens and
3 prime everybody else. So everyone else in American might
4 literally end up sharing little or nothing, not even 4.325
5 billion, while an opt-out state could get a judgment lien
6 for billions. Of course no one is going to do that deal,
7 which is reason number two, no one will do that deal.
8 No creditor group in these cases, to my knowledge,
9 would or will agree to a resolution of their claim if any
10 material party remains free to pursue direct claims against
11 the Sacklers for tens or hundreds of billions of dollars. A
12 tragedy of the common cannot be solved by only some parties
13 agreeing not to drain a common resource. It can only be
14 solved if everyone is bound to the deal.
15 Mr. Preis and I stopped at six. But between us,
16 we confirmed and I hereby represent that the UCC and the
17 AHC, the NSGE and Adult PIs, the NES Committee and the
18 Hospitals will not support a plan that allows for opt-outs
19 that are material along the lines requested by the objecting
20 states. Even if the Sacklers consented to the carve out,
21 everyone of those six groups would instantly support --
22 withdraw -- excuse me -- would instantly withdraw their
23 support for the plan and fiercely oppose it. And of course
24 they would because they wouldn't ever get paid what they've
25 agreed to.

1 This is precisely why, Your Honor, the objectors
2 should be held to this. The Phase 1 Mediation Agreements
3 agreed to among the publics and the privates with virtually
4 no involvement of the Debtors and no involvement of any
5 kind, of any kind by the Sacklers who were not Phase 1
6 mediation parties are expressed conditioned on Sackler
7 participation in the plan.
8 Number three, Your Honor, 1129(a)(11), there
9 actually is a bankruptcy code that governs what you need to
10 make a plan go effective. 1129(a)(11) requires that a plan
11 be feasible. I cannot and would not ever ask a federal
12 judge to confirm a plan that I did not believe was feasible.
13 If there are no third-party releases and material opt-out
14 parties are allowed to sue the Sacklers for tens or hundreds
15 of billions of dollars, I could not stand here and represent
16 to the stakeholders, with whom I am a sworn fiduciary, or to
17 this Court, to whom I have obligations as an officer, that
18 the plan and its many settlements would or could be
19 successfully consummated.
20 The people who so desperately need it and deserve
21 it would get what they bargained for and what they voted
22 for, including, because the overwhelming creditor support we
23 have built after years of effort, would instantly supernova.
24 The Sacklers have no right to vote on our plan, but our
25 creditors do.

1 Four, without the third-party releases objected to
2 by 1/500th of 1 percent of our creditors, everything
3 collapses and those directly impacted by the opioid crisis
4 would lose the billions in hand under the plan and have to
5 wait for recoveries they may never receive and abatement
6 programs that may never launch.
7 Five -- and this is very, very important to me. I
8 find the professed outrage and shock from the objectors
9 about the number of parties on the Sackler side being
10 released to be some combination of confusing, misguided, or
11 utterly hypocritical. Let me explain why with details.
12 I would venture a guess that every single lawyer
13 listening to this hearing right now has done five or ten or
14 twenty or fifty settlements that have releases in the last
15 several years. And I would further venture a guess that
16 virtually every single one of those settlements with any
17 large company or enterprise expressly releases its present
18 and former officers, directors, affiliates, subsidiaries,
19 attorneys, accountants, and representatives or a substantial
20 subset of those representative category because otherwise,
21 the releases are of gossamer spun and essentially worthless.
22 And now I'm not going to speculate. Now I'm going
23 to tell you facts because I know for a fact that of these
24 exact objecting parties, every one of them, including in the
25 last few months, and including in the opioid states, agreed

1 97 percent of actual people who were harmed by the conduct
2 of the Sacklers and Purdue want this deal done.
3 THE COURT: Okay.
4 MR. SHORE: And other than -- if Your Honor
5 doesn't have any questions, I'll just respond later in the
6 hearing...
7 THE COURT: All right, fine. Thank you. I don't
8 at this point. So, the Multistate Governmental Entities
9 Group, I believe, is next?
10 MR. MACLAY: Thank you, Your Honor. Kevin Maclay
11 for the Multistate Governmental Entities Group. And, of
12 course, we've just heard a lot of argument and I will do my
13 best, Your Honor, not to repeat any of it but to hit on a
14 couple of points that are important to my group and I think
15 to the case.
16 As Your Honor knows, I represent the Multistate
17 Governmental Entities Group, a group of approximately 1,300
18 local governmental entities and tribes across 38 states and
19 territories. And, Your Honor, one thing that I would like
20 to highlight in my comments here today is the difficulty of
21 getting to the resolutions reached. As Your Honor knows, it
22 took many months of extensive negotiations involving the
23 services of two of the most highly qualified mediators in
24 the country in former Judge Lane Phillips and in Ken
25 Feinberg, to get to the deal we have today.

1 As the mediators reported on September 23rd to
2 Your Honor, that mediation resulted in Phase 1, in the
3 agreement that all value received by the state and local
4 governments would be exclusively dedicated to programs
5 designed to abate the opioid crisis, and that such value
6 cannot be used for any other purpose other than an amount
7 (indiscernible) administration of the (indiscernible)
8 themselves and to pay legal fees and costs.
9 And that was followed, Your Honor, by Phase 2o of
10 the mediation by those same two esteemed mediators, which
11 resulted, as of March 23, 2021, in a report noting a
12 consensual agreement as to the allocation percentage between
13 and among the public and private creditor groups engaged in
14 the mediation. As that same mediator's report also noted,
15 Your Honor, it also achieved an allocation inter se among
16 the public and private creditor groups, among the
17 overwhelming number of mediation participants. Of course,
18 it resulted in a contribution of over $4 billion from the
19 Sackler Family and associated entity, as also noted by that
20 same mediator's report.
21 And that was followed, Your Honor, by the able
22 assistance of a sitting a sitting court judge, Judge
23 Chapman, who successfully concluded Phase 3 of the
24 mediation, which resulted in additional funds and additional
25 terms that were favorable to both state and local government

1 and all private entities.

2 And so, as a result of those very difficult and

3 time-consuming negotiations overseen by extremely able and

4 experienced advisors, the global settlement was reached.

5 Each aspect of that global settlement is a crucial component

6 of the basis of this plan, and all of them are

7 interconnected (indiscernible) a couple of other people

8 speaking here today.

9 So, just to make it completely clear, Your Honor,

10 the releases are necessary as part of that global

11 settlement, as part of that global deal for the public

12 creditors and the private creditors to receive the funds

13 they have been allocated under the plan, to put towards

14 abatement of the opioid crisis. (indiscernible) releases

15 could be (indiscernible) class of this carefully negotiated

16 and very difficult to achieve settlement. It would allow

17 other creditors to potentially cut in line and obtain funds

18 that would otherwise go towards abatement by the states and

19 local governments.

20 And that, Your Honor, is why the MSG group

21 believes strongly that this plan should be approved. And

22 that's what I have to say about that, Your Honor.

23 THE COURT: Okay, thank you.

24 MR. MACLAY: Thank you.

25 (Recess)

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and Debtors in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
PURDUE PHARMA L.P., et al.,	**Case No. 19-23649 (RDD)**
Debtors.[1]	**(Jointly Administered)**

NOTICE OF FILING OF SEVENTEENTH PLAN SUPPLEMENT PURSUANT TO THE ELEVENTH AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF PURDUE PHARMA L.P. AND ITS AFFILIATED DEBTORS

PLEASE TAKE NOTICE that, on August 31, 2021, the above-captioned debtors and debtors in possession (collectively, the "**Debtors**") filed the *Eleventh Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors* [D.I. 3706] (as modified, amended or supplemented from time to time, the "**Plan**"). Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan.

PLEASE TAKE FURTHER NOTICE that, on June 3, 2021 the Debtors filed the solicitation version of the *Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of*

[1] The Debtors in these cases, along with the last four digits of each Debtor's registration number in the applicable jurisdiction, are as follows: Purdue Pharma L.P. (7484), Purdue Pharma Inc. (7486), Purdue Transdermal Technologies L.P. (1868), Purdue Pharma Manufacturing L.P. (3821), Purdue Pharmaceuticals L.P. (0034), Imbrium Therapeutics L.P. (8810), Adlon Therapeutics L.P. (6745), Greenfield BioVentures L.P. (6150), Seven Seas Hill Corp. (4591), Ophir Green Corp. (4594), Purdue Pharma of Puerto Rico (3925), Avrio Health L.P. (4140), Purdue Pharmaceutical Products L.P. (3902), Purdue Neuroscience Company (4712), Nayatt Cove Lifescience Inc. (7805), Button Land L.P. (7502), Rhodes Associates L.P. (N/A), Paul Land Inc. (7425), Quidnick Land L.P. (7584), Rhodes Pharmaceuticals L.P. (6166), Rhodes Technologies (7143), UDF LP (0495), SVC Pharma LP (5717) and SVC Pharma Inc. (4014). The Debtors' corporate headquarters is located at One Stamford Forum, 201 Tresser Boulevard, Stamford, CT 06901.

EXHIBIT AA

Shareholder Settlement Agreement

FORM OF SETTLEMENT AGREEMENT

BY AND AMONG

THE MASTER DISBURSEMENT TRUST,

EACH OF THE PARTIES LISTED ON EXHIBIT A HERETO,

EACH OF THE PARTIES LISTED ON EXHIBIT B HERETO

AND

PRA L.P.

[_____], 2021

ARTICLE 2.
SETTLEMENT PAYMENTS

Section 2.01 Required Settlement Payment.

(a) Payment of the Outstanding Settlement Amount. Each Payment Party agrees, on a joint and several basis with the other Payment Parties within its Payment Group on the terms and subject to the limitations set forth herein, but on a several and not joint basis as among Payment Groups, to pay or cause to be paid, in the manner and at the times set forth in this Agreement (whether out of Net Proceeds pursuant to Section 2.02, by the applicable Funding Deadlines pursuant to this Section 2.01, as a result of a Payment Remedy, or otherwise) the Outstanding Settlement Amount of its Payment Group. Except as provided in Sections 2.01(i), 2.04, 2.05 or 2.10, the Payment Parties within a Payment Group shall have no further payment obligation under this Section 2.01 once (and for so long as) the Outstanding Settlement Amount of such Payment Group has been reduced to (and remains) zero. For the avoidance of doubt, if, at any time, the Outstanding Settlement Amount of any Payment Group is reduced to zero and then subsequently becomes an amount greater than zero, from and after the date on which the Outstanding Settlement Amount becomes an amount greater than zero, such Payment Group shall comply with the obligations of this Section 2.01 until its Outstanding Settlement Amount is again reduced to (and for so long as it remains) zero.

(b) Minimum Required Settlement Payment.

(i) Subject to the terms and conditions set forth herein, the Aggregate Settlement Amount shall be paid by the Payment Parties in the amounts and on or before the deadlines set forth in the schedule below. Each such payment deadline set forth in the schedule below shall be referred to herein as a "Funding Deadline" and each amount set forth in the schedule below on each Funding Deadline shall be referred to herein as a "Minimum Required Settlement Payment".

#	Funding Deadline	Minimum Required Settlement Payment
1.	Plan Effective Date	$300 million
2.	June 30, 2022	$350 million
3.	June 30, 2023	$375 million
4.	June 30, 2024	$375 million
5.	June 30, 2025	$350 million
6.	June 30, 2026	$300 million
7.	June 30, 2027	$1,000 million
8.	June 30, 2028	$475 million
9.	June 30, 2029	$425 million, subject to adjustment as set forth in the proviso immediately below this schedule
10.	June 30, 2030	$325 million, subject to adjustment as set forth in the proviso immediately below this schedule
11.	June 30, 2031	Up to $200 million, as set forth in the proviso immediately below this schedule

provided that (x) each dollar in excess of $2.5 billion up to and including $2.675 billion in the aggregate that the MDT actually receives pursuant to this Agreement on or prior to June 30, 2026 shall defer one dollar, up to a maximum aggregate amount of $175 million, of the Minimum Required Settlement Payment otherwise payable on June 30, 2030 to instead become payable on June 30, 2031 and (y) each dollar in excess of $2.675 billion that the MDT actually receives pursuant to this Agreement on or prior to June 30, 2026 shall defer one dollar, up to a maximum aggregate amount of $25 million, of the Minimum Required Settlement Payment otherwise payable on June 30, 2029 to instead become payable on June 30, 2031; *provided*, *however*, that deferrals

shall only be made pursuant to the foregoing proviso if the aggregate amount available for deferral pursuant thereto equals or exceeds $25 million.

(ii) Notwithstanding the foregoing clause (i), (A) for each month that the Plan Effective Date is delayed past February 28, 2022, the second Funding Deadline of June 30, 2022 shall be extended in increments of one calendar month (and due at the end of such month) such that there are no fewer than four calendar months between the Plan Effective Date and the second Funding Deadline, with all other Funding Deadlines remaining as set forth above, and (B) in the event any Funding Deadline is otherwise extended pursuant to the terms of this Agreement such that fewer than five calendar months remain until the next Funding Deadline, such next Funding Deadline shall be automatically extended by one calendar month.

(iii) Notwithstanding anything in this Agreement to the contrary, if the Debtors renotice the Confirmation Hearing in accordance with Section 12.3(c) of the Plan, then, unless the Debtors and the Sackler Parties shall agree otherwise in their sole and absolute discretion, the Parties agree to amend this Agreement to remove the agreements and concessions made by the Debtors and the Sackler Parties reflected in the Mediator's Report.

(c) Payment of A-Side Funding Deadline Obligations. With respect to each A-Side Payment Group, on each Funding Deadline,

(i) The A-Side General Obligors shall pay, or cause to be paid (on a joint and several basis with the other A-Side General Obligors) to the MDT, on behalf of the A-Side Payment Groups, the A-Side Funding Deadline Obligation of such A-Side Payment Groups by the applicable Funding Deadline;

(ii) the A-Side Payment Parties that are trusts (other than the A-Side General Obligors and "bare trusts") or other entities within each A-Side Payment Group shall pay, or cause to be paid (on a joint and several basis with the other remaining A-Side Payment Parties that are trusts or other entities within such A-Side Payment Group), to the MDT such A-Side Payment Group's A-Side Funding Deadline Obligation by the applicable Funding Deadline solely to the extent such A-Side Funding Deadline Obligation is not paid pursuant to clause (i); and

(iii) the A-Side Payment Parties that are natural persons or "Bare Trusts" within each A-Side Payment Group shall pay, or cause to be paid (on a joint and several basis with the other A-Side Payment Parties that are natural persons or "Bare Trusts" within such A-Side Payment Group), to the MDT such A-Side Payment Group's A-Side Funding Deadline Obligation by the applicable Funding Deadline solely to the extent such A-Side Funding Deadline Obligation is not paid pursuant to clause (i) or (ii);

provided that (1) if, on any Funding Deadline, the payment of any A-Side Funding Deadline Obligation would cause the Outstanding Settlement Amount of an A-Side Payment Party's Payment Group to be less than zero, such A-Side Payment Party shall pay, or cause to be paid, to MDT on such Funding Deadline an amount equal to the Outstanding Settlement Amount of its A-Side Payment Group; (2) no A-Side Payment Party shall be required to pay any portion of any Required Settlement Payment so long as the Outstanding Settlement Amount of its A-Side Payment Group is zero; (or, in the case of any A-Side General Obligor, so long as the Outstanding Settlement Amounts of all A-Side Payment Groups is zero); (3) no A-Side General Obligor shall have any obligation to make any payment pursuant to this Section 2.01 (and shall not be in Breach or otherwise have any liability to the MDT for the failure to make any payment) if and to the extent it does not have sufficient liquid assets (not including any amounts reserved in good faith for the payment of Taxes or any other Permitted Withdrawals applicable to such A-Side General Obligor) to do

so; and (4) nothing in this Section 2.01(c) shall limit the MDT's right to seek payment in full from any A-Side Payment Party of its A-Side Funding Deadline Obligation without any requirement to seek collection first from any A-Side General Obligor or any other A-Side Payment Party.

(d) Payment of B-Side Funding Deadline Obligations. With respect to each Funding Deadline, each B-Side Payment Group shall pay, or cause to be paid, to the MDT its B-Side Funding Deadline Obligation by the applicable Funding Deadline; *provided* that (x) if, on any Funding Deadline, the payment by any B-Side Payment Group of its B-Side Funding Deadline Obligation would cause its Outstanding Settlement Amount to be less than zero, then such B-Side Payment Group shall pay, or cause to be paid, to MDT an amount equal to its Outstanding Settlement Amount on such Funding Deadline and (y) such B-Side Payment Group shall not be required to pay any portion of any Required Settlement Payment so long as its Outstanding Settlement Amount is zero (or less than zero).

(e) Prepayment of Outstanding Settlement Amount. Any Payment Group (including, for the avoidance of doubt, any A-Side General Obligor on behalf of the A-Side Payment Groups) shall have the right to prepay its Outstanding Settlement Amount at any time, in whole or in part, without premium or penalty. Any such prepayment by a Payment Group shall satisfy and reduce, dollar-for-dollar, the next due funding obligation of such Payment Group pursuant to Section 2.01(a) or (b) (or, at the option of such Payment Group, the next funding obligation of any IAC Payment Party in its Payment Group pursuant to Section 2.02(a) or (b)), it being understood that any unapplied prepayment shall carry over and be used to satisfy and reduce, dollar-for-dollar, such Payment Group's succeeding such funding obligation. For the avoidance of doubt, no such prepayment by a Payment Group (or subsequent reduction of the next due A-Side Funding Deadline Obligation(s) or B-Side Funding Deadline Obligation(s) of such Payment Group) shall affect any payment obligation under this Agreement of any other Payment Group.

(f) Reallocation of A-Side Payments on the First Three Funding Deadlines to B-Side. If the Required Settlement Payment on any of the first, second, or third Funding Deadline is greater than zero, then (i) the payment obligation under Section 2.01(d) of each B-Side Payment Group on such Funding Deadline shall be an amount equal to fifty percent (50%) of such Required Settlement Payment due on such Funding Deadline and (ii) no A-Side Payment Party shall be required to pay any portion of such Required Settlement Payment due on any such Funding Deadlines. For the avoidance of doubt, (x) any payment by a B-Side Payment Group pursuant to this Section 2.01(f) shall be credited in full to such B-Side Payment Group (and not to any A-Side Payment Group) for purposes of calculating the Aggregate Payments of such Payment Group and (y) each B-Side Payment Party shall be jointly and severally liable with the other B-Side Payment Parties within its B-Side Payment Group for the amount payable under this Section 2.01(f) by its B-Side Payment Group.

(g) B-Side Excess Amount Adjustment. If, as of any Funding Deadline, (x) the Aggregate Payments of all Payment Groups exceeds (y) an amount equal to the greater of (i) the Cumulative Minimum Required Settlement Payments as of the immediately prior Funding Deadline and (ii) the aggregate amount of Net Proceeds with respect to all Payment Parties calculated without giving effect to the deduction of Unapplied Advanced Contributions (the amount of the excess between clauses (x) and (y), the "B-Side Excess Amount"), then the portion of the Required Settlement Payment payable by each B-Side Payment Group on such Funding Deadline shall be reduced by the lesser of (A) fifty percent (50%) of the B-Side Excess Amount and (B) one hundred percent (100%) of such B-Side Payment Group's B-Side Payment Group Portion of the Required Settlement Payment after giving effect to Section 2.01(f).

(h) A-Side Allocable Portion Adjustment. If, immediately prior to the eighth Funding Deadline, the A-Side Allocable Portion is greater than zero, then:

(i) on each of the eighth, ninth and tenth Funding Deadlines, each A-Side Payment Group's A-Side Payment Group 2.01 Amount shall be increased by an amount equal to the lesser of (x) one-twenty-fourth (1/24) of the A-Side Allocable Portion calculated as of immediately prior to the eighth Funding Deadline and (y) such A-Side Payment Group's Settlement Amount Balance less its A-Side Payment Group 2.01 Amount as of such eighth, ninth or tenth Funding Deadline; *provided* that the aggregate amount determined pursuant to this Section 2.01(h)(i) on any given Funding Deadline shall not exceed the aggregate B-Side Payment Group 2.01 Amounts on such Funding Deadline (each such payment pursuant to this subparagraph (i), an "A-Side Reallocation Payment"); and

(ii) each B-Side Payment Group's B-Side Payment Group 2.01 Amount for the eighth, ninth or tenth Funding Deadlines shall be reduced by an amount equal to fifty percent (50%) of the aggregate A-Side Reallocation Payments made on such Funding Deadline.

For the avoidance of doubt, (w) any A-Side Reallocation Payment made by an A-Side Payment Group shall be credited in full to such A-Side Payment Group (and not to any B-Side Payment Group) for purposes of calculating the Aggregate Payments, (x) the obligation of each A-Side Payment Group to pay its A-Side Reallocation Payment is included in its obligation to pay its A-Side Funding Deadline Obligation due on such Funding Deadline pursuant to Section 2.01(c), (y) each A-Side Payment Party shall be jointly and severally liable with the other A-Side Payment Parties within its A-Side Payment Group for the A-Side Reallocation Payment of such Payment Group, and (z) an A-Side Payment Group shall have no further obligation to pay its A-Side Reallocation Payment once (and for so long as) the Settlement Amount Balance of such Payment Group has been reduced to zero.

(i) Family Group 8 Cap.

(i) Notwithstanding anything in this Section 2.01 or Section 2.03 to the contrary if, at any time, the A-Side Capped Payment Parties have actually paid an aggregate of $84,500,000 to the MDT pursuant to Sections 2.01(c)(ii), 2.01(e) and 2.10 (not including any payments deemed to have been made by A-Side Payment Group 8 pursuant to Section 2.01(l)), then, with respect to any other payment Obligations of the A-Side Capped Payment Parties arising from time to time thereafter pursuant to Sections 2.01(c)(ii) and Section 2.10 (any such amount, an "Excess Group 8 Payment Obligation"):

(A) the A-Side Payment Parties within each A-Side Payment Group (other than A-Side Payment Group 8) shall pay, or cause to be paid, on a joint and several basis with the other A-Side Payment Parties within their respective A-Side Payment Groups, to the MDT when such Excess Group 8 Payment Obligation is due an amount equal to one fourteenth (1/14) of any such Excess Group 8 Payment Obligation; and

(B) the B-Side Payment Parties within each B-Side Payment Group shall pay, or cause to be paid, on a joint and several basis with the other B-Side Payment Parties within their respective B-Side Payment Groups, to the MDT when such Excess Group 8 Payment Obligation is due an amount equal to one quarter (1/4) of any such Excess Group 8 Payment Obligation; and

(C) the A-Side Capped Payment Parties shall have no obligation to pay any portion of the Excess Group 8 Payment Obligation.

For the avoidance of doubt, (i) nothing in this Section 2.01(i) shall relieve the A-Side General Obligors or the A-Side IAC Payment Parties in A-Side Payment Group 8 of their obligations under

Sections 2.01, 2.02, 2.03, and 2.10 and (ii) the payment of any such Excess Group 8 Payment Obligation (other than an Excess Group 8 Payment Obligation in respect of the Additional A-Side Amount) will be included in the calculation of the Aggregate Payments of A-Side Payment Group 8 (and not of the members of the Payment Group actually making such payment).

(ii) Notwithstanding the foregoing, if (i) any B-Side Payment Group pays any portion of an Excess Group 8 Payment Obligation and (ii) following the date on which the Full Outstanding Settlement Amount of A-Side Payment Group 8 (inclusive of the Excess Group 8 Payment Obligation) and of all other A-Side Payment Groups have been reduced to zero, any A-Side General Obligor receives proceeds from a Sale or Non-Tax Distribution (other than any such proceeds used to pay Taxes, reserved in good faith for the payment of Taxes, or that constitute IAC Distribution Deductions described in clause (ii) of the definition thereof or Sale Proceeds Deductions described in clause (ii) of the definition thereof) (any such proceeds, "Excess IAC Proceeds"), such A-Side General Obligor shall be obligated to pay to each such B-Side Payment Group an amount (such amount, a "2.01(i) Top-Off Payment") equal to the lesser of (x) one thirty-second (1/32) of the amount of Excess IAC Proceeds received by such A-Side General Obligor, and (y) the amount paid by such B-Side Payment Group in respect of the Excess Group 8 Payment Obligation (less amounts previously paid to such B-Side Payment Group pursuant to this paragraph (ii)). Until such time as the B-Side Payment Groups have received 2.01(i) Top-Off Payments equal to the amount paid by all B-Side Payment Groups in respect of the Excess Group 8 Payment Obligation, no A-Side General Obligor shall make any distribution to any A-Side Capped Payment Party of Excess IAC Proceeds. If, notwithstanding the foregoing, any A-Side Capped Payment Party receives any Excess IAC Proceeds, such A-Side Capped Payment party will be obligated to make a 2.01(i) Top-Off Payment to each B-Side Payment Group in an amount equal to the lesser of (1) one fourth (1/4) of the Excess IAC Proceeds received by such A-Side Capped Payment Party and (2) the amount paid by such B-Side Payment Group in respect of the Excess Group 8 Payment Obligation (less amounts previously paid to such B-Side Payment Group by the A-Side General Obligors or the A-Side Capped Payment Parties pursuant to this paragraph (ii)).

(iii) Any 2.01(i) Top-Off Payment required to be made pursuant to the preceding paragraph (ii) will be paid solely upon the later to occur of (x) the date that is thirty (30) days after the date on which the Full Outstanding Settlement Amounts of all A-Side Payment Groups have been reduced to zero (accounting for the maximum amount the A-Side Payment Groups may be liable for hereunder), and (y) the date that is thirty (30) days after the date on which such Excess IAC Proceeds have been received by the relevant A-Side General Obligor or A-Side Capped Payment Party, as the case may be. Any 2.01(i) Top-Off Payment by an A-Side Capped Payment Party or A-Side General Obligor to a B-Side Payment Group pursuant to the immediately preceding sentence shall be made by wire transfer of immediately available funds to such account(s) as may be designated by such B-Side Payment Group to such A-Side Capped Payment Party or such A-Side General Obligor in accordance with Section 11.01. For the avoidance of doubt, the payment of any 2.01(i) Top-Off Payment will not be considered a payment made by any Payment Group for purposes of calculating the Aggregate Payments of any such Payment Group.

(j) Payments by Beacon Trust. All payments by any A-Side Payment Group, except as otherwise designated, shall be made directly or indirectly to Beacon Trust (which received substantial distributions indirectly from Purdue) and contributed by Beacon Trust through intervening entities to Pharmaceutical Research Associates L.P. ("PRA L.P."), which shall make the required payments under this Section 2.01 to the MDT in accordance with Section 2.01(l) below. All such payments made directly or indirectly to Beacon Trust by any A-Side Payment Group shall be paid, dollar for dollar, to the MDT by PRA L.P.

(k) Payments by 74A Trust. All payments by any B-Side Payment Group, except as otherwise designated, shall be made directly or indirectly to the Trust formed under agreement of trust dated November 5, 1974 for the benefit of Beverly Sackler (the "74A Trust") (which received substantial distributions indirectly from Purdue) and contributed by the 74A Trust through intervening entities to PRA L.P., which shall make the required payments under this Section 2.01 to the MDT in accordance with Section 2.01(l) below. All such payments made directly or indirectly to the 74A Trust by any B-Side Payment Group shall be paid, dollar for dollar, to the MDT by PRA L.P.

(l) Allocation of Payments.

(i) For all purposes of this Agreement (including the definitions of Aggregate Payments, Outstanding Settlement Amount and Settlement Amount Balance), any payment by an A-Side General Obligor (including any payment pursuant to Section 2.02(a) or (b) but excluding any payment pursuant to Section 2.10 (the allocation of which shall be governed by Section 2.10)), shall be deemed to have been made by each A-Side Payment Group, in an amount equal to the lesser of (A) one-eighth (1/8) of such payment and (B) such A-Side Payment Group's Settlement Amount Balance, *provided* that if the Settlement Amount Balance of any A-Side Payment Group is zero or is reduced to zero by such allocation, then any unallocated portion of such payment by an A-Side General Obligor shall be deemed to have been made in equal proportion by each of the A-Side Payment Group(s) whose Settlement Amount Balances are greater than zero.

(ii) Any payment by a Payment Party that is a Crossover Member (other than any A-Side General Obligor or Common B-Side Payment Party), shall be deemed to have been made in equal amounts by each Payment Group of which such Crossover Member is a member; *provided* that if the Settlement Amount Balance of any such A-Side Payment Group is zero or is reduced to zero by such allocation, then any unallocated portion of such payment by a such Crossover Member shall be deemed to have been made in equal proportion by each of such A-Side Payment Group(s) of whose Settlement Amount Balances are greater than zero.

(iii) For all purposes of this Agreement (including the definitions of Aggregate Payments, Outstanding Settlement Amount and Settlement Amount Balance), any payment by any B-Side Payment Party that is a member of more than one B-Side Payment Group (such B-Side Payment Party, a "Common B-Side Payment Party"), shall be deemed to have been made by each B-Side Payment Group, in an amount equal to the lesser of (A) one-half (1/2) of such payment and (B) such B-Side Payment Group's Settlement Amount Balance; *provided* that if such payment is made by the 74A Trust as a result of a B-Side Payment Party's payment to the 74A Trust pursuant to Section 2.01(k) or Section 2.02(d), then, for so long as the 74A Trust is a Common B-Side Payment Party, such payment by the 74A Trust shall be deemed to have been made by the B-Side Payment Group in the amount such Payment Group paid to 74A Trust for such payment.

(m) Except as provided in Section 9.03, (1) each Payment Party agrees that its obligations with respect to the Full Outstanding Settlement Amount and all other Obligations owed by its Payment Group, and such Payment Party's obligations arising as a result of its joint and several liability with each other Payment Party within its Payment Group as provided herein, shall be separate and distinct obligations, but all such obligations shall be primary obligations of each such Payment Party and (2) if a Specified Breach has occurred and is continuing with respect to any Payment Group and the MDT has elected to exercise the Payment Remedy in connection with such Specified Breach pursuant to Section 9.02, the MDT may, solely in accordance with Section 9.02 and subject to Section 9.03, proceed directly and at once, against any Payment Party within such Payment Group to collect and recover the full amount, or any portion of, such Payment Group's Full Outstanding Settlement Amount and all other Obligations, without first proceeding against any other Payment Party or any other Person, or against any Collateral securing the Full Outstanding

Settlement Amount and all other Obligations of such Payment Group. Each Payment Party waives all suretyship defenses and consents and agrees that the MDT (and all other Secured Parties) shall be under no obligation to marshal any assets in favor of any Payment Group or against or in payment of any or all of the Full Outstanding Settlement Amount and all other Obligations.

(n) Subject to Section 2.08, all payments made to the MDT pursuant to this Section 2.01 shall be made by wire transfer of immediately available funds to the account set forth on Exhibit G (or such other account(s) of the MDT as may be designated by the MDT to the Sackler Parties' Representative in accordance with Section 11.02 at least ten (10) Business Days prior to the applicable Funding Deadline set forth in Section 2.01(b)).

Section 2.02 Payment of Net Proceeds.

(a) Each IAC Payment Party hereby covenants and agrees to pay, or cause to be paid, within forty-five (45) calendar days following receipt (or as soon thereafter as legally permissible or, if the IAC Payment Party is not entitled to receive any cash in respect of Net Proceeds, the receipt of Net Proceeds by any other IAC Payment Party), an amount equal to 100% of all Net Proceeds in respect of such IAC Payment Party to the MDT in the manner set forth in Section 2.02(c) or (d) below, as applicable, and Section 2.08 (each such payment, a "Net Proceeds Payment"), *provided* that no IAC Payment Party shall be required to pay to the MDT any amounts referred to in the proviso to the first sentence of Section 3.07(d). The A-Side IAC Payment Parties shall have no further payment obligation under this Section 2.02 once (and for so long as) the Outstanding Settlement Amount of all A-Side Payment Groups has been reduced to zero and the B-Side IAC Payment Parties within a Payment Group shall have no further payment obligation under this Section 2.02 once (and for so long as) the Outstanding Settlement Amount of such Payment Group has been reduced to (and remains) zero. For the avoidance of doubt, if the Outstanding Settlement Amount of any Payment Group is reduced to zero and then subsequently becomes an amount greater than zero, from and after the date on which the Outstanding Settlement Amount becomes an amount greater than zero, the IAC Payment Parties in such Payment Group shall comply with the obligations of this Section 2.02 until its Outstanding Settlement Amount is again reduced to zero.

(b) In the event that a B-Side IAC Payment Party's Net Proceeds is greater than the Settlement Amount Balance(s) of the B-Side Payment Group(s) in which such B-Side IAC Payment Party is a member (any such amount, "Unapplied Net Proceeds"), the A-Side IAC Payment Parties (or, if the A-Side IAC Payment Parties have insufficient funds, the other A-Side Payment Parties within each A-Side Payment Group, in a proportion equal to the proportion in which payments by A-Side General Obligors are allocated and deemed to be made by each A-Side Payment Group at such time pursuant to Section 2.01(l)) shall be obligated to pay, on the date such Net Proceeds would otherwise have been payable by the B-Side IAC Payment Party, to the MDT an additional amount equal to the lesser of (x) the Unapplied Net Proceeds of each such B-Side IAC Payment Party and (y) the aggregate remaining Outstanding Settlement Amount of all A-Side Payment Groups.

(c) All payments by any A-Side IAC Payment Party, except as otherwise designated, shall be made directly or indirectly to Beacon Trust (which received substantial distributions indirectly from Purdue) and contributed by Beacon Trust through intervening entities to PRA L.P., which shall make the required payments to the MDT under this Section 2.02 to the account set forth on Exhibit G (or such other account(s) of the MDT that previously have been designated by the MDT to each of the Sackler Parties in accordance with Section 11.02) by wire transfer of immediately available funds. All such payments made directly or indirectly to Beacon Trust by any A-Side IAC Payment Party shall be paid, dollar for dollar, to the MDT by PRA L.P.

ARTICLE 8.
COVENANTS

Section 8.01 Intentionally Omitted.

Section 8.02 Non-Circumvention. Each Sackler Party covenants and agrees that it shall not, and shall cause all Persons under its Control not to, intentionally take or fail to take any action a purpose or material effect of which is to avoid, circumvent, frustrate or impair the ability of any Sackler Party to satisfy its Obligations under this Agreement or the Collateral Documents to which it is a party, the enforcement thereof or the ability of the MDT to recover any unpaid Obligations (a "Prejudicial Impact"); *provided* that, notwithstanding the foregoing, any Sackler Party may (i) for the avoidance of doubt, take any action expressly permitted by this Agreement (including the Credit Support Annexes) or the Collateral Documents to which it is a party and (ii) undergo a conversion, recapitalization, reorganization, division, appointment in further trust, appointment of new trustees or personal representatives or exchange of securities into one or more corporations, limited liability companies, limited partnerships, trusts or other entities, and such action shall not constitute a Prejudicial Impact, but only, in each case, to the extent that (A) the resulting entity or trust assumes the obligations of such Sackler Party in this Agreement pursuant to a joinder agreement in the form attached hereto as Exhibit V, (B) to the extent such Sackler Party has provided Collateral to the MDT or any other Secured Party pursuant to any Collateral Document, such conversion, recapitalization, reorganization, division, appointment, exchange or other transaction shall not have the effect of rendering any liens in favor of the MDT or any other Secured Party granted by such Sackler Party pursuant to any Collateral Document invalid, unenforceable or unperfected or adversely affect the priority thereof and any surviving or resulting trust or entity shall take any and all steps as are necessary to maintain the MDT's or such other Secured Party's perfected security interest (without lapse or change in priority) and also complies with all applicable limitations and requirements imposed under each Collateral Document to which such Sackler Party is a party, (C) the resulting entity or Trust is in the same Payment Group as its predecessor, (D) in the case of a Trust, each trustee and each Assuring Party that is a Power Holder of the continuing or resulting Trust shall have delivered to the MDT a Trust Certification and Further Assurances Undertaking, respectively, and (E) in the case of any change in the personal representatives of the JDS Estate, each personal representative and each Assuring Party that is a Power Holder of the JDS Estate shall have delivered to the MDT an Estate Certification and Further Assurances Undertaking, respectively.

Section 8.03 No Interference. Each Sackler Party hereby covenants and agrees that it will not, and shall cause all Persons under its Control not to, intentionally take any action that would in any material respect interfere with, delay, impede, postpone or frustrate the confirmation or consummation of the Plan and implementation of the transactions contemplated in this Agreement and under the Collateral Documents to which such Sackler Party is a party. Each Sackler Party further covenants and agrees to comply with the provisions of the Plan applicable to it.

Section 8.04 Consent to Cancellation of PPLP Interests and De Minimis PRALP Interests.

(a) PRA L.P. hereby agrees, subject to the terms and conditions of this Agreement, to the deemed surrender, cancellation and/or redemption of the PPLP Interests pursuant to the Plan and that the direct and indirect holders thereof shall not receive or retain any property under the Plan on account of the PPLP Interests.

(b) The Parties agree, subject to the terms and conditions of this Agreement, to the deemed surrender, cancellation and/or redemption of the PPI Interests and the De Minimis PRALP Interests (with any taxes of Purdue Pharma Inc. and any other after-tax costs to Purdue Pharma Inc. attributable to its De Minimis PRALP Interests and resulting from the transactions contemplated in the Plan and this Agreement including, for the avoidance of doubt, any sales of IACs, being borne by the Sackler Parties) pursuant to

the Plan and that (i) Purdue Pharma Inc. shall not receive or retain any property under the Plan on account of the De Minimis PRALP Interests and (ii) the direct and indirect holders of Purdue Pharma Inc. shall not receive or retain any property under the Plan on account of the PPI Interests.

Section 8.05 MDT Shareholder Insurance Rights. The Sackler Parties agree to the treatment of the MDT Shareholder Insurance Rights on the terms and conditions set forth in the Plan.

Section 8.06 Naming Rights. Each Payment Party covenants and agrees that it shall, and the Confirmation Order shall provide that each Family Member that is a member of the Payment Group to which such Payment Party is a member shall, not seek, request, or permit any new naming rights with respect to charitable or similar donations to organizations (irrespective of when such funds were donated or from what source) until the later to occur of (1) the date on which the Full Outstanding Settlement Amount of the Payment Groups that such Family Member is a member has been reduced to zero (accounting, in the case of an A-Side Payment Group, for the maximum amount the A-Side Payment Group may be liable for hereunder) and (2) the first date on which the IAC Payment Parties of such Payment Groups are no longer the owners or holders of any interest in any IAC (other than Retained Interests permitted by Section 3.01(b)); *provided* that at such time such Payment Party and its associated Payment Group and Family Members are in compliance with their obligations under Section 8.09. For the avoidance of doubt, nothing in this Section 8.06 or the Confirmation Order shall prohibit (x) any Payment Party or Family Member from making any charitable or similar donations or (y) the publication of the name of any Payment Party or Family Member making a charitable or similar donation in connection with such donation, provided such publication is not pursuant to a naming right.

Section 8.07 No Side Agreements. No Sackler Party shall maintain or enter into any written or oral agreement with any other Sackler Party with respect to the transactions and obligations contemplated hereby that would adversely affect the ability of such Sackler Party to perform its obligations hereunder.

Section 8.08 Notification of Breach. If any Party becomes aware that a Breach Trigger or Breach has occurred, such Party shall provide notice in accordance with Section 11.01 of this Agreement to all other Parties of the occurrence of such Breach Trigger or Breach within five (5) Business Days (for the avoidance of doubt, any such notice provided by the Sackler Parties' Representative shall constitute notice provided on behalf of all applicable Sackler Parties). Until the earlier of (i) the commencement of a Dispute Proceeding and (ii) the time at which the MDT is permitted to exercise remedies pursuant to Section 9.02(a) of this Agreement, the Parties shall not disclose any occurrence or notice of Breach Trigger or Breach except (a) to the other Parties, (b) to their respective representatives and advisors to whom the confidential nature of such information is also disclosed, (c) as required by applicable law, rule, regulation, or ethical requirement, or by any governmental, judicial, administrative, regulatory or quasi-regulatory body or process or any self-regulatory organization or (d) as necessary, in the sole discretion of the MDT, to evaluate or consider enforcement of its rights and remedies in connection with such Breach Trigger or Breach or as necessary to notify potential affected parties as to the impact of such Breach Trigger or Breach on the MDT's abilities to fulfill its contractual or fiduciary duties (including its obligations under the Plan); *provided* that notice to potential affected parties shall not be through the making of a public announcement or public disclosure (whether by press release, social media posting or otherwise).

Section 8.09 Opioid Business. Each Person listed on Exhibit H-1 (each a "Restricted Person") shall not, other than by way of ownership of the IACs (unless and to the extent such IAC is no longer owned (directly or indirectly) by such Person (other than Retained Interests)), engage directly or indirectly in the manufacturing or sale of opioids, provided, however, that this provision shall not prohibit: (a) any investment in any third-party investment vehicle that is not controlled by any Restricted Person(s) and that makes investment decisions over which such Restricted Person has no discretion; *provided* that it is not an express investment purpose or objective of such third party investment vehicle to make investments in the

opioid business or in entities engaged in the manufacturing or sale of opioids; (b) any investment in less than 5% of the equity of any Person; (c) investments in any Person for whom the researching, development, manufacturing, distribution or sale of opioids is incidental or does not constitute one of such Person's principle businesses or business segments (including, without limitation, the practice of medicine or engaging in academic research on opioids); (d) investments held by such Restricted Person on the Agreement Effective Date and identified on Exhibit H-2 (or received as proceeds from dispositions of such investments); (e) activities related to MN Consulting LLC (as identified on Exhibit H-2), including serving as a director or officer thereof, only for so long as any IAC Payment Party directly or indirectly owns an IAC, to the extent such activities would otherwise violate this Section 8.09; or (f) engaging in activities for which the researching, development, manufacturing, distribution or sale of opioids is incidental, including, without limitation, the practice of medicine or engaging in academic research on opioids. To the extent that any Restricted Person engages in dispositions, sales or other transfers in order to comply with this provision, such dispositions, sales or other transfers shall not be with Persons known to such Restricted Person to be Related Parties, *provided* that for the purposes of this provision, Related Parties shall not include any IAC, any IAC Holding Company or any IAC Pledged Entity that is as of the time of determination not still owned or controlled by any of the Sackler Parties. In the event a Restricted Person holds an investment or interest in a Person and such Person makes acquisitions or changes its business to cause such investment or the holding of such interest to be impermissible under this Section 8.09 but for this sentence, the holding of such interest or investment shall not be a violation of Section 8.09 so long as (i) such Restricted Person uses its best efforts to dispose of all or a portion of such investment sufficient to cause it no longer to be impermissible within 90 days (in the case of marketable securities) or 180 days (in the case of non-marketable securities) of learning of the pertinent facts of such acquisitions or change in business, and (ii) such Restricted Person has disposed of all or a portion of such investment sufficient to cause it no longer to be impermissible hereunder prior to the second anniversary of learning of the pertinent facts of such acquisitions or change in business.

Each Restricted Person that has any ownership interest in any entity listed on Schedule H-2 (except for MN Consulting LLC) (each, a "Schedule H-2 Entity") shall (i) not actively participate in the ongoing management of any of the Schedule H-2 Entities; (ii) not provide their consent (where required under the relevant documentation) to any action intended to lead to a material expansion of the opioid business of the Schedule H-2 Entities; (iii) use reasonable efforts to explore exit options with regard to their investments in those of the Schedule H-2 Entities the ownership of which would be prohibited by Section 8.09 but for the fact that such entities are listed on Schedule H-2; and (iv) at such time as applicable restrictions on their rights to exit their investments in the Schedule H-2 Entities lapse, use their best efforts to dispose of such investments, if and to the extent that their ownership of such entities would be prohibited by Section 8.09 but for the fact that such entities are listed on Schedule H-2.

Section 8.10 Additional Assuring Parties. The Sackler Parties shall use reasonable best efforts to cause each Power Holder promptly to execute a Further Assurances Undertaking upon such Person becoming a new Power Holder with respect to any relevant power and promptly notify the MDT of any difficulties encountered in obtaining the same.

Section 8.11 Opinions of Counsel. If counsel to the Ad Hoc Committee or counsel to the Creditors' Committee seeks to secure any Opinions of Counsel as to (1) the enforceability of the security interests with respect to the Collateral granted by the applicable Payment Parties and the IAC Pledgors to the Secured Party pursuant to the Collateral Documents or (2) the perfection of the security interests with respect to the Collateral granted by the applicable Payment Parties and the IAC Pledgors to the Secured Party pursuant to the Collateral Documents, then the applicable Payment Parties and IAC Pledgors shall cooperate with the reasonable requests of such counsel related to the provision of such Opinions of Counsel, *provided* that such cooperation shall not be required if counsel to the applicable Sackler Party has provided the applicable Opinion of Counsel or has communicated to counsel to the Ad Hoc Committee and counsel

to the Creditors' Committee that it will provide the applicable Opinion of Counsel (and such Opinion of Counsel is actually provided) .

Section 8.12 Refundings. Each Trust hereby covenants and agrees that any property reverting or required to be refunded to such Trust by or from any other Trust shall be held by the trustees of such recipient Trust as a separate resulting trust that will remain subject to the transferring Trust's obligations under the Settlement Documents as if still held by such transferring Trust (with the satisfaction of obligations due MDT having, with respect to such resulting trust and the property thereof, priority over all other obligations of the recipient Trust to the fullest extent permitted by applicable law), and to execute such further documents as the MDT may reasonably request to evidence and confirm the same.

Section 8.13 Additional IACs. Each Sackler Party hereby covenants and agrees that, in the event there is an entity that is as of the Agreement Effective Date a non-U.S. pharmaceutical operating company Controlled, directly or indirectly, individually or acting together with other Sackler Parties or their Affiliates, by one or more Sackler Parties is not listed in Exhibit E-1 (other than those entities set forth on Exhibit E-2), the applicable Sackler Parties shall, within 90 days of becoming aware of any such entity and that it is not listed on Exhibit E-1, deliver to the Parties an amended Exhibit E-1 that includes such company and such company shall constitute an "IAC" for all purposes under this Agreement as of the date of such delivery. Each Sackler Party that owns (directly or indirectly) Equity Interests in such IAC, as may reasonably be requested by the MDT, shall become an IAC Payment Party under this Agreement and/or shall cause any of its Controlled Affiliates that own any Equity Interest in such IAC to become an IAC Payment Party under this Agreement (in each case to the extent it is not already an IAC Payment Party). Each such Sackler Party shall (or shall cause a Controlled Affiliate to) grant a security interest in an entity that directly or indirectly owns 100% of the Equity Interests of such IAC owned (directly or indirectly) by such Sackler Party to the MDT pursuant to Section 3.07. For the avoidance of doubt, any IAC Payment Party that becomes party to this Agreement subsequent to the Agreement Effective Date pursuant to this Section 8.13 shall be bound by, and subject to the terms of, this Agreement applicable to IAC Payment Parties (including with respect to such newly added IAC) as of the date an amended Exhibit E-1 is delivered to the Parties pursuant to this Section 8.13 (and any representations and warranties made pursuant to this Agreement shall be made as of the date of such delivery) and all references in this Agreement to "Agreement Effective Date" and "Settlement Effective Date" shall, with respect to any such new IAC Payment Party and IAC, be understood to be the date of such delivery.

ARTICLE 9.
BREACH AND REMEDIES

Section 9.01 Breach. The events described in this Section 9.01 shall, as specified herein, constitute a "Breach Trigger", "Specified Breach" or "Non-Specified Breach":

(a) Non-Payment

(i) The Payment Parties in a Payment Group fail to pay when due all or any portion of (A) the Full Outstanding Settlement Amount (including any Funding Deadline Obligation and, if applicable, any Additional A-Side Amount Payment) owed by such Payment Group pursuant to Article 2 (excluding obligations referenced in the succeeding clause (ii)) or (B) any Breach Fee pursuant to Section 9.05, each of which, upon notice by the MDT to the Sackler Parties' Representative pursuant to Section 11.01, shall constitute a Specified Breach with respect to all the Payment Parties in such Payment Group.

(ii) Any IAC Payment Party fails to (A) pay when due all or any portion of any Net Proceeds Payment pursuant to Section 2.02 or (B) deposit Sale Proceeds or IAC Distributions in

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
PURDUE PHARMA L.P., et al.,	**Case No. 19-23649 (RDD)**
Debtors.[1]	**(Jointly Administered)**

TWELFTH AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF PURDUE PHARMA L.P. AND ITS AFFILIATED DEBTORS

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Christopher S. Robertson

Counsel to the Debtors
and Debtors in Possession

Dated: September 2, 2021
New York, New York

[1] The Debtors in these cases, along with the last four digits of each Debtor's registration number in the applicable jurisdiction, are as follows: Purdue Pharma L.P. (7484), Purdue Pharma Inc. (7486), Purdue Transdermal Technologies L.P. (1868), Purdue Pharma Manufacturing L.P. (3821), Purdue Pharmaceuticals L.P. (0034), Imbrium Therapeutics L.P. (8810), Adlon Therapeutics L.P. (6745), Greenfield BioVentures L.P. (6150), Seven Seas Hill Corp. (4591), Ophir Green Corp. (4594), Purdue Pharma of Puerto Rico (3925), Avrio Health L.P. (4140), Purdue Pharmaceutical Products L.P. (3902), Purdue Neuroscience Company (4712), Nayatt Cove Lifescience Inc. (7805), Button Land L.P. (7502), Rhodes Associates L.P. (N/A), Paul Land Inc. (7425), Quidnick Land L.P. (7584), Rhodes Pharmaceuticals L.P. (6166), Rhodes Technologies (7143), UDF LP (0495), SVC Pharma LP (5717) and SVC Pharma Inc. (4014). The Debtors' corporate headquarters is located at One Stamford Forum, 201 Tresser Boulevard, Stamford, CT 06901.

"***ERISA***" means the Employee Retirement Income Security Act of 1974, as amended. 29 U.S.C. §§ 1301-1461.

"***Escrow Period***" means (i) a period commencing on an SSA Payment Date on which the Minimum Required Settlement Payment under the Shareholder Settlement Agreement is held in escrow pursuant to Section 2.08 of the Shareholder Settlement Agreement and not released to the Master Disbursement Trust, and continuing until all such escrowed Minimum Required Settlement Payments have been released from escrow and paid to the Master Disbursement Trust (and, if such release of funds or other payment to the Master Disbursement Trust that would terminate the Escrow Period is solely in accordance with Section 2.08(f) of the Shareholder Settlement Agreement, no party to the Shareholder Settlement Agreement objects to the termination of the Escrow Period), in accordance with the terms of the Shareholder Settlement Agreement and (ii) if the Supreme Court grants a writ of certiorari that could result in the vacatur, modification, or reversal of the Shareholder Releases, a period commencing the date on which such writ is granted, and continuing until the Supreme Court renders a decision or dismisses the appeal or writ of certiorari.

"***Estate(s)***" means, individually or collectively, the estate or estates of the Debtors created under section 541 of the Bankruptcy Code.

"***Estate Causes of Action***" means any and all Causes of Action that any Debtor may have or be entitled to assert on behalf of its Estate or itself, whether or not asserted.

"***Estate Surviving Pre-Effective Date Claim***" means any Estate Cause of Action against a Co-Defendant that (i) arose in the ordinary course of business, (ii) is not related to a Co-Defendant Action, and (iii) concerns conduct occurring before the Effective Date.

"***Excluded Assets***" means (i) all Effective Date Cash other than the Initial NewCo Cash and (ii) any other Assets of the Debtors excluded from the transfer to NewCo pursuant to the NewCo Transfer Agreement, including without limitation all MDT Transferred Assets and all PAT Assets.

"***Excluded Claim***" means (i) any criminal action or criminal proceeding arising under a criminal provision of any statute instituted (A) by a Domestic Governmental Entity that has authority to bring such a criminal action or criminal proceeding, and (B) to adjudicate a person's guilt or to set a convicted person's punishment; (ii) any Cause of Action against a non-Debtor Person by any federal, state or local authority with respect to taxes imposed on such non-Debtor Person; (iii) any Estate Cause of Action or any Cause of Action held by a Releasing Party against an Excluded Party; (iv) any Estate Cause of Action identified on the Schedule of Retained Causes of Action; (v) any Cause of Action (including, without limitation, any such Cause of Action held by holders of Settled Canadian Patient Claims or by other Canadians) against any non-Debtor Person (including, without limitation, Purdue Pharma, a Canadian limited partnership, Purdue Pharma Inc., a Canadian corporation and/or Purdue Frederick Inc., a Canadian corporation (collectively, "***Purdue Canada***") or any other Shareholder Released Party) that (x) arises out of or relates to the conduct of any corporations, companies, partnerships and other entities formed under the laws of Canada or its provinces affiliated or associated with any of the Debtors, including, without limitation, Purdue Canada and (y) is not based upon any conduct of the Debtors, including any Opioid-Related Activities of the Debtors; or (vi) any Cause of Action against any Person to the extent based on the actual conduct of such Person after the Effective Date. For greater certainty, with respect to the foregoing clause (v), to the extent a Cause of Action is asserted in Canada against a Shareholder Released Party and/or former director or officer of a Debtor, the knowledge of that Person regarding the Opioid-Related Activities of the Debtors may be asserted against that Person and form part of the Cause of Action in Canada, and any such assertion shall be without prejudice to all defenses of the applicable Shareholder Released Party or former officer or director to such assertion.

based on the subrogation rights of the Holder thereof that is not an Other Subordinated Claim), and that is not a Priority Tax Claim.

"***Non-NAS PI Channeled Claim***" means (i) any Non-NAS PI Claim or (ii) any Released Claim or Shareholder Released Claim that is for alleged opioid-related personal injury or that is a similar opioid-related Cause of Action, in each case, that arose prior to the Petition Date, and that is not an NAS PI Channeled Claim, a Third-Party Payor Channeled Claim, an NAS Monitoring Channeled Claim or a Hospital Channeled Claim, or held by a Domestic Governmental Entity. Non-NAS PI Channeled Claims shall be channeled to the PI Trust in accordance with the Master TDP.

"***Non-NAS PI Claim***" means any Claim against any Debtor that is for alleged opioid-related personal injury or other similar opioid-related Cause of Action against any Debtor, in each case, that arose prior to the Petition Date, and that is not an NAS PI Claim, a Third-Party Payor Claim, an NAS Monitoring Claim or a Hospital Claim, or held by a Domestic Governmental Entity.

"***Non-NAS PI Portion***" means (i) all amounts distributed to the PI Trust under the Plan *less* (ii) the NAS PI Portion, which amount is gross of applicable PI Trust Deductions and Holdbacks.

"***Non-NAS PI TDP***" means the trust distribution procedures to be implemented by the PI Trust with respect to Non-NAS PI Channeled Claims, the terms of which shall be consistent with Articles I through XII of the Plan and otherwise acceptable to the Debtors and the Ad Hoc Group of Individual Victims and reasonably acceptable to the Creditors' Committee and the Governmental Consent Parties, and which shall be filed by the Debtors with the Plan Supplement (it being understood and agreed that the form of Non-NAS PI TDP filed on July 14, 2021 is acceptable to such parties).

"***Non-Opioid Excluded Claim***" means a Cause of Action by a Person that is not a Debtor, an Estate, the Master Disbursement Trust, a Creditor Trust, the Plan Administration Trust or any successor of any of the foregoing against a Shareholder Released Party to the extent such Cause of Action (i) does not arise from or relate to Opioid-Related Activities, Pending Opioid Actions or opioid use or misuse or the consequences thereof; (ii) is not based upon and does not arise from the same allegations, facts or evidence as any Pending Opioid Action; (iii) does not allege (expressly or impliedly) any liability of such Shareholder Released Party that is derivative of any liability of any Debtor or any of their Estates, including, but not limited to, by making allegations (expressly or impliedly) that such Shareholder Released Party is directly or indirectly liable for the conduct of or a Cause of Action against a Debtor by reason of such Shareholder Released Party's (A) direct or indirect ownership of an Interest in a Debtor, a past or present affiliate of a Debtor, or a predecessor in interest of a Debtor; (B) involvement in the management of a Debtor or a predecessor in interest of a Debtor, or service as an officer, director or employee of a Debtor or a related party; or (C) involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the Debtor or a related party, including but not limited to involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction, or acquiring or selling a financial interest in an entity as part of such a transaction; and (iv) has been authorized to proceed by the Bankruptcy Court in accordance with Section 11.1(e) of the Plan. As used in this definition of Non-Opioid Excluded Claim, the term "related party" has the same meaning as in 11 U.S.C. § 524(g)(4)(A)(iii).

"***Notice of Shareholder Release Snapback***" means a notice filed with the Bankruptcy Court by the Master Disbursement Trust pursuant to the Shareholder Settlement Agreement providing notice that a Shareholder Family Group is in Specified Breach (as defined in the Shareholder Settlement Agreement) and the Master Disbursement Trust has elected to enforce the Shareholder Release Remedy and identifying the Breaching Shareholder Family Group and the Designated Shareholder Released Parties subject to such Shareholder Release Remedy.

cooperation obligation arising out of any such action or investigation or (v) any mediation or settlement related to the same or similar subject matter of any of the foregoing.

"***Purdue Monitor***" means the monitor retained pursuant to the voluntary injunction set forth in Appendix I to the Preliminary Injunction.

"***Purdue Pension Plan***" means the Purdue Pharma L.P. Pension Plan, a single-employer defined benefit pension plan covered by Title IV of ERISA.

"***Ratepayer Claim***" means any Claim against any Debtor that arises out of or relates to the payment for health insurance by the Holder of such Claim.

"***Ratepayer Mediation Participants***" means the proposed representatives of classes of privately insured parties who are plaintiffs and proposed class representatives identified in the *Amended Verified Statement of Stevens & Lee, P.C. Pursuant to Bankruptcy Rule 2019* [D.I. 333].

"***RBS Foundation***" means the Raymond and Beverly Sackler Foundation, a New York not-for-profit corporation.

"***RBS Fund***" means the Raymond and Beverly Sackler Fund for the Arts and Sciences, a Delaware not-for-profit and non-stock corporation.

"***Reciprocal Releasee***" means each of the following: (i) the Debtors and their Estates; (ii) the Supporting Claimants, solely in their respective capacities as such; (iii) all Holders of Claims against or Interests in the Debtors, solely in their respective capacities as such; (iv) each Person that has a Cause of Action against a Shareholder Released Party relating to or arising out of the Opioid-Related Activities of the Debtors, solely in its capacity as a litigant in connection with such Cause of Action; (v) each Settling Co-Defendant; and (vi) with respect to each of the Persons in the foregoing clauses (i) through (v), each of their Related Parties, solely in their respective capacities as such; *provided* that no Shareholder Released Party shall be a Reciprocal Releasee.

"***Reinstated***" means, with respect to any Claim against or Interest in a Debtor, that such Claim or Interest shall be rendered Unimpaired in accordance with section 1124 of the Bankruptcy Code.

"***Related Parties***" means, with respect to a Person, (i) such Person's predecessors, successors, assigns, Subsidiaries, affiliates, managed accounts or funds, past, present and future officers, board members, directors, principals, agents, servants, independent contractors, co-promoters, third-party sales representatives, medical liaisons, members, partners (general or limited), managers, employees, subcontractors, agents, advisory board members, financial advisors, attorneys and legal representatives, accountants, investment bankers, consultants, representatives, management companies, fund advisors and other professionals and advisors, trusts (including trusts established for the benefit of such Person), trustees, protectors, beneficiaries, direct or indirect owners and/or equityholders, parents, transferees, heirs, executors, estates, nominees, administrators, and legatees, in each case in their respective capacities as such; (ii) the Related Parties of each of the foregoing, in each case in their respective capacities as such; and (iii) solely with respect to the Settling Co-Defendants, any insurer of any Settling Co-Defendant solely in its capacity as such and specifically excluding any MDT Insurer, solely in its capacity as an MDT Insurer. For the avoidance of doubt, the citizens and residents of a State shall not be deemed to be Related Parties of such State solely as a result of being citizens or residents of such State.

"***Released Claims***" means any Causes of Action released pursuant to Section 10.6(a) and (b) of the Plan.

"***Released Parties***" means, collectively, (i) the Debtors, (ii) each of the Debtors' Related Parties, solely in their respective capacities as such, and (iii) solely for purposes of the Releases by the Debtors in Section 10.6(a) of the Plan, (A) the Supporting Claimants, the Creditors' Committee and the Creditors' Committee's members and each of their respective professionals, in each case solely in their respective capacities as such and (B) the Settling Co-Defendants and each of their Related Parties, in each case solely in their respective capacities as such; *provided*, *however*, that, notwithstanding the foregoing or anything herein to the contrary, no Excluded Party or Shareholder Released Party shall be a Released Party in any capacity or respect. For purposes of this definition of "Released Parties," the phrase "solely in their respective capacities as such" means, with respect to a Person, solely to the extent a claim against such Person (x) arises from such Person's conduct or actions taken in such capacity, or from such Person's identified capacity in relation to another specified Released Party and not, in either case, from such Person's conduct or actions independent of such capacity, and (y) to the extent such Person's liability depends on or derives from the liability of such other Released Party, such claim would be released if asserted against such other Released Party.

"***Releases***" means the releases provided for in Section 10.6 of the Plan.

"***Releasing Parties***" means, collectively, (i) the Supporting Claimants, solely in their respective capacities as such, (ii) all Holders of Claims (whether or not asserted, transferred, hypothecated, waived, Allowed, allowable, choate, known, accrued, treated under this Plan or otherwise) against, or Interests in, the Debtors, (iii) all Holders of Future PI Channeled Claims, (iv) the Settling Co-Defendants, (v) with respect to each of the Persons in the foregoing clauses (i) through (iv), each of their Related Parties and (vi) each of the Debtors' Related Parties, in each case, other than any Shareholder Released Party.

"***Reserved MDT Insurance Policies***" means (i) policy number B0509FINMR 1600558 and policy number B0509FINMR 1600559 and (ii) any MDT Insurance Policy that is not listed by policy number in Schedule 2 to the MDT Agreement.

"***Restructuring Steps Memorandum***" means the summary of transaction steps to complete the Restructuring Transactions, which shall be consistent with Articles I through XII of the Plan and otherwise acceptable to the Debtors and reasonably acceptable to the Creditors' Committee and the Governmental Consent Parties, and which shall be included in the Plan Supplement.

"***Restructuring Transactions***" means one or more transactions to occur on or before the Effective Date or as soon as reasonably practicable thereafter, that may be necessary or appropriate to effect any transaction described in, approved by, contemplated by or necessary to effectuate this Plan, including (i) the creation of NewCo and the direct or indirect transfer thereto and vesting therein (or in a Subsidiary of NewCo) of the NewCo Transferred Assets free and clear of Claims, Interests and liabilities in accordance with the NewCo Transfer Agreement, (ii) the creation of TopCo and the issuance of the NewCo Interest to TopCo, (iii) the creation of the Master Disbursement Trust and the transfer thereto and vesting therein of the MDT Transferred Assets, (iv) the creation of the Plan Administration Trust and the vesting therein of the PAT Assets, (v) the creation of NOAT and the Tribe Trust and the consummation of the Public Entity Settlements, consisting of the payment of the Initial Public Creditor Trust Distributions and the issuance of the MDT Interests and the TopCo Interests, (vi) the creation of the Private Creditor Trusts and the consummation of the Private Entity Settlements, consisting of the payment of the Initial Private Creditor Trust Distributions and the issuance of the MDT Private Claims, (vii) the creation and funding of the Priority Claims Reserve and the PAT Distribution Account to make Distributions in respect of Allowed Claims (other than Channeled Claims), (viii) the payment of the Truth Initiative Contribution in satisfaction of the Ratepayer Claims, (ix) entry into the Shareholder Settlement, including the Shareholder Releases and the Channeling Injunction for the benefit of the Shareholder Released Parties in exchange for, among other things, the contribution of funds to the Master Disbursement Trust pursuant to the Shareholder Settlement

"***Shareholder Released Claims***" means any Causes of Action released pursuant to Section 10.7(a) and (b) of the Plan.

"***Shareholder Released Parties***" means, collectively, (i) the Shareholder Payment Parties; (ii) the Designated Shareholder Released Parties and the Persons identified on Exhibit X to the Shareholder Settlement Agreement; (iii) all Persons directly or indirectly owning an equity interest in any Debtor on the date on which such Debtor commenced its Chapter 11 Case; (iv) Sackler Family Members; (v) all trusts for the benefit of any of the Persons identified in the foregoing clause (iv) and the past, present and future trustees (including, without limitation, officers, directors and employees of any such trustees that are corporate or limited liability company trustees and members and managers of trustees that are limited liability company trustees), protectors and beneficiaries thereof, solely in their respective capacities as such; (vi) all Persons (other than the Debtors) to which property or funds of the Persons identified in any of the foregoing clauses (i) through (v) have been or are directly or indirectly transferred (including for charitable or philanthropic purposes), solely in such Persons' capacities as transferees and solely to the extent of any property or funds transferred to them; and (vii) with respect to each Person in the foregoing clauses (i) through (v), such Person's (A) predecessors, successors, permitted assigns, subsidiaries (other than the Debtors), controlled affiliates, spouses, heirs, executors, estates and nominees, in each case solely in their respective capacities as such, (B) current and former officers and directors, principals, members and employees, in each case, solely in their respective capacities as such, (C) financial advisors, attorneys (including, without limitation, attorneys retained by any director, in his or her capacity as such), accountants, investment bankers (including, without limitation, investment bankers retained by any director, in his or her capacity as such), consultants, experts and other professionals, in each case, solely in their respective capacities as such, and (D) property possessed or owned at any time or the proceeds therefrom; *provided* that the Debtors and the Excluded Parties identified on the Schedule of Excluded Parties shall not be Shareholder Released Parties. For purposes of this definition of "Shareholder Released Parties," the phrase "solely in their respective capacities as such" means, with respect to a Person, solely to the extent a claim against such Person (x) arises from such Person's conduct or actions taken in such capacity, or from such Person's identified capacity in relation to another specified Shareholder Released Party and not, in either case, from such Person's conduct or actions independent of such capacity, and (y) to the extent such Person's liability depends on or derives from the liability of such other Shareholder Released Party, such claim would be released if asserted against such other Shareholder Released Party. For the avoidance of doubt, any Person that fits within multiple categories above shall be a Shareholder Released Party in all such categories and failure to include any Person that fits within any category above on Exhibit X to the Shareholder Settlement Agreement shall not mean that such Person is not a Shareholder Released Party.

"***Shareholder Releases***" means the releases provided for in Section 10.7 of the Plan.

"***Shareholder Settlement***" means the Shareholder Settlement Agreement and the transactions contemplated thereunder, the release and channeling of the Shareholder Released Claims pursuant to the Shareholder Releases and the Channeling Injunction issued for the benefit of the Shareholder Released Parties as set forth in Sections 10.7 and 10.8 of the Plan, the other transactions and terms described in Section 5.2(g) of the Plan and all other terms and provisions of the Plan, the Confirmation Order and the other Plan Documents implementing any of the foregoing.

"***Shareholder Settlement Agreement***" means the settlement agreement to be entered into by and among the Debtors (and/or successors to the Debtors) and the Shareholder Payment Parties, which shall provide for, among other things, the payment of the Shareholder Settlement Amount by the Shareholder Payment Parties to the Master Disbursement Trust in exchange for the Shareholder Releases and the Channeling Injunction with respect to the Shareholder Released Claims, and the terms of which shall be consistent with Articles I through XII of the Plan and the Shareholder Settlement Term Sheet and

(i) Reinstated; or

(ii) Compromised and settled or canceled and extinguished with no distribution on account thereof.

(b) Impairment and Voting: Intercompany Claims are either Unimpaired or Impaired with no distribution on account thereof. Holders of Intercompany Claims are either conclusively presumed to accept this Plan pursuant to section 1126(f) of the Bankruptcy Code or deemed to reject this Plan pursuant to section 1126(g) of the Bankruptcy Code. Therefore, Holders of Intercompany Claims are not entitled to vote to accept or reject the Plan, and the votes of such Holders will not be solicited with respect to such Intercompany Claims.

4.15 ***Shareholder Claims (Class 13)***.

(a) Treatment: Holders of Shareholder Claims shall not receive or retain any property on account of such Claims. As of the Effective Date, in accordance with the terms of and except as otherwise expressly provided in the Shareholder Settlement, all Shareholder Claims shall automatically, and without further act, deed or court order, be deemed to have been released without any distribution on account thereof, and such Claims shall be of no further force or effect.

(b) Impairment and Voting: Shareholder Claims are Impaired. Holders of Shareholder Claims are deemed to reject this Plan pursuant to section 1126(g) of the Bankruptcy Code. Therefore, Holders of Shareholder Claims are not entitled to vote to accept or reject the Plan, and the votes of such Holders will not be solicited with respect to such Shareholder Claims.[2]

4.16 ***Co-Defendant Claims (Class 14)***.

(a) Treatment: In full and final satisfaction and release of each Co-Defendant Claim, the Holder thereof shall (i) not receive or retain any property on account of such Co-Defendant Claim and not have any recourse to any Debtor or any Assets of any Debtor, any Estate or any Assets of any Estate, or any other Protected Party or any Assets of any Protected Party and (ii) retain its Co-Defendant Defensive Rights, which may be exercised solely in accordance with Section 10.18. As of the Effective Date, Co-Defendant Claims shall be deemed expunged, released and extinguished without further action by or order of the Bankruptcy Court, and shall be of no further force or effect. Notwithstanding the release, satisfaction, expungement and extinguishment of Co-Defendant Claims, a Co-Defendant retains its Co-Defendant Defensive Rights, which includes the ability to recover from Persons that are not Protected Parties or from any insurance policies that are not Purdue Insurance Policies or other insurance policies of Protected Parties.

(b) Impairment and Voting: Co-Defendant Claims are Impaired. Holders of Co-Defendant Claims are deemed to reject this Plan pursuant to section 1126(g) of the Bankruptcy Code. Therefore, Holders of Co-Defendant Claims are not entitled to vote to accept or reject the Plan, and the votes of such Holders will not be solicited with respect to such Co-Defendant Claims.

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[2] Although Holders of Shareholder Claims are deemed to reject the Plan pursuant to section 1126(g) of the Bankruptcy Code, the Shareholder Payment Parties, in all capacities (including as Holders of Claims), have agreed to support the Plan pursuant to the Shareholder Settlement Agreement.

(ii) enforcing, levying, attaching (including any prejudgment attachment), collecting or otherwise recovering in any manner or by any means, whether directly or indirectly, any judgment, award, decree or order against a Released Party, or any direct or indirect transferee of any property of, or direct or indirect successor-in-interest to, any of the foregoing Persons mentioned in this clause (ii) or any property of any such transferee or successor; (iii) creating, perfecting or otherwise enforcing any encumbrance of any kind or asserting any Released Claims in any manner, directly or indirectly, against a Released Party or any of its property, or any direct or indirect transferee of any property of, or successor in interest to, any of the foregoing Persons mentioned in this clause (iii) or any property of any such transferee or successor; (iv) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of this Plan; and (v) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of this Plan.

10.6 ***Releases***.

(a) **Releases by Debtors**.

As of the Effective Date, for good and valuable consideration, the adequacy of which is hereby confirmed, including, without limitation, the service of the Released Parties before and during the Chapter 11 Cases to facilitate the reorganization of the Debtors and the implementation of the Restructuring Transactions, and except as otherwise explicitly provided in the Plan or in the Confirmation Order, the Released Parties shall be conclusively, absolutely, unconditionally, irrevocably, fully, finally, forever and permanently released by the Debtors and their Estates from any and all Causes of Action, including any derivative claims asserted or assertible by or on behalf of any Debtor or any of their Estates and including any claims that any Debtor or any of their Estates, or that any other Person or party claiming under or through any Debtor or any of their Estates, would have presently or in the future been legally entitled to assert in its own right (whether individually or collectively) or on behalf of any Debtor or any of their Estates or any other Person, notwithstanding section 1542 of the California Civil Code or any law of any jurisdiction that is similar, comparable or equivalent thereto (which shall conclusively be deemed waived), whether existing or hereinafter arising, in each case, based on or relating to, or in any manner arising from, in whole or in part, (i) the Debtors, as such Entities existed prior to or after the Petition Date (including the Debtors' Opioid-Related Activities, manufacture, marketing and sale of Products, interaction with regulators concerning Opioid-Related Activities or Products, and involvement in the subject matter of the Pending Opioid Actions, and the past, present or future use or misuse of any opioid by a Releasing Party), (ii) the Estates or (iii) the Chapter 11 Cases. The Debtors, the Plan Administration Trust, the Master Disbursement Trust, the Creditor Trusts, NewCo, TopCo and any other newly-formed Persons that shall be continuing the Debtors' businesses after the Effective Date shall be bound, to the same extent the Debtors are bound, by the Releases set forth in this Section 10.6(a).

Notwithstanding anything herein to the contrary, (x) nothing in the Plan shall release any Excluded Claim and (y) nothing in this Section 10.6(a) shall (A) release any contractual Estate Cause of Action or any Estate Cause of Action that is commercial in nature and, in each case, unrelated to either the Chapter 11 Cases or the subject matter of the Pending Opioid Actions; *provided* that, with respect to the Settling Co-Defendants, only Estate Surviving Pre-Effective Date Claims shall be retained and not released, (B) release any Estate Cause of Action against a Holder of a Claim against a Debtor, to the extent such Estate Cause of Action is necessary for the administration and resolution of such Claim solely in accordance with the Plan, *provided*, *however*, that the foregoing shall not apply to any Holder of a Co-Defendant Claim solely with respect to such Co-Defendant Claim, (C) be construed to impair in any way the Effective Date or post-Effective Date rights and obligations of any Person under the Plan, the Plan Documents, the Confirmation Order or

the Restructuring Transactions, including the Shareholder Settlement Agreement, or (D) release any Claim or right to disgorge, recoup or recover compensation under the orders authorizing the Key Employee Plans or the orders with respect to the *Motion of Debtors for Entry of an Order Authorizing (I) Debtors to (A) Pay Pre-Petition Wages, Salaries, Employee Benefits and Other Compensation and (B) Maintain Employee Benefits Programs and Pay Related Administrative Obligations, (II) Employees and Retirees to Proceed with Outstanding Workers' Compensation Claims and (III) Financial Institutions to Honor and Process Related Checks and Transfers* [D.I. 6].

(b) **Releases by Releasing Parties**.

As of the Effective Date, for good and valuable consideration, the adequacy of which is hereby confirmed, including, without limitation, the service of the Released Parties before and during the Chapter 11 Cases to facilitate the reorganization of the Debtors and the implementation of the Restructuring Transactions, and except as otherwise explicitly provided in the Plan or in the Confirmation Order, the Released Parties shall be conclusively, absolutely, unconditionally, irrevocably, fully, finally, forever and permanently released by the Releasing Parties from any and all Causes of Action, including any derivative claims asserted or assertible by or on behalf of the Debtors or their Estates and including any claims that any Releasing Party, or that any other Person or party claiming under or through any Releasing Party, would have presently or in the future been legally entitled to assert in its own right (whether individually or collectively) or on behalf of any Releasing Party or any other Person, notwithstanding section 1542 of the California Civil Code or any law of any jurisdiction that is similar, comparable or equivalent thereto (which shall conclusively be deemed waived), whether existing or hereinafter arising, in each case, based on or relating to, or in any manner arising from, in whole or in part, (i) the Debtors, as such Entities existed prior to or after the Petition Date (including the Debtors' Opioid-Related Activities, manufacture, marketing and sale of Products, interaction with regulators concerning Opioid-Related Activities or Products, and involvement in the subject matter of the Pending Opioid Actions, and the past, present or future use or misuse of any opioid by a Releasing Party), (ii) the Estates or (iii) the Chapter 11 Cases.

For the avoidance of doubt and without limitation of the foregoing, each Person that is a Governmental Unit or a Tribe shall be deemed to have released all Released Claims that have been, are or could have been brought by (1) such Governmental Unit or Tribe in its own right, in its *parens patriae* or sovereign enforcement capacity, or on behalf of or in the name of another Person or (2) any other governmental official, employee, agent or representative acting or purporting to act in a *parens patriae*, sovereign enforcement or quasi-sovereign enforcement capacity, or any other capacity on behalf of such Governmental Unit or Tribe.

Notwithstanding anything herein to the contrary, (x) nothing in the Plan shall release any Excluded Claim; (y) Co-Defendants shall not be Released Parties for purposes of this Section 10.6(b); and (z) nothing in this Section 10.6(b) shall (A) release any Non-Opioid Excluded Claims, (B) release any Estate Cause of Action against a Holder of a Claim against a Debtor, to the extent such Estate Cause of Action is necessary for the administration and resolution of such Claim solely in accordance with the Plan, *provided*, *however*, that the foregoing shall not apply to any Holder of a Co-Defendant Claim solely with respect to such Co-Defendant Claim, or (C) be construed to impair in any way the Effective Date or post-Effective Date rights and obligations of any Person under the Plan, the Plan Documents, the Confirmation Order or the Restructuring Transactions, including the Shareholder Settlement Agreement.

Notwithstanding anything herein to the contrary, but subject to the MDT Insurer Injunction and the Settling MDT Insurer Injunction, the Debtors shall not be released from

liability for any Claim (other than any Co-Defendant Claim) that is or may be covered by any Purdue Insurance Policy; *provided* that recovery for any such Claim, including by way of settlement or judgment, shall be limited to the available proceeds of such Purdue Insurance Policy (and any extra-contractual liability of the Insurance Companies with respect to the Purdue Insurance Policies), and no Person or party shall execute, garnish or otherwise attempt to collect any such recovery from any assets other than the available proceeds of the Purdue Insurance Policies. The Debtors shall be released automatically from a Claim described in this paragraph upon the earlier of (x) the abandonment of such Claim and (y) such a release being given as part of a settlement or resolution of such Claim, and shall be released automatically from all Claims described in this paragraph upon the exhaustion of the available proceeds of the Purdue Insurance Policies (notwithstanding the nonoccurrence of either event described in the foregoing clauses (x) and (y)).

(c) **Releases by Debtors of Holders of Claims.**

As of the Effective Date, all Holders of Channeled Claims (excluding, in all respects, any Excluded Party, Shareholder Release Snapback Party or MDT Insurer) are hereby released by the Debtors and their Estates from any and all Causes of Action for any Claim in connection with, or arising out of, (i) the administration of the Chapter 11 Cases; the negotiation and pursuit of the Restructuring Transactions, the Plan, the Master Disbursement Trust, the Creditor Trusts (including the trust distribution procedures and the other Creditor Trust Documents) and the solicitation of votes with respect to, and confirmation of, the Plan; the funding of the Plan; the occurrence of the Effective Date; the administration of the Plan and the property to be distributed under the Plan; and the wind-up and dissolution of the Liquidating Debtors and the transactions in furtherance of any of the foregoing or (ii) such Holder's participation in the Pending Opioid Actions. The Debtors, the Plan Administration Trust, the Master Disbursement Trust, the Creditor Trusts, NewCo, TopCo and any other newly-formed Persons that shall be continuing the Debtors' businesses after the Effective Date shall be bound, to the same extent the Debtors are bound, by the Releases set forth in this Section 10.6(c).

As of the Effective Date, all Holders of PI Channeled Claims and Holders of NAS Monitoring Channeled Claims (excluding, in all respects, any Excluded Party, Shareholder Release Snapback Party or MDT Insurer) are hereby released by the Debtors and their Estates from any and all Causes of Action for any Claim in connection with, or arising out of, (i) the Debtors, as such Entities existed prior to or after the Petition Date (including the Debtors' Opioid-Related Activities, manufacture, marketing and sale of Products, interaction with regulators concerning Opioid-Related Activities or Products, and involvement in the subject matter of the Pending Opioid Actions, and the past, present or future use or misuse of any opioid by a Releasing Party), (ii) the Estates or (iii) the Chapter 11 Cases, including, in each case, without limitation, any act, conduct, omission, event, transaction, occurrence, injury, damage, or continuing condition in any way relating to the foregoing.

Notwithstanding anything herein to the contrary, (x) nothing in the Plan shall release any Excluded Claim and (y) nothing in this Section 10.6(c) shall (A) release any contractual Estate Cause of Action or any Estate Cause of Action that is commercial in nature and, in each case, unrelated to either the Chapter 11 Cases or the subject matter of the Pending Opioid Actions, *provided* that, with respect to the Settling Co-Defendants, only Estate Surviving Pre-Effective Date Claims shall be retained and not released, (B) release any Estate Cause of Action against a Holder of a Claim against a Debtor, to the extent such Estate Cause of Action is necessary for the administration and resolution of such Claim solely in accordance with the Plan, *provided*, *however*, that the foregoing shall not apply to any Holder of a Co-Defendant Claim solely with respect to such Co-Defendant Claim, (C) release any claim or right arising in the ordinary course of the Debtors' or

NewCo's business, including, without limitation, any such claim with respect to taxes or (D) be construed to impair in any way the Effective Date or post-Effective Date rights and obligations of any Person under the Plan, the Plan Documents, the Confirmation Order or the Restructuring Transactions, including the Shareholder Settlement Agreement.

10.7 ***Shareholder Releases***.

(a) **Releases by Debtors.**

As of the Effective Date, for good and valuable consideration, the adequacy of which is hereby confirmed, and except as otherwise explicitly provided in the Plan or in the Confirmation Order, the Shareholder Released Parties shall be conclusively, absolutely, unconditionally, irrevocably, fully, finally, forever and permanently released, subject to clause (z) of the last paragraph of this Section 10.7(a), by the Debtors and their Estates from any and all Causes of Action, including any derivative claims asserted or assertible by or on behalf of any Debtor or any of their Estates and including any claims that any Debtor or any of their Estates, or that any other Person or party claiming under or through any Debtor or any of their Estates, would have presently or in the future been legally entitled to assert in its own right (whether individually or collectively) or on behalf of any Debtor or any of their Estates or any other Person, notwithstanding section 1542 of the California Civil Code or any law of any jurisdiction that is similar, comparable or equivalent thereto (which shall conclusively be deemed waived), whether existing or hereinafter arising, in each case, based on or relating to, or in any manner arising from, in whole or in part, (i) the Debtors, as such Entities existed prior to or after the Petition Date (including the Debtors' Opioid-Related Activities, manufacture, marketing and sale of Products, interaction with regulators concerning Opioid-Related Activities or Products, and involvement in the subject matter of the Pending Opioid Actions, and the past, present or future use or misuse of any opioid by a Releasing Party), (ii) the Estates or (iii) the Chapter 11 Cases. The Debtors, the Plan Administration Trust, the Master Disbursement Trust, the Creditor Trusts, NewCo, TopCo and any other newly-formed Persons that shall be continuing the Debtors' businesses after the Effective Date shall be bound, to the same extent the Debtors are bound, by the Shareholder Releases set forth in this Section 10.7(a).

Notwithstanding anything herein to the contrary, (x) nothing in the Plan shall release any Excluded Claim; (y) nothing in this Section 10.7(a) shall be construed to impair in any way the Effective Date or post-Effective Date rights and obligations of any Person under the Plan, the Plan Documents, the Confirmation Order or the Restructuring Transactions, including the Shareholder Settlement Agreement and the Separation Agreements; and (z) upon the filing of a Notice of Shareholder Release Snapback, (A) the Shareholder Releases set forth in this Section 10.7(a) shall be entirely null and void, revoked and invalidated, as of the Effective Date, with respect to all members of the Breaching Shareholder Family Group and the Designated Shareholder Released Parties, (B) the *status quo ante* shall be restored in all respects for the Debtors and the Master Disbursement Trust with respect to the members of the Breaching Shareholder Family Group and the Designated Shareholder Released Parties, and (C) the Master Disbursement Trust shall be deemed to have received and accepted all of the rights with respect to any member of the Breaching Shareholder Family Group and the Designated Shareholder Released Parties, in each case, that the Debtors and their Estates had prior to the Effective Date and that the Master Disbursement Trust would have pursuant to the transfer of the MDT Shareholder Rights to the Master Disbursement Trust if the Shareholder Releases of this Section 10.7(a) had never been granted, which rights the Debtors and their Estates shall be deemed to have irrevocably transferred, granted and assigned to the Master Disbursement Trust; *provided* that, for the avoidance of doubt, notwithstanding the nullification, voiding, revocation and invalidation pursuant to the foregoing clause (A), the Shareholder Releases shall continue in effect for, and shall be fully enforceable by and

for the benefit of, all other Shareholder Released Parties other than the Breaching Shareholder Family Group and the Designated Shareholder Released Parties.

(b) **Releases by Releasing Parties.**

As of the Effective Date, for good and valuable consideration, the adequacy of which is hereby confirmed, and except as otherwise explicitly provided in the Plan or in the Confirmation Order, the Shareholder Released Parties, other than any Shareholder Released Parties identified in clause (vii)(C) of the definition of Shareholder Released Parties (and in no other clause of such definition), shall be conclusively, absolutely, unconditionally, irrevocably, fully, finally, forever and permanently released, subject to clause (z) of the last paragraph of this Section 10.7(b), by the Releasing Parties from any and all Causes of Action, including any derivative claims asserted or assertible by or on behalf of the Debtors or their Estates and including any claims that any Releasing Party, or that any other Person or party claiming under or through any Releasing Party, would have presently or in the future been legally entitled to assert in its own right (whether individually or collectively) or on behalf of any Releasing Party or any other Person, notwithstanding section 1542 of the California Civil Code or any law of any jurisdiction that is similar, comparable or equivalent thereto (which shall conclusively be deemed waived), whether existing or hereinafter arising, in each case, (x) based on or relating to, or in any manner arising from, in whole or in part, (i) the Debtors, as such Entities existed prior to or after the Petition Date (including the Debtors' Opioid-Related Activities, manufacture, marketing and sale of Products, interaction with regulators concerning Opioid-Related Activities or Products, and involvement in the subject matter of the Pending Opioid Actions, and the past, present or future use or misuse of any opioid by a Releasing Party), (ii) the Estates or (iii) the Chapter 11 Cases and (y) as to which any conduct, omission or liability of any Debtor or any Estate is the legal cause or is otherwise a legally relevant factor.

In addition, as of the Effective Date, notwithstanding anything to the contrary herein, each Shareholder Released Party shall be released by any Person (regardless of whether such Person otherwise is a Releasing Party) that is a Shareholder Released Party's current or former officer, director, principal, member, employee, financial advisor, attorney (including, without limitation, any attorney retained by any director, in his or her capacity as such), accountant, investment banker (including, without limitation, investment banker retained by any director, in his or her capacity as such), consultant, expert or other professional, from any Cause of Action for indemnification, contribution or any similar liability-sharing theory based on or relating to, or in any manner arising from, in whole or in part, the subject matter of the preceding paragraph.

For the avoidance of doubt and without limitation of the foregoing, each Person that is a Governmental Unit or a Tribe shall be deemed to have released all Shareholder Released Claims that have been, are or could have been brought by (1) such Governmental Unit or Tribe in its own right, in its *parens patriae* or sovereign enforcement capacity, or on behalf of or in the name of another Person or (2) any other governmental official, employee, agent or representative acting or purporting to act in a *parens patriae*, sovereign enforcement or quasi-sovereign enforcement capacity, or any other capacity on behalf of such Governmental Unit or Tribe.

Notwithstanding anything herein to the contrary, (x) nothing in the Plan shall release any Excluded Claim; (y) nothing in this Section 10.7(b) shall (A) release any Non-Opioid Excluded Claims or (B) be construed to impair in any way the Effective Date or post-Effective Date rights and obligations of any Person under the Plan, the Plan Documents, the Confirmation Order or the Restructuring Transactions, including the Shareholder Settlement Agreement and the Separation Agreements; and (z) upon the filing of a Notice of Shareholder Release Snapback, (A) the

Shareholder Releases set forth in this Section 10.7(b) shall be entirely null and void, revoked and invalidated, as of the Effective Date, with respect to all members of the Breaching Shareholder Family Group and the Designated Shareholder Released Parties and (B) the *status quo ante* shall be restored in all respects for the Releasing Parties with respect to the members of the Breaching Shareholder Family Group and the Designated Shareholder Released Parties; *provided* that, for the avoidance of doubt, notwithstanding the nullification, voiding, revocation and invalidation pursuant to the foregoing clause (A), the Shareholder Releases shall continue in effect for, and shall be fully enforceable by and for the benefit of, all other Shareholder Released Parties other than the Breaching Shareholder Family Group and the Designated Shareholder Released Parties.

(c) **Releases by Shareholder Released Parties.**

As of the Effective Date, for good and valuable consideration, the adequacy of which is hereby confirmed, and except as otherwise explicitly provided in the Plan or in the Confirmation Order, the Reciprocal Releasees shall be conclusively, absolutely, unconditionally, irrevocably, fully, finally, forever and permanently released, subject to clause (z) of the last paragraph of this Section 10.7(c), by the Shareholder Released Parties from any and all Causes of Action, including any derivative claims asserted or assertible by or on behalf of the Debtors or their Estates and including any claims that any Shareholder Released Party, or that any other Person or party claiming under or through any Shareholder Released Party, would have presently or in the future been legally entitled to assert in its own right (whether individually or collectively) or on behalf of any Shareholder Released Party or any other Person, notwithstanding section 1542 of the California Civil Code or any law of any jurisdiction that is similar, comparable or equivalent thereto (which shall conclusively be deemed waived), whether existing or hereinafter arising, in each case, based on or relating to, or in any manner arising from, in whole or in part, (i) the Debtors, as such Entities existed prior to or after the Petition Date (including the Debtors' Opioid-Related Activities, manufacture, marketing and sale of Products, interaction with regulators concerning Opioid-Related Activities or Products, and involvement in the subject matter of the Pending Opioid Actions, and the past, present or future use or misuse of any opioid by a Releasing Party), (ii) the Estates or (iii) the Chapter 11 Cases.

Notwithstanding anything herein to the contrary, (x) nothing in the Plan shall release any Excluded Claim; (y) nothing in this Section 10.7(c) shall be construed to impair in any way the Effective Date or post-Effective Date rights and obligations of any Person under the Plan, the Plan Documents, the Confirmation Order or the Restructuring Transactions, including the Shareholder Settlement Agreement and the Separation Agreements, and including the rights of any Shareholder Released Party that is a current or former director, officer or employee of the Debtors but is not a Sackler Family Member relating to plan treatment of any Claims held by such party; and (z) upon the filing of a Notice of Shareholder Release Snapback and the commencement or continuation of any action or proceeding against a member of a Breaching Shareholder Family Group or a Designated Shareholder Released Party by any Reciprocal Releasee, (A) the releases set forth in this Section 10.7(c) of any Reciprocal Releasee that has commenced or continued any such action shall be entirely null and void, revoked and invalidated, as of the Effective Date, with respect to the members of the Breaching Shareholder Family Group and the Designated Shareholder Released Parties and (B) the *status quo ante* shall be restored in all respects for the members of the Breaching Shareholder Family Group and the Designated Shareholder Released Parties with respect to any Reciprocal Releasee that has commenced or continued any such litigation; *provided* that, for the avoidance of doubt, notwithstanding the nullification, voiding, revocation and invalidation pursuant to the foregoing clause (A), the releases set forth in this Section 10.7(c) shall continue in effect for, and shall be fully enforceable by and for the benefit of, all other Reciprocal Releasees, and shall be binding on, and enforceable against, all other Shareholder Released Parties, including any

members of the Breaching Shareholder Family Group with respect to any Reciprocal Releasee that has not commenced any such litigation.

10.8 ***Channeling Injunction***.

In order to supplement the injunctive effect of the Plan Injunction, the Releases and the Shareholder Releases set forth in Sections 10.5, 10.6 and 10.7 of the Plan, the Confirmation Order shall provide for the following permanent injunction to take effect as of the Effective Date:

(a) **Terms. In order to preserve and promote the settlements contemplated by and provided for in the Plan and to supplement, where necessary, the injunctive effect of the Plan Injunction, the Releases and the Shareholder Releases described in Sections 10.5, 10.6 and 10.7 of the Plan, and pursuant to the exercise of the equitable jurisdiction and power of the Bankruptcy Court under section 105(a) of the Bankruptcy Code, all Persons that have held or asserted, that hold or assert or that may in the future hold or assert any Channeled Claim shall be permanently and forever stayed, restrained and enjoined from taking any action for the purpose of directly or indirectly collecting, recovering or receiving payments, satisfaction, recovery or judgment of any form from or against any Protected Party with respect to any Channeled Claim, including:**

(i) **commencing, conducting or continuing, in any manner, whether directly or indirectly, any suit, action or other proceeding, in each case, of any kind, character or nature, in any forum in any jurisdiction with respect to any Channeled Claims, against or affecting any Protected Party, or any property or interests in property of any Protected Party with respect to any Channeled Claims;**

(ii) **enforcing, levying, attaching, collecting or otherwise recovering, by any means or in any manner, either directly or indirectly, any judgment, award, decree or other order against any Protected Party or against the property of any Protected Party with respect to any Channeled Claims;**

(iii) **creating, perfecting or enforcing, by any means or in any manner, whether directly or indirectly, any Lien of any kind against any Protected Party or the property of any Protected Party with respect to any Channeled Claims;**

(iv) **asserting or accomplishing any setoff, right of subrogation, indemnity, contribution or recoupment of any kind, whether directly or indirectly, in respect of any obligation due to any Protected Party or against the property of any Protected Party with respect to any Channeled Claims; and**

(v) **taking any act, by any means or in any manner, in any place whatsoever, that does not conform to, or comply with, the provisions of the Plan Documents, with respect to any Channeled Claims.**

(b) **Reservations. Notwithstanding anything to the contrary in this Section 10.8 or the Confirmation Order, this Channeling Injunction shall not stay, restrain, bar or enjoin:**

(i) **the rights of Holders of Channeled Claims to the treatment afforded them under the Plan and the Plan Documents, including the rights of Holders of Channeled Claims to assert such Channeled Claims solely in accordance with Section 6.21 of the Plan, the Master TDP and the Creditor Trust TDPs, in each case whether or not there are funds to make Distributions in respect of such Channeled Claims and whether or not such rights entitle such Holders to Abatement Distributions or any other form of Distributions;**

(ii) **the rights of Persons to assert any claim, debt, litigation or liability for payment of Creditor Trust Operating Expenses solely against the applicable Creditor Trust;**

(iii) **the rights of Persons to assert any claim, debt or litigation against any Excluded Party;**

(iv) **the rights of the Master Disbursement Trust to pursue and enforce the MDT Shareholder Rights, the MDT Insurance Rights and the MDT Causes of Action;**

(v) **the rights of the parties to the LRP Agreement to enforce the terms thereof in accordance with the Plan;**

(vi) **the Creditor Trusts from enforcing their respective rights against the Master Disbursement Trust under the Plan and the MDT Documents;**

(vii) **the Master Disbursement Trust from enforcing its rights, on behalf of itself and the Private Creditor Trusts, against NewCo and TopCo under the Plan and the NewCo Credit Support Agreement; or**

(viii) **NOAT or the Tribe Trust from enforcing their respective rights against TopCo under the TopCo Operating Agreement.**

(c) **Notice of Shareholder Release Snapback**. Upon the filing of a Notice of Shareholder Release Snapback, the Channeling Injunction shall terminate, be rescinded and have no application, without further order of the Bankruptcy Court, to any suit, action or other proceeding, in each case, of any kind, character or nature, brought against any member of the Breaching Shareholder Family Group or any Designated Shareholder Released Party; *provided*, *however*, that the extension of time provided by Section 10.9(a) of the Plan shall continue in effect in accordance with its terms; and *provided further* that, for the avoidance of doubt, notwithstanding the termination and rescission pursuant to this Section 10.8(c), the Channeling Injunction shall continue in effect for, and shall be fully enforceable by and for the benefit of, all other Protected Parties, including all other Shareholder Released Parties, other than the Breaching Shareholder Family Group and the Designated Shareholder Released Parties.

(d) **Modifications**. Except as expressly set forth in paragraph (c) of this Section 10.8, there can be no modification, dissolution or termination of the Channeling Injunction, which shall be a permanent injunction.

(e) **Non-Limitation of Channeling Injunction**. Except as expressly set forth in paragraphs (b) and (c) of this Section 10.8, nothing in the Plan, the MDT Documents or the Creditor Trust Documents shall be construed in any way to limit the scope, enforceability or effectiveness of the Channeling Injunction issued in connection with the Plan.

(f) **Bankruptcy Rule 3016 Compliance**. The Debtors' compliance with the requirements of Bankruptcy Rule 3016 shall not constitute an admission that the Plan provides for an injunction against conduct not otherwise enjoined under the Bankruptcy Code.

10.9 ***Tolling of Shareholder Released Claims; Violations of Shareholder Releases and Channeling Injunction***.

(a) **Tolling of Shareholder Released Claims**. If applicable law, an order in any proceeding or an agreement fixes a period for commencing or continuing an action or proceeding based on a Shareholder Released Claim and such Shareholder Released Claim is released pursuant to the Shareholder Releases or such action or proceeding is enjoined by the Channeling Injunction, then such period does not expire with respect to such Shareholder Released Claim with respect to the Master Disbursement Trust (or the MDT Trustees) or the Releasing Parties until the latest of (i) the end of such period; (ii) with respect to the applicable Shareholder Family Group and any Designated Shareholder Released Party, two hundred twenty-five (225) days after the filing of a Notice of Shareholder Release Snapback with respect to such Shareholder Family Group; (iii) with respect to the applicable Shareholder Family Group and any Designated Shareholder Released Party, when such Shareholder Family Group fulfills its payment obligations under the Shareholder Settlement Agreement; and (iv) with respect to the applicable Shareholder Released Party that is a Subsidiary (as defined in the Shareholder Settlement Agreement) of a Shareholder Payment Party, two hundred twenty-five (225) days after the reinstatement of any Estate Cause of Action against such Shareholder Released Party pursuant to Section 10.20 of the Plan.

(b) **Violations of Shareholder Releases and Channeling Injunction**. In the event that any Person takes any action that a Shareholder Released Party believes violates the Shareholder Releases or Channeling Injunction as it applies to any Shareholder Released Party, such Shareholder Released Party shall be entitled to make an emergency application to the Bankruptcy Court for relief, and may proceed by contested matter rather than by adversary proceeding. The Bankruptcy Court shall have jurisdiction and authority to enter final orders in connection with any dispute over whether an action violates the Shareholder Releases or Channeling Injunction. Upon determining that a violation of the Shareholder Releases or Channeling Injunction has occurred, the Bankruptcy Court, in its discretion, may award any appropriate relief against such violating Person, including, but not limited to, (i) disgorgement from the violating Person of any funds, assets or other value received, directly or indirectly, pursuant to the Plan or Plan Documents (including fees and expenses paid pursuant to the Plan or Plan Documents on account of legal or other advisory services rendered to or for the benefit of the violating Person); (ii) the termination of any rights of the violating Person to receive any funds, assets or other value pursuant to the Plan or Plan Documents; (iii) the reduction of any payments owed by any Shareholder Released Parties under the Shareholder Settlement Agreement to the violating Person in an amount equal to the amount of disgorgement ordered from, or the reduction of future payments ordered to be made to, or on account of, the violating Person (subject to the right of the violating Person to request that any amounts actually disgorged from such violating Person offset any reduction of future payments ordered to be made to, or on account of, such violating Person); (iv) an admonition, reprimand or censure of, or citation of contempt by, the violating Person and its counsel; (v) a fine or penalty paid into the Bankruptcy Court; (vi) a bond or other

seek or obtain any affirmative monetary recovery from any Protected Party or any Asset of any Protected Party (including from any Purdue Insurance Policy or any other insurance policy of a Protected Party) on account of any Released Claim or Shareholder Released Claim. The foregoing does not constitute a release of any Co-Defendant's Class 14 Claim or any other Excluded Party's Class 11(c) Claim.

10.19 ***Channeling of Future PI Channeled Claims and Injunction in Support of PI Futures Trust*.**

As of the Effective Date, in accordance with the Plan and the Master TDP, any and all liability of the Debtors and the other Protected Parties for any and all Future PI Channeled Claims shall automatically, and without further act, deed or court order, be channeled exclusively to and assumed by the PI Futures Trust. Each Future PI Channeled Claim shall be asserted exclusively against the PI Futures Trust and resolved solely in accordance with the terms, provisions and procedures of the PI Futures TDP. The sole recourse of any Person on account of any Future PI Channeled Claim, whether or not the Holder thereof participated in the Chapter 11 Cases and whether or not such Holder filed a Proof of Claim in the Chapter 11 Cases, shall be to the PI Futures Trust as and to the extent provided in the PI Futures TDP. **Holders of Future PI Channeled Claims are enjoined from asserting against any Debtor or other Protected Party any Channeled Claim, and may not proceed in any manner against any Debtor or other Protected Party on account of any Channeled Claim in any forum whatsoever, including any state, federal or non-U.S. court or administrative or arbitral forum, and are required to pursue Future PI Channeled Claims exclusively against the PI Futures Trust, solely as and to the extent provided in the PI Futures TDP.**

10.20 ***Reinstatement of Certain Shareholder Released Claims*.**

As set forth in the Shareholder Settlement Agreement, if any Shareholder Released Party that is a Subsidiary (as defined in the Shareholder Settlement Agreement) of a Shareholder Payment Party voluntarily or involuntarily becomes subject to an insolvency, bankruptcy, reorganization, winding-up, administration, dissolution, composition or similar proceeding, upon election by notice from the Sackler Party Representative (as defined in the Shareholder Settlement Agreement), with the consent of the Master Disbursement Trust, any Estate Causes of Action against such Shareholder Released Party that were previously held by the Debtors and that were released pursuant to Section 10.7(a) of the Plan shall be reinstated in full (and the Shareholder Release provided under Section 10.7(a) of the Plan shall be deemed null and void with respect thereto, and the Channeling Injunction shall terminate, be rescinded and have no application with respect thereto) and the Master Disbursement Trust, in its sole discretion and upon receipt of an advance for fees and expenses provided by the Shareholder Released Parties in an amount determined by the Master Disbursement Trust in its sole discretion (which advance shall be repaid to the extent not used), shall utilize commercially reasonable efforts to maximize the value of any such Estate Causes of Action in such insolvency or liquidation proceeding, and any recovery shall be treated in accordance with the terms as set forth in the Shareholder Settlement Agreement.

10.21 ***Special Provisions for United States*.**

(a) As to the United States, notwithstanding anything contained in the Plan or Confirmation Order to the contrary (except Section 5.2(h) of the Plan and in respect of the United States-PI Claimant Medical Expense Claim Settlement), including but not limited to this Article X, nothing in the Plan or Confirmation Order (except Section 5.2(h) of the Plan and in respect of the United States-PI Claimant Medical Expense Claim Settlement) shall:

(i) limit or expand the scope of discharge, release or injunction permitted to debtors under the Bankruptcy Code. The discharge, release, and injunction provisions contained in the Plan and

Confirmation Order are not intended and shall not be construed to bar the United States from, subsequent to the Confirmation Order, pursuing any police or regulatory action, or any criminal action;

(ii) discharge, release, exculpate, impair or otherwise preclude: (A) any liability to the United States that is not a "claim" within the meaning of section 101(5) of the Bankruptcy Code; (B) any Claim of the United States arising on or after the Effective Date; (C) any liability of the Debtors under police or regulatory statutes or regulations to the United States as the owner, lessor, lessee or operator of property that such Entity owns, operates or leases after the Effective Date; or (D) any liability to the United States, including but not limited to any liabilities arising under the IRC, the environmental laws, the criminal laws, the civil laws or common law, of any Person, including any Released Parties, Shareholder Released Parties or any Exculpated Parties, in each case, other than the Debtors; *provided, however*, that the foregoing shall not (x) limit the scope of discharge granted to the Debtors under sections 524 and 1141 of the Bankruptcy Code, (y) diminish the scope of any exculpation to which any Person is entitled under section 1125(e) of the Bankruptcy Code or (z) change the treatment of the DOJ Forfeiture Judgment Claim pursuant to Section 2.3 of the Plan or the treatment of the Federal Government Unsecured Claims pursuant to Section 4.3 of the Plan;

(iii) enjoin or otherwise bar the United States from asserting or enforcing, outside the Bankruptcy Court, any liability described in the preceding clause (ii); *provided*, *however*, that the non-bankruptcy rights and defenses of all Persons with respect to (A)–(D) in clause (ii) are likewise fully preserved;

(iv) affect any valid right of setoff or recoupment of the United States against any of the Debtors; *provided*, *however*, that the rights and defenses of the Debtors with respect thereto are fully preserved (other than any rights or defenses based on language in the Plan or the Confirmation Order that may extinguish setoff or recoupment rights);

(v) divest any court, commission or tribunal of jurisdiction to determine whether any liabilities asserted by the United States are discharged or otherwise barred by this Confirmation Order, the Plan or the Bankruptcy Code; *provided*, *however*, that the Bankruptcy Court shall retain jurisdiction as set forth in and pursuant to the terms of the Plan to the extent permitted by law; or

(vi) be deemed to (A) determine the tax liability of any Person, including but not limited to the Debtors, (B) have determined the federal tax treatment of any item, distribution or Entity, including the federal tax consequences of the Plan or Confirmation Order, or (C) expressly expand or diminish the jurisdiction of the

Bankruptcy Court to make determinations as to federal tax liability and federal tax treatment under the Bankruptcy Code and 28 U.S.C. §§ 157, 1334.

For the avoidance of doubt, the Channeling Injunction set forth in Section 10.8 of the Plan does not apply to the rights and causes of action protected by this Section 10.21.

(b) Notwithstanding anything to the contrary herein, nothing in the Plan, the Confirmation Order, the Shareholder Settlement Agreement or any other document filed in connection with the Plan shall release claims held by the United States of America against the Shareholder Released Parties; *provided* that, for the avoidance of doubt, nothing in the Plan, Confirmation Order, the Shareholder Settlement Agreement or any other document filed in connection with the Plan shall limit the releases contained in the Settlement Agreement between the United States of America and Purdue Pharma L.P., executed on October 21, 2020, or the Settlement Agreement between the United States of America and Dr. Richard Sackler, David Sackler, Mortimer D.A. Sackler, Kathe Sackler, and the Estate of Jonathan Sackler, executed on October 21, 2020.

(c) Several of the Debtors are parties to the various following agreements with the Secretary of the Department of Health and Human Services under which the Debtors owe rebates to third parties:

(i) The Medicare Coverage Gap Discount Program Agreement is established under 42 U.S.C. §§ 1395w-l14A, 1395w-153 and is required should manufacturers wish to have coverage for their products under Medicare Part D. Under the Medicare Coverage Gap Discount Program Agreement, manufacturers agree to reimburse Medicare Part D plan sponsors for certain Coverage Gap discounts the plans provide to Medicare beneficiaries in the Part D coverage gap. The Centers for Medicare & Medicaid Services requires that a new entity that seeks to assume a Medicare Coverage Gap Discount Program Agreement enter into a novation agreement with the Centers for Medicare & Medicaid Services with respect to the transfer of such agreement. The Debtors that have entered into Medicare Coverage Gap Discount Program Agreements with the Secretary are: Purdue Pharma L.P. (P1180) and Rhodes Pharmaceuticals L.P. (P1281);

(ii) The Medicaid Drug Rebate Program, established under section 1927 of the Social Security Act, requires manufacturers to enter into National Drug Rebate Agreements with the Secretary for the coverage and payment of a manufacturer's covered outpatient drugs. Under the Medicaid Drug Rebate Program, if a manufacturer has entered into and has in effect a National Drug Rebate Agreement, Medicaid covers and pays for all of the drugs of that manufacturer dispensed and paid for under the state plan, and in return manufacturers pay applicable rebates to the states. The Debtors that have National Drug Rebate Agreements and the labeler codes associated with the National Drug Rebate Agreements are as follows: Rhodes Pharmaceuticals L.P. (42858), Purdue Pharma L.P. (59011), Avrio Health L.P. (67618) and Adlon Therapeutics L.P. (72912);

(iii) Manufacturers with National Drug Rebate Agreements must also comply with the Drug Pricing Program under section 340B of the Public Health Service Act, 42 U.S.C. § 256b, and have Pharmaceutical Pricing Agreements with the Secretary of the Department of Health and Human Services. Under the Pharmaceutical Pricing Agreements, manufacturers agree to charge a price for covered outpatient drugs that will not exceed the average manufacturer price decreased by a rebate percentage. The Debtors that have Pharmaceutical Pricing Agreements and the labeler codes associated with such agreements are as follows: Rhodes Pharmaceuticals L.P. (42858), Purdue Pharma L.P. (59011), Avrio Health L.P. (67618) and Adlon Therapeutics L.P. (72912); and

(iv) The Medicare Coverage Gap Discount Program Agreements, the Medicaid National Drug Rebate Agreements and the Pharmaceutical Pricing Agreements identified above provide that, in the event of a transfer of ownership, such agreements are automatically assigned to the new owner and all terms and conditions of such agreements remain in effect as to the new owner. Accordingly, notwithstanding anything contained in the Plan or the Confirmation Order which may be to the contrary, the Debtors shall assume such agreements pursuant to section 365 of the Bankruptcy Code, and upon the Effective Date, the Medicare Coverage Gap Discount Program Agreements, the Medicaid National Drug Rebate Agreements and the Pharmaceutical Pricing Agreements identified above shall be assigned to NewCo. NewCo, as the new owner, will assume the obligations of the Debtors who are parties under such agreements from and after the Effective Date, and to fully perform all the duties and responsibilities that exist under such agreements in accordance with their terms, including the payment of discounts owed to Part D Plan sponsors or payment of rebates owed to states and wholesalers for quarters prior to the Effective Date. For the avoidance of doubt, NewCo shall be liable for any outstanding rebates or discounts owed to third parties (and any applicable interest thereon) arising prior to the Effective Date, as well as any penalties associated with noncompliance by the Debtors with the Medicare Coverage Gap Discount Program Agreements, the Medicaid National Drug Rebate Agreements and the Pharmaceutical Pricing Agreements identified above prior to the Effective Date.

(d) Notwithstanding anything to the contrary herein, nothing in the Plan, the Confirmation Order, the Shareholder Settlement Agreement or any other document filed in connection with the Plan shall bind the United States in any application of statutory, or associated regulatory, authority grounded in Title 19 of the Social Security Act, 42 U.S.C. § 1396-1 et seq. (the "***Medicaid Program***") or in section 1115 of Title 11 of the Social Security Act. The United States is neither enjoined nor in any way prejudiced in seeking recovery of any funds owed to the United States under the Medicaid Program.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
PURDUE PHARMA L.P., *et al.*,	**Case No. 19-23649 (RDD)**
Debtors.[1]	**(Jointly Administered)**

DECLARATION OF JESSE DELCONTE

[1] The Debtors in these cases, along with the last four digits of each Debtor's registration number in the applicable jurisdiction, are as follows: Purdue Pharma L.P. (7484), Purdue Pharma Inc. (7486), Purdue Transdermal Technologies L.P. (1868), Purdue Pharma Manufacturing L.P. (3821), Purdue Pharmaceuticals L.P. (0034), Imbrium Therapeutics L.P. (8810), Adlon Therapeutics L.P. (6745), Greenfield BioVentures L.P. (6150), Seven Seas Hill Corp. (4591), Ophir Green Corp. (4594), Purdue Pharma of Puerto Rico (3925), Avrio Health L.P. (4140), Purdue Pharmaceutical Products L.P. (3902), Purdue Neuroscience Company (4712), Nayatt Cove Lifescience Inc. (7805), Button Land L.P. (7502), Rhodes Associates L.P. (N/A), Paul Land Inc. (7425), Quidnick Land L.P. (7584), Rhodes Pharmaceuticals L.P. (6166), Rhodes Technologies (7143), UDF LP (0495), SVC Pharma LP (5717) and SVC Pharma Inc. (4014). The Debtors' corporate headquarters is located at One Stamford Forum, 201 Tresser Boulevard, Stamford, CT 06901.

I, Jesse DelConte, pursuant to 28 U.S.C. § 1746, hereby declare as follows under penalty of perjury:

1. I am a Managing Director of AlixPartners, LLP ("**AlixPartners**"), which has a place of business at 909 Third Avenue, Floor 30, New York, New York 10022 and which serves as one of the principal advisors to Purdue Pharma L.P. ("**PPLP**") and certain of its affiliates, as debtors and debtors in possession in the above-captioned cases (collectively, "**Purdue**" or the "**Debtors**").

2. I submit this Declaration in support of the Debtors' opposition to the motions filed by the States of Washington and Connecticut [Dkt. No. 3789], the State of Maryland [Dkt. No. 3845], Certain Canadian Municipality Creditors and Canadian First Nation Creditors [Dkt. 3873], Ronald Bass Sr. [Dkt. No. 3860], Ellen Isaacs [Dkt. No. 3890], and the U.S. Trustee [Dkt. Nos. 3778, 3801, 3972] seeking a stay pending appeal of the Court's order confirming the Debtors' Twelfth Amended Plan of Reorganization (the "**Plan**" and the order confirming the Plan, the "**Confirmation Order**").[2] My testimony is based on my personal knowledge of the facts set forth below.

3. My testimony proceeds in four sections. Section I describes the abatement and personal injury trusts established under the Plan, the timing and amount of payments that the Debtors' existing shareholders are obligated to make to the Estates under the Shareholder Settlement Agreement, and the amount and timing of distributions of that value to creditors contemplated under the Plan. Section II identifies the distributions to creditors that might be delayed if an order staying the Confirmation Order is entered. Section III identifies the increased

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan.

professional fees that would likely be incurred if an order staying the Confirmation Order is entered. Section IV describes operational risks that the Debtors' businesses (which inure to the benefit of creditors under the Plan) would likely face if an order staying the Confirmation Order is entered.

I. The Abatement and Personal Injury Trusts, the Shareholder Settlement Payments, and Distributions to Creditors Under the Plan

4. As I set forth in my Declaration in support of the Debtors' Fifth Amended Plan [Dkt. No. 3456] ("**Confirmation Declaration**"), the Plan will deploy Purdue's assets to help address and abate the opioid crisis. The majority of Purdue's value will be dedicated to trusts that, together, will fund abatement efforts and distribute funds to personal injury claimants. The value distributed under the Plan will include $4.325 billion in funds that will be paid over time by the Debtors' existing shareholders pursuant to the terms of a settlement agreement ("**Shareholder Settlement Agreement**") among the Debtors, certain shareholders of the Debtors (including members of the Mortimer Sackler family and Raymond Sackler family (together, the "**Sackler Families**") and trusts for the benefit of the Sackler Families. This value, in turn, will be transferred to the abatement and personal injury trusts as early as the Effective Date for distribution to creditors. The Debtors' business assets will also be transferred on the Effective Date to a new entity charged with the express purpose of addressing the opioid crisis and funding the trusts going forward.

A. The Plan Establishes Creditor Trusts to Administer Abatement and Distribution

5. The Plan establishes trusts to administer the distribution of value to fund opioid abatement efforts and compensate personal injury claimants. As set forth in detail in my Confirmation Declaration, these trusts include (1) the National Opioid Abatement Trust ("**NOAT**"); (2) the Tribe Trust (together with NOAT, "**Public Creditor Trusts**"); (3) the TPP

Trust; (4) the Hospital Trust; (5) the NAS Monitoring Trust; (6) the PI Trust; and (7) the PI Futures Trust. NOAT, the Tribe Trust, the Hospital Trust, the TPP Trust, and the NAS Monitoring Trust are abatement trusts and may only make distributions for the purpose of opioid abatement (or to pay attorneys' fees and costs) (such trusts, "**Abatement Trusts**"). (*See* Plan § 5.7(d).) The PI Trust and PI Futures Trust will make distributions to qualifying personal injury claimants. (*See* Plan § 5.7(e).) NOAT, the Tribe Trust, the Hospital Trust, the TPP Trust, the NAS Monitoring Trust, the PI Trust, and the PI Futures Trust are known as the "**Creditor Trusts**."

6. In addition to the Creditor Trusts, the Plan establishes the Master Disbursement Trust ("**MDT**"). The Master Disbursement Trust, among other things, will have the right to receive settlement payments under the Shareholder Settlement Agreement as set forth below in Section I.B. (Plan § 5.6(c).) MDT also will make distributions to the Creditor Trusts as set forth below in Section I.C. (*See* Plan § 5.2).

B. Under the Shareholder Settlement Agreement, the Estates Will Receive $4.325 Billion in Cash Over Time

7. As noted above, the value distributed under the Plan will include $4.325 billion in funds that will be paid over time by the Sackler Families to MDT (collectively, the "**Shareholder Settlement Payments**"). The amount and timing of the Shareholder Settlement Payments will proceed according to a set schedule as set forth in the Shareholder Settlement Agreement. The first settlement payment—totaling at least $300 million—is due to be paid on the Effective Date of the Plan ("**Initial Shareholder Settlement Payment**"). The second settlement payment—totaling at least $375 million—is due to be paid on June 30, 2022 ("**Second Shareholder Settlement Payment**"). If the Effective Date is delayed past February 28, 2022, however, the Shareholder Settlement Agreement provides that the Second Shareholder

Settlement Payment will not be required to be paid until a date that is at least four calendar months after the Effective Date. Under the Shareholder Settlement Agreement, both the Initial Shareholder Settlement Payment and the Second Shareholder Settlement Payment will be paid directly to MDT.

8. The third settlement payment is due on June 30, 2023 ("**Third Shareholder Settlement Payment**"). The Third Shareholder Settlement Payment will total at least $375 million and be paid directly to MDT subject to certain conditions. These conditions include, for example, if an appeal of the Confirmation Order is taken and a final decision by the Court of Appeals for the Second Circuit ("**Second Circuit**") has not been issued, (a) that the Second Circuit has accepted a direct appeal, (b) the appeal has been expedited, and (c) a stay pending appeal has been denied. (Shareholder Settlement Agmt. at § 2.08(a)(iii)(A)-(C).) I understand that if the conditions as to the Third Shareholder Settlement Payment set forth in the Shareholder Agreement are not satisfied at that time, the Third Shareholder Settlement Payment will be paid into an escrow account ("**Appeals Account**"), and not to MDT, pending the final resolution of any appeals of the Confirmation Order. Moreover, if the Second Shareholder Settlement Payment is not made until after January 2023, the Third Shareholder Settlement Payment will not become due until at least five months after the Second Shareholder Settlement Payment is made.

9. The remaining shareholder settlement payments ("**Remaining Shareholder Settlement Payments**") are due to be paid over the next seven (or eight) years according to a schedule as set forth in the Shareholder Settlement Agreement. The Remaining Shareholder Settlement Payments are to be paid into the Appeals Account pending the final resolution of all

appeals of the Confirmation Order. After a final resolution of all appeals, any payments that had been paid into the Appeals Account will be released and paid to MDT.

C. The Creditor Trusts Will Make Distributions for Abatement Purposes and Distributions to Personal Injury Claimants

10. As I set forth in my Confirmation Declaration, distributions to claimants will be made not by MDT, but by the Creditor Trusts discussed above. Each of the Creditor Trusts is charged with holding, managing, and investing funds received from, among others, the Debtors and the MDT, maintaining funds to pay its expenses, and administering, processing, resolving, and liquidating claims that the Plan and Confirmation Order will channel to such Creditor Trust. The five private creditor Trusts ("**Private Creditor Trusts**") are the Hospital Trust, the TPP Trust, the NAS Monitoring Trust, the PI Trust, and the PI Futures Trust, while the two Public Creditor Trusts are NOAT and the Tribe Trust. (*See* Plan § 5.7.) Each Creditor Trust has its own trust distribution procedures ("**TDPs**").

11. The purpose of the Hospital Trust is to make distributions to be used solely for opioid abatement purposes on account of certain claims filed by hospitals and other providers of health treatment or other social services. Recipients of Hospital Abatement Distributions, in turn, will be required to dedicate 100% of the net funds of each such distribution (i.e., the amount of such distribution after deducting for legal fees and litigation expenses as set forth in the Hospital TDPs) solely and exclusively for opioid use disorder abatement programs as identified in the Hospital TDPs. These permitted abatement purposes include, for example, providing continuing professional education in addiction medicine, participating in community efforts to provide opioid-use disorder treatment to others in the community (such as those in jails, prisons, or other detention facilities), providing Naloxone kits and instruction to patients upon discharge, and prospectively providing otherwise unreimbursed or under-reimbursed future

medical services for patients with opioid use disorder or other opioid related diagnoses. (*See* Hospital Trust Distribution Procedures § 7(a).)

12. The Plan contemplates that the Hospital Trust will receive a total of $250 million in distributions over time, with an initial payment of $25 million to the Hospital Trust on the Effective Date and five subsequent payments to the Hospital Trust from the Master Disbursement Trust in the following amounts: (i) $35 million on July 31, 2022; (ii) $45 million on July 31, 2023; (iii) $45 million on July 31, 2024; (iv) $50 million on July 31, 2025; and (v) $50 million on July 31, 2026. (Plan § 5.2(d)(i)(A).)

13. The purpose of the TPP Trust is to make distributions to be used solely for opioid abatement purposes on account of certain claims filed by TPPs. Recipients of TPP Abatement Distributions, in turn, will be required under the Plan to dedicate 100% of the net funds of each such distribution (i.e., the amount of such distribution after deducting for legal fees and litigation expenses as set forth in the TPP TDPs) solely and exclusively for opioid use disorder abatement programs. (Plan §§ 4.7(a), 5.7(d).) These permitted abatement purposes include, for example, expanding telehealth networks and availability to increase access to treatment for opioid-use disorder and/or any substance use disorder or mental health conditions, including medication-assisted treatment, as well as counseling, psychiatric support, and other treatment and recovery support services. (*See* TPP Trust Distribution Procedures Appendix D.)

14. The Plan contemplates that the TPP Trust will receive a total of $365 million in distributions over time, with an initial payment of $5 million to the TPP Trust on the Effective Date and three subsequent payments to the TPP Trust from the Master Disbursement Trust in the following amounts: (i) $120 million on July 31, 2022; (ii) $120 million on July 31, 2023; and (iii) $120 million on July 31, 2024. (Plan § 5.2(d)(i)(B).)

15. The NAS Monitoring Trust will be established to address claims that (i) are filed on account of an NAS Child, (ii) are related to medical monitoring support, educational support, vocational support, familial support or similar related relief, and (iii) are not for an alleged personal injury suffered by an NAS Child. (*See* Plan §§ 1.1, 4.9(a).)

16. The Plan contemplates that the NAS Monitoring Trust will receive a total of $60 million in distributions over time, with an initial payment of $1 million to the NAS Monitoring Trust on the Effective Date and two subsequent payments to the NAS Monitoring Trust from the Master Disbursement Trust in the following amounts: (i) $24 million on the first scheduled Master Distribution Trust distribution date and (ii) $35 million on July 31, 2023. (Plan § 5.2(d)(i)(C).)

17. Unlike the Hospital Trust, the TPP Trust, and the NAS Monitoring Trust, the purpose of the PI Trust is to make distributions directly to qualified personal injury claimants, on account of (i) alleged opioid-related personal injury or similar claims and (ii) alleged opioid-related personal injury to an NAS Child or similar opioid-related claim asserted by or on behalf of an NAS Child. The PI Trust will establish two funds: a PI Trust NAS Fund and a PI Trust Non-NAS Fund. The PI Trust will make distributions to holders of NAS PI Channeled Claims from the PI Trust NAS Fund in accordance with the NAS PI Trust distribution procedures, and it will make distributions to holders of Non-NAS PI Channeled Claims from the PI Trust Non-NAS Fund in accordance with the Non-NAS PI Trust distribution procedures. (Plan § 4.10.)

18. The Plan contemplates that the PI Trust will receive a total of between $700 to $750 million in distributions over time, with an initial payment of at least $300 million to the PI Trust on the Effective Date. The PI Trust will receive additional payments of (i) $200 million on July 31, 2024, (ii) $100 million on July 31, 2025, and (iii) $100 million on July 31, 2026,

respectively. In addition, the PI Trust will receive the value of proceeds received (in an amount not to exceed $450 million in the aggregate) from certain of the Debtors' insurance policies that cover opioid-related activities. (Plan § 5.2(d)(i)(D).)

19. The PI Futures Trust will be established to address claims filed on account of an alleged opioid-related personal injury or a similar opioid-related claim that arises from or relates to the use of an opioid that is manufactured by or placed in the stream of commerce by NewCo or any successor owner of NewCo's opioid business. The PI Futures Trust will make distributions to holders of Future PI Channeled Claims according to the PI Futures Trust distribution procedures. (Plan § 5.7(f).)

20. The PI Futures Trust will receive $5 million in distributions on the Effective Date. For so long as the PI Futures Trust has assets available to make distributions, the PI Futures Trust will make such distributions on account of allowed Future PI Channeled Claims. If, on the sixth anniversary of the Effective Date, there are amounts remaining in the PI Futures Trust after the resolution of all Future PI Channeled Claims asserted against the PI Futures Trust on or before the sixth anniversary of the Effective Date and the payment of all operating expenses of the PI Futures Trust, those amounts will be contributed to MDT. (Plan §§ 5.2(d), 5.7(f).)

21. NewCo's residual cash, after making the distributions to the Private Creditor Trusts described above and accounting for payments owed to the DOJ under the resolution approved by the Court on November 18, 2020 between PPLP and the DOJ ("**DOJ Resolution**") and for NewCo's operating cash requirements, will be transferred to the Public Creditor Trusts. The total distribution of value from the Debtors' estates to the Public Creditor Trusts is estimated to exceed $4 billion over time.

D. Under the Plan, Purdue's Businesses Will be Operated by New Entities for the Public Benefit

22. Under the Plan, PPLP, PPLP's general partner Purdue Pharma Inc. ("**PPI**") and several of PPLP's subsidiaries[3] will cease to exist. The Debtors' businesses will be transferred to and operated by a new entity, **NewCo**. NewCo will be wholly owned by a new entity, **TopCo**. TopCo, in turn, will be owned by the NOAT and the Tribe Trust. As I set forth in my Confirmation Declaration, the Plan establishes a comprehensive system of safeguards designed to ensure that NewCo will operate the Debtors' businesses for the public benefit. These include, among other things, an operating agreement that requires NewCo to operate in a responsible and sustainable manner (*See* NewCo Operating Agreement § 2.3(a)) and covenants set forth in the Confirmation Order designed to ensure that, among other things, NewCo pursues and implements certain public health initiatives to develop and distribute medicines to treat opioid addiction and reverse opioid overdoses ("**Public Health Initiatives**").[4]

23. On the Effective Date, NewCo will receive substantially all of PPLP's non-cash assets and $200 million of unrestricted cash and cash equivalents. In broad overview, the proceeds of NewCo's business will be used to fund the Public Health Initiatives and to make distributions to TopCo, which will, in turn, make distributions to NOAT and the Tribes Trust. (Plan §§ 1.1, 5.2(d)(iii); NewCo Operating Agreement §§ 6.2, 6.5.)

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[3] Specifically, Rhodes Associates L.P., Rhodes Technologies, Paul Land Inc., UDF LP, SVC Pharma Inc., SVC Pharma LP, Button Land L.P., Quidnick Land L.P.

[4] The Debtors' Public Health Initiatives include three separate products (1) Buprenorphine / Naloxone Sublingual tablets, which are FDA approved and are used for addiction treatment, (2) over-the-counter intranasal Naloxone, which is an overdose rescue medication that is still in development and (3) Nalmafene vial, pre-filled syringe and autoinjector, which is also an overdose rescue medication that is still in development.

II. A Stay Would Delay Distributions to Creditors Under the Plan

24. In the event that and while an order staying the Confirmation Order pending appeal is entered, the Shareholder Settlement Payments under the Settlement Agreement will not be made, and accordingly, distributions to MDT under the Plan will not commence. In addition, in this scenario, no funds from the Debtors will be distributed to TopCo. The result of an order staying the Confirmation Order, therefore, will be a delay in the distribution of funds to the Creditor Trusts and ultimately to creditors. The total amount of funds that may be delayed will depend on the length of the stay order ("**Stay Period**").

25. A stay of the Confirmation Order will have the effect of delaying the Effective Date. In total, it is estimated that approximately $600 million would be transferred to the Creditor Trusts on the Effective Date, assuming an Effective Date of December 31, 2021.[5] This includes an estimated $290 million[6] that would be transferred to the Abatement Trusts (including in particular an estimated $200 million that would be distributed specifically to NOAT)[7] for the purpose of funding programs and efforts to abate the opioid crisis. This also include $300

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[5] For the purposes of this estimation and others contained in this Declaration, I have relied on the financial projections described at Appendix C to the Debtors *Fifth Amended Disclosure Statement for the Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma, L.P., et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Dkt. No. 2983] ("**Disclosure Statement**"). As I described in my Confirmation Declaration, my team and I developed this financial model to reflect the Debtors' anticipated financial condition post-emergence if the Plan was confirmed. In addition, the above estimate of distributions to Creditor Trusts on the Effective Date also includes the $6.5 million Truth Initiative Contribution as provided for in the Plan.

[6] This amount is subject to payments of professional fees as set forth in section 5.8 of the Plan.

[7] The final amount of the initial NOAT distribution on the Effective Date is subject to adjustment for, among other things, year-to-date budget to actual adjustments for both operating and non-operating results, items outside of the Debtors' control, including but not limited to, potential variability in investment monetization proceeds, higher than forecasted restructuring-related professional fees and potential cash collateral necessary to secure insurance coverage for NewCo and TopCo, and other adjustments.

million that would be transferred to the PI Trust for distribution to individual personal injury claimants.[8] In addition, $250 million (consisting of the $225 million DOJ Forfeiture Payment and a $25 million payment on account of the Federal Government Unsecured Claims) will be transferred to the United States on or around the Effective Date.[9] Generally speaking, the longer any Stay Period lasts, the greater the amount of funds delayed that would have been transferred to the Creditor Trusts. The consequence of this delay to creditors is that creditors will be delayed in utilizing the funds for abatement purposes as provided by the Plan or in receiving compensation for personal injuries. This harm is further compounded when the future value of these payments is adjusted to present value to account for the time value of money. In addition, a stay of the Confirmation Order could result in delaying the timeline on which the Debtors and NewCo can get their Public Health Initiatives to market at or below cost and ultimately to those in need.

26. To illustrate the harm created by delaying the distribution of funds, my team and I prepared six illustrative delay scenarios based on a hypothetical Stay Period of 3 months, 6 months, 9 months, 12 months, 18 months, and 24 months, respectively, with each Stay Period beginning on the assumed effective date of December 31, 2021. As a basis for this analysis, my team and I relied on the financial projections set forth in the Debtors' Disclosure Statement updated to reflect the terms of the final Shareholder Settlement Agreement, which increased the total shareholder contribution by $50 million to $4.325 billion and adjusted certain future

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[8] The $300 million amount excludes $5 million which would be transferred to the PI Futures Trust on the Effective Date. This transfer, however, is included in the total estimated Effective Date distributions to Creditor Trusts described above.

[9] Under the terms of the DOJ Resolution and the Plan, the DOJ Forfeiture Payment must be made within three business days following the entry of a judgment of conviction pursuant to Plea Agreement.

payment timing. My team and I then calculated the total distributions to the United States and to the Creditor Trusts that would otherwise have been made during the various Stay Periods, which in each case exceeded $1 billion. My team and I then calculated the present value loss of these payments due to the delay caused by the various Stay Periods using a discount rate of 9%. The results of these calculations are summarized in the chart below ($ in millions):

Hypothetical Stay Period	**Amount of Distributions Delayed by Stay Period**	**Net Present Value Loss of Distributions Delayed by Stay Period (at 9.0% Discount Rate)**
3 Months	$1,221.2	$15.7
6 Months	$1,221.2	$37.1
9 Months	$1,221.2	$58.1
12 Months	$1,634.7	$86.7
18 Months	$2,044.9	$147.1
24 Months	$2,518.0	$205.6

27. For example, during a three month hypothetical Stay Period, all distributions to creditors and the federal government that would have otherwise been made on the Effective Date—totaling approximately $852 million—would be delayed by three months. In addition, under a three month delay scenario, due to provisions in the Shareholder Settlement Agreement and Plan that would delay the second distribution date in the event of a delay of the Effective Date, it is estimated that approximately $369 million in additional distributions would be delayed by one month. Accordingly, a hypothetical three month stay would, in total, result in the delay of approximately $1.221 billion in distributions to creditors.

28. Moreover, the present value loss of the delayed payments under a three month stay scenario would be $15.7 million (assuming a 9% discount rate). Importantly, in calculating the present value loss of delayed distributions during each Stay Period, I have assumed that MDT or TopCo would not incur any forecasted expenses during the Stay Period. This assumption results in a future cost savings and thus has the effect of offsetting the projected present value

loss due to delayed payments. In addition, the above present value calculations do not account for any delays in recoveries on causes of action that MDT and TopCo may pursue under the Plan, such as from potential recoveries against pre-petition insurance policies. Delays in such recoveries would have the effect of increasing the present value loss associated with a stay of the Confirmation Order. Therefore, the above present value loss estimates almost certainly underestimate the loss of present value that would result from delaying distribution payments during each of the hypothetical Stay Periods. For the avoidance of doubt, such present value loss calculations do not include other costs and losses that could be associated with a delay of distributions to creditors, including, without limitation, the human costs of a delay, any multiple effects of abatement as discussed in the testimony of Dr. Gautam Gowrisankaran at the Confirmation Hearing, professional fees and costs (discussed more below), and risks to the Debtors' business and the future viability of NewCo and its Public Health Initiatives (also discussed more below), among potentially many others.

III. A Stay Would Increase the Incurrence of Professional Costs by the Estates

29. One element that will positively impact the Debtors' post-emergence financial picture is the significant decrease in assumed litigation expenses. Between September 15, 2019, the date the bankruptcy petitions were filed, and September 30, 2021, the Debtors have incurred approximately $697 million in non-recurring professional fees based on the Debtors' monthly operating reports. In the event the Confirmation Order is stayed, and the Debtors are unable to emerge from bankruptcy, the Estates will continue to incur professional fees in connection with the chapter 11 cases. This will include fees and costs exclusive of fees that would be incurred regardless of whether a stay was imposed. In other words, the Estates would continue to incur fees as a result of remaining in chapter 11 above and beyond fees incurred through, for example, litigation of creditor motions for a stay pending appeal, the appeals themselves or post-

emergence planning (such incremental chapter 11 costs, "**Incremental Professional Fees**"). The total amount of Incremental Professional Fees incurred by the Estates as a result of a stay of the Confirmation Order will depend on the length of the Stay Period.

30. To estimate Incremental Professional Fees that the Estates might be expected to incur during a stay of the Confirmation Order, my team and I assumed a monthly run rate for each of the Debtors' legal advisors and financial advisors that is approximately 15% of the average monthly run rate incurred by these professionals during the first six months of 2021. This percentage represents a reasonable estimate of Incremental Professional Fees that might be incurred on a monthly basis during a stay scenario. My team and I then assumed each such professional firm would incur these costs each month during a stay of the Confirmation Order. The results of these projections are provided in the chart below ($ in millions).

Assumed Stay Period	**Projected Incremental Professional Fees Incurred During Assumed Stay Period**
3 Months	$10
6 Months	$20
9 Months	$30
12 Months	$40
18 Months	$60
24 Months	$80

31. It bears emphasis, however, that the Estates incurred on average approximately $28 million in professional fees and costs each month during the course of these chapter 11 cases, and it is possible that, due to uncertainties of remaining in chapter 11, that the above Incremental Professional Fees projections could be significantly higher. Under the Plan, with exception of payments to the PI Trust and the DOJ and the NewCo Initial Cash Distribution (and for certain other legal fees and costs), the value of the Debtors will be transferred for the purpose of abating the opioid crisis. Accordingly, any incremental value expended on professional fees

during any Stay Period is value that otherwise would be transferred for purposes of abatement in the absence of a stay of the Confirmation Order.

IV. A Stay Would Increase Operational and Other Risks to the Debtors' Businesses

32. As described above, the Plan provides that PPLP will be dissolved and the Debtors' assets, including their operational businesses, will be transferred to NewCo. NewCo will then operate these businesses in a responsible manner for the benefit of creditors. Among other things, NewCo's business will be used to fund the Public Health Initiatives and to make distributions to the Public Creditor Trusts.

33. Continuing to remain in bankruptcy would also present an existential risk to the Debtors' business and, therefore, NewCo's future viability. Throughout the pendency of the chapter 11 cases, the Debtors have continually promised their various stakeholders, such as their employees, customers and vendors, that although the timeline to emergence was long, there was a light at the end of the tunnel: the Debtors would emerge from bankruptcy and transition to their new life as a public benefit company. The uncertainty and delay introduced by a stay risks upsetting those expectations with potentially disastrous effects on the financial viability of the Company and the ability to make the level of cash distributions contemplated in the plan. For example, remaining in bankruptcy could cause the Debtors' customers, such as the various pharmacy benefit managers that provide insurance coverage for the Debtors' products, to terminate their relationship with the Debtors given the increased perceived risk to the Debtors' future viability. Vendors who have continued to work with the Debtors could decide to decline to do business with the Debtors as a result of ongoing reputational or other concerns that would have been abated by emerging from chapter 11. And finally, continuing to remain in bankruptcy will have negative consequences for morale and the retention of employees. As described more fully in Mr. Lowne's declaration filed in conjunction with the Debtors' 2021 KEIP and KERP

plans, the Debtors already have experienced higher than average employee attrition given that the Debtors have been in bankruptcy for over 24 months. Confirmation of the Plan and the expectation that the Debtors' assets will soon be transferred to a new operating company that will operate in the public interest has provided important finality to this process.

34. Moreover, operating a complicated pharmaceutical company in bankruptcy requires a significant amount of time and focus from numerous employees across the Debtors' businesses. Emergence will help relieve the pressure on the Debtors and their employees and will enable the Debtors' employees to turn their full attention to NewCo and its public health mission. Given that approximately $650 million in cash is projected to be distributed post-Effective Date through 2025 by NewCo to TopCo, MDT and ultimately the Public Creditor Trusts, putting the future viability of NewCo at risk by staying confirmation could potentially deprive the country of hundreds of millions of dollars in abatement funds.

35. Finally, one central feature of NewCo, which will operate as a public benefit company, is not only that NewCo will provide cash for abatement, but also, as noted above, that it will continue to develop and bring to market three opioid overdose and rescue medications. The Plan also calls for NewCo to develop and distribute these medicines at or below cost. I understand that this is an essential characteristic of the Plan for many stakeholders. A stay of the Confirmation Order could jeopardize NewCo's ability to bring these medicines to market at all, or could delay for years the availability of these potentially life-saving medicines.

Pursuant to 28 U.S. Code § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 22, 2021

/s/ Jesse DelConte
Jesse DelConte

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Case No. 19-23649-rdd
4 - x
5 In the Matter of:
6
7 PURDUE PHARMA L.P.,
8
9 Debtor.
10 - x
11
12 United States Bankruptcy Court
13 300 Quarropas Street, Room 248
14 White Plains, NY 10601
15
16 November 9, 2021
17 10:20 AM
18
19
20
21 B E F O R E :
22 HON ROBERT D. DRAIN
23 U.S. BANKRUPTCY JUDGE
24
25 ECRO: ART

1 THE COURT: Well, that's what you're saying too.
2 I'm just saying it's a prediction.
3 MR. GOLDMAN: Well, Your Honor, I'm not offering
4 my argument as testimony yet, but he is.
5 THE COURT: Well, only for this --
6 MR. GOLDMAN: So --
7 THE COURT: -- I will treat only for that purpose
8 is what he reasonably believes based on his knowledge of the
9 company.
10 MR. GOLDMAN: Let me move on to Mr. Gard. And in
11 paragraph 3, again, this really goes over what Mr. DelConte
12 testified to, and that it's his belief that a delay, though
13 materially, would give us Perdue's residual value and
14 talking about the uncertainty of the bankruptcy process.
15 Again, he -- this is lay opinion. It's not supported by
16 facts establishing it's within his personal knowledge.
17 And this is in the province of experts to say what
18 Perdue's residual value might be given the uncertainty and
19 delay of -- and stay of the limited duration that we're
20 requesting. And in paragraphs 14 and 16, he offers the
21 prediction that as a result of the delayed distributions
22 during the stay, it's quite possible that additional
23 Americans will die, and then suggest that a stay will allow
24 Americans to needlessly die, who would not have died but for
25 a stay.

1 Now, this is obvious argument as well and not
2 fact. I mean, evidence of widespread death as a result of
3 stay of limited duration has got to be based --
4 THE COURT: Well, again --
5 MR. GOLDMAN: -- on more than --
6 THE COURT: -- it depends on what the length of
7 the stay is. I just -- look, on your first point, the only
8 example that he gives for the effect of a stay is if the
9 plea goes forward without the plan being implemented. And
10 to me that is a meaningful effect. To the extent he's
11 talking about other effects on keeping senior employees, I
12 agree with you.
13 I don't think he's really -- unlike Mr. DelConte,
14 he's not really in a position, you know, other than anyone
15 else or different than anyone else to talk about that point.
16 But on the plea point, I understand his point.
17 And then, look, the testimony is based upon I
18 think an undisputed fact that roughly 200 opioid-related
19 overdose deaths occur, and that those deaths have been
20 increasing at remarkable percentage rates over the last
21 couple of years. And I think he and -- he is perfectly
22 positioned to discuss that point given his job, which he's
23 required to assess how best to deal with that issue for his
24 state.
25 And I take, again, his prediction that at some

1 point -- and he doesn’t really say when that point is, but
2 at some point, a stay can lead to additional deaths if it
3 results in a meaningful delay of funds. I don't see how
4 anyone could dispute that.
5 MR. GOLDMAN: Your Honor, I do -- the point I'm
6 trying to make here is that Mr. Gar and the other
7 declarations are trying to draw a causal connection here
8 then because distributions will be delayed, that will result
9 in grievous harm. And there just -- that really is in the
10 province of experts.
11 What will happen, they haven't said the amount of
12 funds that are going to be delayed. What would otherwise be
13 disbursed and used by the various constituents --
14 THE COURT: The record is --
15 MR. GOLDMAN: -- during period of --
16 THE COURT: The record is crystal clear that every
17 dollar counts because there is no surplus. If that weren't
18 the case, then your client's lawsuits are meaningless. This
19 is a really strange exercise, Mr. Goldman, I have to say.
20 MR. GOLDMAN: Well, I make --
21 THE COURT: And I guess --
22 MR. GOLDMAN: -- they're --
23 THE COURT: -- what you're saying is your clients
24 really don't think this money counts?
25 MR. GOLDMAN: No, that is not --

1 THE COURT: Is that what you're --
2 MR. GOLDMAN: -- what I'm saying, Your Honor.
3 THE COURT: -- ultimately saying here in terms of
4 saving lives and addressing the opioid crisis?
5 MR. GOLDMAN: No, it is not, and I would
6 acknowledge that it certainly does count. The point I'm
7 trying to make is that they are trying to translate that
8 into grievous harm based on not knowing what the amount is
9 going to be disbursed during this limited duration and for
10 what purposes.
11 THE COURT: But he wasn't responding to just a
12 limited duration. The motion sought a stay through the
13 entire appeal process through the Supreme Court. So these
14 declarations address through the end of 2023 and through the
15 end of 2024. I agree with you. If you're looking for or if
16 I'm considering a shorter injunction, then this information,
17 although still meaningful because if anyone dies, that
18 pretty important.
19 MR. GOLDMAN: Yes.
20 THE COURT: Plus all of the other societal harms
21 that flow from not having the funding start. But if the
22 funding isn't really going to start in any event until --
23 let's pick a date. And I'm not talking about the effective
24 date now, I'm talking about when funding would actually
25 start. Let's say that's January 1, then your point is a

1 point on argument, not an evidentiary point, which is that
2 this declaration doesn't say that there's any harm
3 specifically before January 1 because it doesn't establish
4 that the funding would start then -- before then.
5 MR. GOLDMAN: Well, that is what my argument is
6 directed to.
7 THE COURT: All right, but --
8 MR. GOLDMAN: -- Your Honor. I understand --
9 THE COURT: -- I don't think that's an evidentiary
10 point. I think that's an argument. That's a point you can
11 make in argument.
12 MR. GOLDMAN: Very well, Your Honor. I'll -- I
13 will move on. And I would echo what Mr. Gold had said is
14 that even beyond that date, we would welcome any sort of
15 interim measures for disbursing funds for abatement and
16 other purposes, similar to the ERF. An ERF2, if you will --
17 THE COURT: Well, the ERF didn't happen --
18 MR. GOLDMAN: -- and could even be --
19 THE COURT: -- so but I take your statement now
20 seriously.
21 MR. GOLDMAN: Thank you, Your Honor.
22 THE COURT: Okay.
23 MR. GOLDMAN: I was just going to make the point
24 it could be implemented pursuant to 363(b) and not pursuant
25 to the plan to remove any idea that it would be -- cause

1 equitable moot.
2 THE COURT: Okay.
3 MR. GOLDMAN: Just moving onto the declarations
4 that the UCC submitted, I think we -- from the two members
5 who have experienced firsthand the devastating effects of
6 the opioid epidemic, I think that, you know, it has to be
7 acknowledged that of all the people who have a right to
8 express an opinion on what will occur due to the opioid
9 epidemic if a stay is issued, is these two people.
10 However, that does not make certain parts of their
11 declarations admissible, which is really what we have the
12 objection to. I think, you know, they have to be given all
13 the solicitudes for the personal loss they've suffered and
14 admiration for what they have turned that into in terms of
15 positive giveback. And I hope the objections or challenges
16 to certain portions of their declarations will be taken in
17 that vein. They're simply technical in nature in terms of
18 establishing what record is made on these proceedings.
19 THE COURT: Well, again, I mean, I think you're
20 objecting to one of the declarants saying that various forms
21 of treatment have stopped over the last year or the last
22 several months for want of funding. And asking me to draw
23 an inference that, under the plan, similar occurrences
24 wouldn't -- would be prevented in the future, I think she --
25 again, I think that the witness can make a prediction of

1 want to understand if that's what you meant.
2 THE COURT: Well, yes, correct. And that's
3 primarily to give the movants the opportunity to renew their
4 motion.
5 MR. PREIS: Again, (sound glitch) that will be 37
6 days -- I'm sorry -- 30 days, 37 because (crosstalk).
7 THE COURT: Well, except that under Rule 8025,
8 unless Judge McMahon shortened it, there would be 14 days
9 added on to the December 7th date, so you'd be at December
10 21.
11 MR. PREIS: Right. Which is I think why in the
12 original proposal, we get offered December 20th, which I
13 understand was not December 21. The only reason I'm raising
14 this is because part of our argument, the irreparable harm
15 (sound glitch). And I know Mr. Kaminetzky said, you know,
16 being December 20th to December 30th is okay. And then, you
17 know, there was some discussion about the holidays, so let's
18 move it to January 7.
19 In effect, we've now elongated almost more than
20 half a month before -- if it turns out that Judge McMahon
21 actually rules by December 7 and we're able to get a
22 sentencing hearing by December 20th, we will move their
23 effective date by 17 or 18 days at the very least. And
24 again, from our perspective, every day matters.
25 THE COURT: Well, except -- let me address that

1 because, again, I fully accept that there is almost
2 immeasurable harm in not getting the plan distributions to
3 PI claimants and to the state and governmental entities for
4 the purpose of abatement, and the other entities, the Indian
5 tribes and the hospitals and the like.
6 But based on my understanding of the plan and Mr.
7 DelConte's testimony, the money wouldn't actually go to them
8 until sometime after the effective date and probably weeks
9 after the effective date.
10 So I think that the real issue where the balancing
11 of the harms comes into play or the real time comes into
12 play is where the movants would seek a stay after the
13 District Court's ruling, pending appeal to the Second
14 Circuit.
15 MR. PREIS: I don't dispute your reading of Mr.
16 DelConte's declaration. But isn't what all you've done is
17 just move the same period back (sound glitch).
18 THE COURT: I did. I moved it a week from the end
19 of the year to January 7th, and that's basically because --
20 or arguably two weeks from December 21 to January 7, and
21 that's basically because I have some concerns about imposing
22 a hearing date on Judge McMahon around New Year's Eve or
23 around the Christmas holiday, so that's the only reason.
24 And it didn't seem to me, given the testimony,
25 that the delivery of the distributions beyond the trusts

1 And I believe that the scheduling issue can be dealt with by
2 saying the earlier of the district court's ruling and
3 December 31 or such later date. I'm sorry, subject to the
4 district court's calendar. So if the district court is not
5 available at or around December 31 to hear a potential
6 renewed stay motion depending on the district court's ruling
7 and when that occurs, then it would be the later date for
8 the district court to hold the hearing.
9 Clearly, the parties here have already prepared
10 their stay motions. Indeed, the U.S. Trustee prepared four
11 of them, which are all in my pleading binder. And we have
12 had an extensive record for this hearing. I believe under
13 those circumstances it's not a burden for them if the
14 district court can schedule a stay hearing if they decide to
15 make a stay motion after the district court's ruling by the
16 outside date of December 31 if the district court had not
17 ruled by then.
18 Otherwise, the appellate process would be governed
19 by Rule 8025. And accordingly, I believe that a key element
20 on the conditions that I just stated for the movants
21 prevailing on the request for a stay pending appeal has not
22 been met.
23 I will also address, however, the last two prongs
24 that the movants would have to show, namely that there is no
25 substantial injury to other parties interested in the

1 proceeding and where the public's interest lies.

2 As far as there being no substantial harm to other

3 parties interested, the record here is clear and I believe,

4 frankly, uncontroverted that there is to the contrary

5 substantial harm to the Debtor's creditors, the vast

6 majority of whom have either not objected to the plan and/or

7 voted in favor of the plan affirmatively in each instance,

8 the vast majority that is.

9 After the Debtors are ready to have the effective

10 date of the plan occur, and it appears to me that that would

11 not be realistically before December 31, although perhaps a

12 week before they could be ready, after that date when they

13 are ready, every day that they do not implement the

14 effective date which starts the process of liquidating

15 personal injury claims and making distributions on them and

16 making the initial distributions for abatement purposes

17 seriously causes harm to the creditors. It is clear to me

18 that the personal injury creditors bargained for a rapid

19 payout, which is reflected not only in their bargaining for

20 a fixed, upfront sum of several hundred million dollars, but

21 also the procedures they've adopted for consistent with due

22 process and the burden of proof a streamlined option to

23 liquidate one's proof of claim.

24 Similarly, the roughly up to a billion dollars

25 minus the funds going to the personal injury creditors would

1 be going out shortly after the effective date through 2023
2 for abatement purposes, as well as the $225 million payment
3 to the United States, which although not specifically
4 earmarked for abatement purposes, United States has
5 represented the vast majority of which will go to hospitals
6 and other care facilities. This is amply testified to by
7 Mr. Guard as far as the payments are concerned at Paragraphs
8 9 through 13 of his declaration as well as at Paragraphs 7
9 through 9 and 12 through 21 and in the summary at Paragraph
10 25 of Mr. DelConte's declaration. That declaration also
11 address in Paragraph 22 and 23 the funding of Newco and
12 setting it up as a public benefit company to focus on
13 developing products at a reasonable price to combat the
14 opioid crisis.
15 As Mr. Guard eloquently summarized, many states
16 have been litigating these issues since, well -- I'll quote
17 him, because it's actually quite telling -- for as long as
18 five years before the commencement of the bankruptcy case in
19 addition to the two years of this bankruptcy case. I
20 believe that that length of time was necessary to satisfy
21 the due process Iridium and Metromedia factors as well as to
22 negotiate the intricate intercreditor deals in the plan.
23 The additional time of a stay pending appeal after the
24 district court's ruling is necessary only to have further
25 appeals. There is nothing else that would hold up the

1 payment of the money.

2 As Ms. Juaire and Ms. Trainor eloquently have

3 testified, that payment is, if made, to be put to use both

4 for the immediate needs of the individual victims and for

5 abatement purposes at a time when every dollar counts. And

6 as time passes, the problem only gets worse.

7 As testified to by Mr. Guard and Mr. Jorgenson,

8 opioid deaths have been increasing over the last two years

9 at a very disturbing level, roughly 30 percent nationally,

10 such that in the last year of March to March, roughly 200

11 opioid-related overdose deaths occur each day.

12 I agree with the states of Washington and

13 Connecticut that if the parties could all agree that those

14 initial distributions could be made and the parties who are

15 appealing would take the risk on equitable mootness with

16 regard to those distributions, that would be all to the

17 good. But the U.S. Trustee and the State of Maryland do not

18 seem to be prepared to agree to such a resolution to get

19 money out promptly.

20 So on the one hand, we have that clear, tangible

21 harm. On the other hand, post the date when the Debtors

22 would be ready to go effective, which, again, would be at

23 the end of this year, we have tangible harm as described in

24 the Juaire, Trainor, Guard and Jorgenson declarations,

25 contrasted with the legitimate but non-economic harm of

Hearing Date and Time: March 9, 2022 at 1:00 p.m. (prevailing Eastern Time)
Objection Date and Time: March 8, 2022 at 7:00 p.m. (prevailing Eastern Time)
Reply Date and Time: March 9, 2022 at 11:00 a.m. (prevailing Eastern Time)

DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 701-5800
Marshall S. Huebner
Benjamin S. Kaminetzky
Eli J. Vonnegut
Christopher S. Robertson

Counsel to the Debtors
and Debtors in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
PURDUE PHARMA L.P., ***et al.*****,**	**Case No. 19-23649 (RDD)**
Debtors.[1]	**(Jointly Administered)**

NOTICE OF HEARING REGARDING MOTION OF DEBTORS PURSUANT TO 11 U.S.C. § 105(a) AND 363(b) FOR ENTRY OF AN ORDER AUTHORIZING AND APPROVING SETTLEMENT TERM SHEET

PLEASE TAKE NOTICE that on March 3, 2022, the above-captioned debtors and debtors in possession in these proceedings (collectively, the "**Debtors**") filed the *Motion of*

[1] The Debtors in these cases, along with the last four digits of each Debtor's registration number in the applicable jurisdiction, are as follows: Purdue Pharma L.P. (7484), Purdue Pharma Inc. (7486), Purdue Transdermal Technologies L.P. (1868), Purdue Pharma Manufacturing L.P. (3821), Purdue Pharmaceuticals L.P. (0034), Imbrium Therapeutics L.P. (8810), Adlon Therapeutics L.P. (6745), Greenfield BioVentures L.P. (6150), Seven Seas Hill Corp. (4591), Ophir Green Corp. (4594), Purdue Pharma of Puerto Rico (3925), Avrio Health L.P. (4140), Purdue Pharmaceutical Products L.P. (3902), Purdue Neuroscience Company (4712), Nayatt Cove Lifescience Inc. (7805), Button Land L.P. (7502), Rhodes Associates L.P. (N/A), Paul Land Inc. (7425), Quidnick Land L.P. (7584), Rhodes Pharmaceuticals L.P. (6166), Rhodes Technologies (7143), UDF LP (0495), SVC Pharma LP (5717) and SVC Pharma Inc. (4014). The Debtors' corporate headquarters is located at One Stamford Forum, 201 Tresser Boulevard, Stamford, CT 06901.

<u>Exhibit B</u>

Term Sheet

SETTLEMENT PROPOSAL[1]

Incremental Economic Consideration and Accommodations	1) On the terms and schedule set forth on **Attachment A** hereto, $1 billion in incremental cash shall be paid by the Sackler family members or trusts as follows: a) $112,236,111.11 is allocated to California, of which amount California elects that $21,222,222.22 shall be paid to the SOAF (defined below) and allocated to California, with the remainder to be paid to the Master Disbursement Trust as additional consideration under the Shareholder Settlement Agreement. b) $785,652,777.78 is allocated collectively to Connecticut, Delaware, Maryland, Oregon, Rhode Island, Vermont, and the District of Columbia, of which amount $148,555,555.54 will be paid to the SOAF ($21,222,222.22 allocated to each of Connecticut, Delaware, Maryland, Oregon, Rhode Island, Vermont, and the District of Columbia) with the remainder to be paid to the Master Disbursement Trust as additional consideration under the Shareholder Settlement Agreement. c) $93,111,111.11 is allocated to Washington, which elects to retain control of such full amount through the SOAF. d) $14,000,000 is allocated and will be paid to New Hampshire (which is not a party hereto but has confirmed its support for this agreement) from the SOAF. e) Cumulatively, (i) $723,111,111.13 in incremental cash consideration shall be paid to the Master Disbursement Trust as additional consideration under the Shareholder Settlement Agreement and (ii) $276,888,888.87 shall be paid by the Sackler family members or trusts directly to a fund established, structured, and administered by the Nine[2] (the "Supplemental Opioid Abatement Fund" or "SOAF") on the terms and schedule set forth on Attachment A hereto and otherwise on the same payment terms as under the Shareholder Settlement Agreement. Of the first $200,000,000 paid to the SOAF, 95.5% will be allocated equally among the Nine, and 4.5% will be allocated to New Hampshire. Funds in the SOAF shall be devoted exclusively to opioid-related abatement, including support and services for survivors, victims and their families and each member of the Nine shall have the right to direct allocation of the SOAF funds for such purposes in the amounts and as set forth on **Attachment D** hereto. 2) The Nine acknowledge and confirm that the Sackler family members and trusts had no role in determining the allocation of settlement consideration between the SOAF and the Master Disbursement Trust or the allocation of the SOAF funds among the Nine or to any other State as set forth in this Term Sheet. 3) In addition, (i) $175 million in incremental cash shall be paid by the Sackler family members or trusts under the Shareholder Settlement Agreement to the Master Disbursement Trust on the Effective Date in lieu of any obligations relating to the Foundations, including appointment of the Continuing Foundation Members as members of the Foundations and (ii) as further incremental cash consideration under the Shareholder Settlement Agreement, the Sackler family members or trusts shall pay to the Master Disbursement Trust, up to a maximum of $500 million, 90% of the amount by which aggregate Net Proceeds (without giving effect to the deduction of Unapplied Advanced Contributions) with respect to all IAC Payment Parties exceeds $4.3 billion. 4) All amounts paid to the Master Disbursement Trust will be further distributed in accordance with the terms of the Plan. 5) The Direct Settlement Agreement (hereinafter defined) shall benefit from, and be *pari passu* with, the same collateral applicable to the existing Shareholder Settlement Agreement. In the event that any of the payments under the Direct Settlement Agreement set forth on

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the *Twelfth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors* [ECF No. 3726] (the "Plan") or the Shareholder Settlement Agreement attached as Exhibit AA to the *Notice of Filing of Seventeenth Plan Supplement Pursuant to the Eleventh Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors* [ECF No. 3711].

[2] The "Nine" means the eight states and the District of Columbia that appealed the Bankruptcy Court's order confirming the Plan.

<table>
<tr><td></td><td>
<u>Attachment A</u> hereto are not made when due, SOAF will have the same enforcement rights on account of such payments as would be available to the Master Disbursement Trust on account of missed payments under the existing Shareholder Settlement Agreement.
6) There shall not be additional covenants or changes to the credit support arrangements related to the existing Shareholder Settlement Agreement as a result of the additional payments described above.
7) The Sacklers shall procure all necessary corporate and judicial approvals to authorize the applicable Sackler payment parties to enter into the Direct Settlement Agreement and the modified Shareholder Settlement Agreement and all ancillary arrangements and shall execute and deliver these Agreements to the other Term Sheet Parties as soon as is reasonably practicable or as otherwise expressly provided herein.
8) This Term Sheet summarizes the principal terms of the settlement among the parties.
9) Notwithstanding anything herein to the contrary, no legally binding obligations will be created unless and until (i) the Direct Settlement Agreement shall be in agreed execution form and the Nine and the Sackler family shall be satisfied with the proposed procedures, mechanics and remedies for any signature pages not theretofor delivered, and (ii) court authorization (as set forth below) has been obtained, in each case on or before March 10, 2022. This term sheet and any documents implementing the agreements set forth in this term sheet shall be governed in all respects by the laws of New York, provided that matters internal to each member of the Nine shall be governed by the laws of such member's jurisdiction.
10) Upon and after acceptance of this Settlement Proposal by all of the Term Sheet Parties, the Term Sheet Parties shall immediately commence and pursue the negotiation of the definitive agreements documenting and implementing the Direct Settlement Agreement (the "Definitive Documents") in good faith.
11) As part of this settlement, and subject to it becoming effective and not terminated, the Nine will agree they will not seek incremental settlement consideration from the Sackler family members or trusts in excess of the foregoing amounts or to directly or indirectly support any party in seeking any such incremental consideration.
</td></tr>
<tr><td>Naming Rights</td><td>
1) The Sackler family (including Sackler family foundations) will agree upon occurrence of the Effective Date of the Plan to allow any institution or organization in the United States to remove the Sackler name from (i) physical facilities and (ii) academic, medical, and cultural programs, scholarships, endowments, and the like, provided that:
a) The institution provides the Sackler family with 45 days' confidential notice of its intention to remove the Sackler name;
b) The removal of the Sackler name would be disclosed or announced by any such institution (if the institution in its discretion determines such an announcement is necessary) in a statement that indicates that the removal of the Sackler name is pursuant to an agreement reached in the Mediation in the Purdue bankruptcy case; and
c) Any statements issued by the institution in connection with or substantially concurrent with such renaming will not disparage the Sacklers, provided that such prohibition shall not restrict any academic or similar work at such institution or organization.
d) These name removal rights are in addition to, and do not limit, any rights that the institution or organization otherwise has.
</td></tr>
<tr><td>Additional Terms</td><td>
1) The Debtors have agreed to supplement the Public Document Repository as described on <u>Attachment B</u> hereto.
2) The Debtors shall promptly file a motion seeking the entry of the Approval Order (as defined below). Among other things, the Approval Order shall authorize the payment of the reasonable and documented attorneys' fees of each of the Nine in the Purdue bankruptcy case (including any adversary proceedings, and any appeals thereunder), accrued to the date of the entry of the Approval Order and thereafter in furtherance of the agreements set forth herein, in each case subject to compliance with procedures applicable to the fees and expenses of the Ad Hoc Committee.
</td></tr>
</table>

<table>
<tr><td></td><td></td></tr>
<tr><td>Statement</td><td>1) Nothing in this Settlement Proposal shall restrict the ability of the Nine to cite any unsealed or public trial testimony or public statements, including any expressions of regret, by members of the Sackler families.
2) No later than two days after the filing with the Bankruptcy Court of a Mediator's Report that indicates the acceptance by the Nine of the terms of this Settlement Proposal, a statement in the form of <u>Attachment C</u> hereto will be issued by a spokesperson for the Sackler families. It is expressly understood that such statement is not an admission of any wrongdoing or liability and that the Sackler families reaffirm that they have always acted lawfully.</td></tr>
<tr><td>Acceptance/ Effectiveness</td><td>1) By the deadline communicated by the Mediator, each of the Nine, Sackler Side A and Sackler Side B (collectively, the "Term Sheet Parties") and the Debtors shall write independently and directly only to the Mediator by email, c/o Jamie Eisen at Jamie_Eisen@nysb.uscourts.gov, indicating whether it accepts the Settlement Proposal.[3]
2) The effectiveness of the agreement is subject to the condition precedent of the entry of an order by the Bankruptcy Court (the "Approval Order") that provides necessary approvals of this settlement, and all documents contemplated hereunder, including a finding that the Direct Settlement Agreement does not contravene any provision of the Bankruptcy Code.
3) "Acceptance" by a member of the Nine, or by the Sacklers, as the case may be, shall constitute an agreement by such Term Sheet Party to promptly engage in good faith negotiations of the Definitive Documents.
4) Each of the Term Sheet Parties agrees to support the entry of the Approval Order and to defend it against any appeal therefrom.
5) The Debtors agree to seek the entry of the Approval Order, to support the settlement and related transactions contemplated hereunder, to participate in the negotiation of the Definitive Documents, and to seek the support of the other parties appealing the District Court's decision for the settlement and related transactions contemplated hereunder and to defend the Approval Order against any appeal therefrom.
6) Upon the effectiveness of this settlement and subject to the settlement not having been terminated, each Member of the Nine agrees: (i) that all issues raised in the Nine's appeals of the Bankruptcy Court's order confirming the Plan have been resolved by this settlement and that each of them consents to and grants the releases to be provided under the terms of the Plan upon the effectiveness thereof; (ii) that after the filing of a joint notice by the Nine and the Debtors advising the Court of Appeals for the Second Circuit that the Nine's non-opposition to the Appeal is contingent upon the terms of this settlement and subject to potential termination if the Approval Order is reversed by a final non-appealable order of a court of competent jurisdiction and that the parties will not argue in such circumstance that by failing to file briefs or present arguments that the Nine no longer have standing as appellees, it will not file any brief with or present any argument to the Second Circuit panel hearing the appeal of the District Court's Decision and Order issued on December 16, 2021 currently being prosecuted by the Debtors and the other supporters of the Plan (the "Appeal") or in any en banc proceeding or panel rehearing that may subsequently take place in the Second Circuit in the Appeal; (iii) that if the Appeal is decided in the Debtors' favor, it will not (a) file a party or amicus curiae brief at the petition stage in the Supreme Court of the United States, asking that court to grant certiorari with respect to the Appeal or (b) file a party brief at the merits stage in the Supreme Court should the Supreme Court grant certiorari with respect to the Appeal; (iv) that it will not object to the continuation of the Preliminary Injunction through a</td></tr>
</table>

[3] Each party's acceptance of the Settlement Proposal shall be conditioned on (i) acceptance of the Settlement Proposal by all members of the Nine, Sackler Side A and Sackler Side B, (ii) the allocation of the funds in the SOAF set forth in Attachment D and (iii) that none of the Nine shall have received from the Sackler family or trusts or the Debtors actual or promised consideration not provided for hereunder or under the Plan.

	ruling by the Court of Appeals for the Second Circuit on the Appeal and (v) to execute any other documentation and make any court filings reasonably necessary to implement any of the foregoing agreements. 7) The Nine shall be permitted to file a motion with the Court of Appeals for the Second Circuit to excuse the filing of appellate briefs by the current deadline of March 11, 2022 or thereafter and/or a statement (separate from the joint notice provided for herein) as has been agreed by the parties consistent with this Term Sheet explaining that the Nine are foregoing the filing of appellate briefs in connection with this settlement, which motion and/or statement shall not seek, suggest, or otherwise support any modification of the current Appeal schedule. 8) Subject to the Approval Order becoming final and non-appealable, each Member of the Nine will, upon the conclusion of the Appeal resulting in reversal or vacatur of the District Court's Decision and Order on Appeal issued on December 16, 2021, promptly file a notice and/or motion withdrawing and requesting dismissal of its appeal to the District Court of the Bankruptcy Court's order confirming the Plan. 9) If certiorari has been granted by the United States Supreme Court, members of the Nine may file amicus curiae briefs at the merits stage in the Supreme Court with respect to the Appeal, provided that such brief shall note that said member of the Nine withdrew its objections to the Plan in connection with this settlement and is not subject to a non-consensual release under the Plan. 10) For the avoidance of doubt, the agreement will not include the requirement to file any other pleadings or present argument in support or in favor of the Plan, and nothing in this agreement limits the ability of the Nine to write, to speak, or to participate fully in any judicial or other proceeding unrelated to Purdue or the Sacklers other than as expressly prohibited by this settlement. 11) If any payments or consideration or amounts allocated to any of the Nine under this Settlement Proposal cannot be effectuated because the Approval Order is reversed by a final order of a court of competent jurisdiction, the Sackler family members or trusts shall instead pay such consideration pursuant to one or more alternative mechanisms acceptable to each of the Nine in their sole discretion, that are permitted by or not inconsistent with such final order and also consistent with any subsequent governing court orders (which mechanism may include, without limitation, consent or stipulated judgments satisfactory to the Sackler family members or trusts and in favor of the Nine to be filed in the courts of their respective jurisdictions, with the form of such judgments to be attached to the Definitive Documents on or before the Effective Date of the Plan), provided that all such funds shall continue to be used for opioid-related abatement, including support and services for survivors, victims and their families, and provided further that such alternative mechanisms shall not be adverse to the Sackler family members or trusts as compared to the mechanisms set forth herein (it being agreed and understood that modest additional administrative or similar burdens, including the provision of consent or stipulated judgments satisfactory to the Sackler Family members or trusts as referenced above or a redirection of payments consistent with the allocation set forth herein, shall not be considered adverse). Each member of the Nine shall have the right to terminate the Agreement on and after a period of seven business days (or a shorter period if the full seven-day period would be unduly prejudicial) if the Nine after good faith consultation with one another do not identify and agree upon any such alternative mechanisms. 12) Each of the Nine and New Hampshire will voluntarily consent to grant the releases to be provided by it under the terms of the Plan as currently formulated in Section 10.7 thereof upon the effectiveness of the Plan as modified by this settlement and will therefore be voluntarily bound thereby. Each of the Nine and New Hampshire fully reserves its right to object to and litigate non-consensual third-party releases in all other bankruptcy cases. 13) Any Plan supporter that has agreed to support the transactions contemplated by this Term Sheet may note in its briefs in the Appeal that, subject to the conditions hereof, the Nine and New Hampshire do not object to, and will consensually be bound to, the releases contained in the Plan. However, any Plan supporter that notes in its briefs in the Appeal that the Nine and New Hampshire are not objecting to, or are being consensually bound to, the releases

	contained in the Plan must note that such consent is not an indication that the Nine or New Hampshire agree with the legality of the Plan or of the non-consensual third party releases included in the Plan. 14) The Debtors will advise the Court of Appeals for the Second Circuit that: (a) all states have agreed to be consensually bound by the third party releases in the Plan; (b) that the appeal therefore no longer presents the question of whether claims brought by states against third parties can be non-consensually released in bankruptcy, either generally or under the facts of this case; and (c) and that therefore the following portions of the identified briefs are withdrawn as moot: Section III.B. of the Debtors' page proof brief at pgs. 79-84 and Section III.B. of the Mortimer-side Initial Covered Sackler Persons page proof brief at pgs. 63-67.
Implementation	1) The Shareholder Settlement Agreement shall be amended to reflect the additional Master Disbursement Trust payments and non-economic terms herein, and a new settlement agreement (the "Direct Settlement Agreement") among the Term Sheet Parties shall be entered into to reflect the payments to the SOAF, together with customary intercreditor arrangements between the Master Disbursement Trust and SOAF that shall provide that SOAF is pari passu with the Master Disbursement Trust, in each case subject to receipt by the Mediator of acceptances by Sackler Side A, Sackler Side B, the Debtors, and all of the members of the Nine, with consummation of the Shareholder Settlement Agreement so modified and the Direct Settlement Agreement contingent upon entry of the Approval Order by the Bankruptcy Court[4] and consummation of the Plan. 2) Other than as provided in the provision beginning "If any payments" above, this agreement shall be void and have no effect on the rights of the parties if the settlement described herein or consummation of the Plan is barred by a final, non-appealable order of a court of competent jurisdiction, if a court of competent jurisdiction determines in a final, non-appealable order that any essential element of the settlement (including, without limitation, the Direct Settlement Agreement) or the Plan is invalid, or if the Plan otherwise becomes incapable of being consummated. 3) The parties acknowledge and agree that upon the Effective Date of the Plan all parties are bound by the terms thereof unless the confirmation order is subsequently vacated.

[4] Any order or definitive documents effectuating the terms of this Settlement Proposal shall provide that the actions taken by members of the Sackler family or trust or their related parties in accordance with the terms of this Settlement Proposal are taken in connection with the Chapter 11 Cases for purposes of Section 10.7 of the Plan.

Attachment A

Payment Date[5][6]	**Payment Amount to Master Disbursement Trust**	**Direct Payment Amount to SOAF**
Effective Date	$175 million	$25 million
Second Funding Deadline	$0.00	$25 million
Third Funding Deadline	$0.00	$25 million
Fourth Funding Deadline	$0.00	$25 million
Fifth Funding Deadline	$0.00	$0.00
Sixth Funding Deadline	$0.00	$0.00
Seventh Funding Deadline	$0.00	$0.00
Eighth Funding Deadline	$0.00	$0.00
Ninth Funding Deadline	$0.00	$0.00
Tenth Funding Deadline	$0.00	$0.00
6/30/2031	$80 million	$20 million
6/30/2032	$80 million	$20 million
6/30/2033	$80 million	$20 million
6/30/2034	$80 million	$20 million
6/30/2035	$80 million	$20 million
6/30/2036	$80,777,777.78	$19,222,222.22
6/30/2037	$80,777,777.78	$19,222,222.22
6/30/2038	$80,777,777.78	$19,222,222.22
6/30/2039	$80,777,777.78	$19,222,222.22

[5] The Funding Deadlines are set forth in Section 2.01(b)(i) of the Shareholder Settlement Agreement and are subject to adjustment pursuant to Section 2.01(b)(ii) thereof.

[6] The $175 million of incremental amounts paid in lieu of appointment of the Continuing Foundation Members as the sole members of the Foundations shall be funded $62.5 million by the Sackler family A-Side Payment Parties and $112.5 million by the Sackler family B-Side Payment Parties. The first $400 million chronologically of all other incremental amounts shall be funded 50% by the Sackler family A-Side Payment Parties and 50% by the Sackler family B-Side Payment Parties. Other incremental amounts above $575 million in the aggregate shall be funded exclusively by the Sackler family B-Side Payment Parties.

Attachment B

Agreed Amendments to the Debtors' Privilege Waiver Section of Plan

(1) Lobbying

Revised subsection (I) – Legal advice regarding advocacy before the United States Congress or a state legislative branch with respect to (i) any opioid product sold by Purdue, including OxyContin; and (ii) any public policies regarding the availability and accessibility of opioid products.

(2) Public Relations

New Subsection – Legal advice provided to Purdue's public relations department regarding the promotion, sales, or distribution of Purdue's opioid products, including but not limited to their safety, efficacy, addictive properties, or availability of opioid products.

(3) Compliance

Legal advice to the Compliance department regarding the organizational structure of the Compliance Department, including its processes for implementing order monitoring systems, suspicious order monitoring programs, and abuse deterrence and detection programs.

Subsection (ii)(B)

Documents created before February 2018 reflecting legal review and advice with respect to recommendations received from McKinsey & Company, Razorfish, and Publicis, related to the sale and marketing of opioids.

Attachment C

Sackler Family Statement

The Sackler families are pleased to have reached a settlement with additional states that will allow very substantial additional resources to reach people and communities in need. The families have consistently affirmed that settlement is by far the best way to help solve a serious and complex public health crisis. While the families have acted lawfully in all respects, they sincerely regret that OxyContin, a prescription medicine that continues to help people suffering from chronic pain, unexpectedly became part of an opioid crisis that has brought grief and loss to far too many families and communities.

Attachment D

Allocation of SOAF

Attachment D

Allocation of SOAF

Payment Date	Direct Payment Amount to SOAF	CA	CT	DE	MD	OR	RI	VT	WA	DC	NH	Total
Effective Date	$25,000,000.00	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$ 1,125,000.00	$25,000,000
Second Funding Deadline	$25,000,000.00	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$ 1,125,000.00	$25,000,000
Third Funding Deadline	$25,000,000.00	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$ 1,125,000.00	$25,000,000
Fourth Funding Deadline	$25,000,000.00	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$2,652,777.78	$ 1,125,000.00	$25,000,000
Fifth Funding Deadline	$0.00											
Sixth Funding Deadline	$0.00											
Seventh Funding Deadline	$0.00											
Eighth Funding Deadline	$0.00											
Ninth Funding Deadline	$0.00											
Tenth Funding Deadline	$0.00											
6/30/2031	$20,000,000.00	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$ 900,000.00	$20,000,000
6/30/2032	$20,000,000.00	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$ 900,000.00	$20,000,000
6/30/2033	$20,000,000.00	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$ 900,000.00	$20,000,000
6/30/2034	$20,000,000.00	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$ 900,000.00	$20,000,000
6/30/2035	$20,000,000.00	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$2,122,222.22	$ 900,000.00	$20,000,000
6/30/2036	$19,222,222.22								$17,972,222.22		$ 1,250,000.00	$19,222,222
6/30/2037	$19,222,222.22								$17,972,222.22		$ 1,250,000.00	$19,222,222
6/30/2038	$19,222,222.22								$17,972,222.22		$ 1,250,000.00	$19,222,222
6/30/2039	$19,222,222.22								$17,972,222.22		$ 1,250,000.00	$19,222,222
Total		$21,222,222.22	$21,222,222.22	$21,222,222.22	$21,222,222.22	$21,222,222.22	$21,222,222.22	$21,222,222.22	$93,111,111.10	$21,222,222.22	$14,000,000.00	$276,888,889

22-110-bk(L), 22-113-bk(CON) 22-115-bk(CON), 22-116-bk(CON), 22-117-bk(CON), 22-119-bk(CON), 22-121-bk(CON), 22-299-bk(CON), 22-203-bk(XAP)

United States Court of Appeals

for the

Second Circuit

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

(For Continuation of Caption See Inside Cover)

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

DECLARATION OF JESSE DELCONTE

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

Debtors.

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

Debtors-Appellants-Cross-Appellees,

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

Appellants-Cross-Appellees,

– v. –

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

Appellees-Cross-Appellants,

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

Appellees.

I, Jesse DelConte, pursuant to 28 U.S.C. § 1746, hereby declare as follows under penalty of perjury:

1. I am a Partner and Managing Director of AlixPartners, LLP ("**AlixPartners**"), a corporate advisory and restructuring firm that has its principal office at 909 Third Avenue, Floor 30, New York, New York 10022 and which serves as one of the principal advisors to Purdue Pharma L.P. ("**PPLP**") and certain of its affiliates, as debtors and debtors in possession in the above-captioned cases (collectively, "**Purdue**" or the "**Debtors**"). I specialize in providing leadership to troubled and underperforming companies and advising senior executives, boards of directors, and creditors. I have over 15 years of experience working with distressed companies across numerous industries, including pharmaceuticals, retail/apparel, technology, energy, automotive, industrial and business services, and industrial manufacturing.

2. In the four plus years that my team and I have been working with the Debtors, we have assisted management and the Debtors' other restructuring advisors on a number of different workstreams. In the course of my work, I have frequent conversations with the Debtors' employees, senior management, including Purdue Pharma's chief executive officer, chief financial officer and general counsel, board members and executive committee members. I attend regular meetings with key executives regarding the Debtors' bankruptcy process

and ongoing operations and regularly join board and committee meetings. In addition, I was involved in, and assisted management and the Debtors' other restructuring advisors in connection with, the formulation of the Debtors' plan of reorganization. As a result, I am familiar with, among other things, the Debtors' operations, budgeting processes, and plan of reorganization

3. I submit this Declaration in support of the Debtors' Opposition to the United States Trustee's Motion to Stay Mandate Pending Disposition of Petition for a Writ of Certiorari. My testimony is based on my personal knowledge of the facts set forth below.

4. My testimony proceeds in four sections. Section I describes the abatement and personal injury trusts established under Purdue's plan of reorganization ("**Plan**"), the timing and amount of payments that the Debtors' existing shareholders are obligated to make to the estates under the Shareholder Settlement Agreement (defined below) and the Incremental Shareholder Settlement Agreement (defined below); and the amount and timing of distributions of that value to creditors contemplated under the Plan. Section II identifies the distributions to creditors that might be delayed if the issuance of mandate is stayed. Section III identifies the increased professional fees that would likely be incurred if the issuance of mandate is stayed. Section IV describes operational risks that the

Debtors' businesses (which inure to the benefit of creditors under the Plan) would likely face if the issuance of mandate is stayed.

I. The Abatement and Personal Injury Trusts, the Shareholder Settlement Payments, and Distributions to Creditors Under the Plan

5. The Plan will deploy Purdue's assets to help address and abate the opioid crisis and compensate victims. The majority of value of the estates will be dedicated to trusts that, collectively, will fund abatement efforts and distribute funds to personal injury claimants. All of the Debtors' business assets will also be transferred on the Effective Date to a new entity ("**NewCo**") charged with the express purpose of addressing the opioid crisis and funding the trusts going forward. Cash in the Debtors' estates that is not required for other purposes pursuant to the Plan will be transferred to abatement and personal injury trusts; and NewCo will continue its work on medicines for opioid overdose reversal and medically assisted treatment. The value distributed to creditors will also include approximately $5.5 to $6 billion that will be paid over time by members of the Mortimer Sackler family and Raymond Sackler family (together, the "**Sackler Families**") and trusts for the benefit of the Sackler Families. This value, in turn, will be transferred to the abatement and personal injury trusts, in some cases as early as the Effective Date, for distribution to creditors.

A. The Plan Establishes Creditor Trusts to Administer Abatement and Distribution

6. The Plan establishes trusts to administer the distribution of value to fund opioid abatement efforts and compensate personal injury claimants. These trusts include (1) the National Opioid Abatement Trust ("**NOAT**"); (2) the Tribe Trust (together with NOAT, "**Public Creditor Trusts**"); (3) the TPP Trust; (4) the Hospital Trust; (5) the NAS Monitoring Trust; (6) the PI Trust; and (7) the PI Futures Trust (collectively, the "**Creditor Trusts**"). NOAT, the Tribe Trust, the Hospital Trust, the TPP Trust, and the NAS Monitoring Trust are abatement trusts and may only make distributions for specified opioid abatement purposes (or to pay attorneys' fees and costs) (such trusts, "**Abatement Trusts**"). (*See* Plan § 5.7(d).) The PI Trust and PI Futures Trust will make distributions to qualifying personal injury claimants. (*See* Plan § 5.7(e).)

7. In addition to the Creditor Trusts, the Plan establishes the Master Disbursement Trust ("**MDT**"). The Master Disbursement Trust, among other things, will have the right to receive settlement payments under the terms of a settlement agreement ("**Shareholder Settlement Agreement**") among the Debtors, the Sackler Families and trusts for the benefit of the Sackler Families as set forth below in Section I.B. (Plan § 5.6(c).) MDT also will make distributions to the Creditor Trusts as set forth below in Section I.C. (*See* Plan § 5.2).

8. Finally, under the terms of a subsequent settlement reached between eight states[1] and the District of Columbia (together, the "**Nine**") and the Sackler Families ("**Incremental Shareholder Settlement Agreement**"),[2] the Nine will establish, structure, and administer a supplemental opioid abatement fund ("**SOAF**"). Funds in SOAF will also be devoted exclusively to opioid-related abatement, including support and services for victims and their families.[3]

B. The Shareholders Will Contribute $5.5 to $6 Billion in Cash Over Time

9. As noted above, the value to be distributed to creditors will include $5.5 billion to $6 billion that will be paid over time by the Sackler Families. This includes $4.325 billion to be paid directly to the MDT pursuant to the Shareholder Settlement Agreement ("**Original Shareholder Settlement Payments**"), and an additional $1.175 to 1.675 billion to be paid to the MDT and SOAF pursuant to the Incremental Shareholder Settlement Agreement ("**Incremental Shareholder Settlement Payments**," and collectively with the Original Shareholder Settlement

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[1] California, Connecticut, Delaware, Maryland, Oregon, Rhode Island, Vermont, and Washington.

[2] This settlement, reached during the pendency of the appeal, is memorialized in a term sheet filed with the Bankruptcy Court on March 3, 2022 ("**Settlement Term Sheet**"). The Bankruptcy Court approved the Settlement Term Sheet on March 10, 2022.

[3] Payments to SOAF are not made under the Plan, but payments to SOAF are contingent upon the effectiveness of the Plan.

Payments, the "**Shareholder Settlement Payments**"). The Incremental Shareholder Settlement Payments include: (i) $898.1 million in cash payments to be made directly to the MDT; (ii) $500 million in cash payments to the MDT contingent on the net proceeds of sales of foreign independent associated companies owned by the Sackler Families exceeding a certain level; and (iii) $276.9 million in payments to be made directly to SOAF ("**SOAF Settlement Payments**").

10. The amount and timing of the Shareholder Settlement Payments will proceed according to a schedule as set forth in the Shareholder Settlement Agreement and Incremental Shareholder Settlement Agreement. The first settlement payment—totaling at least $475 million—is due to be paid on the Effective Date of the Plan ("**First Shareholder Settlement Payment**"). The second settlement payment to the MDT—totaling at least $375 million—was due to be paid on June 30, 2022 ("**Second Shareholder Settlement Payment**"). Because the Effective Date has been delayed, however, the Shareholder Settlement Agreement provides that the Second Shareholder Settlement Payment will be due four months from the Effective Date. The third settlement payment to the MDT—totaling at least $375 million—was due to be paid on June 30, 2023 ("**Third Shareholder Settlement Payment**"). Again, because the Effective Date has been delayed, under the Shareholder Settlement Agreement, the Third Shareholder

Settlement Payment will now be due five months after the Second Shareholder Settlement Payment. Moreover, assuming an effective date of December 31, 2023, the fourth shareholder settlement payment to the MDT—totaling at least $375 million ("**Fourth Shareholder Settlement Payment**")—and the fifth shareholder settlement payment to the MDT—totaling at least $375 million ("**Fifth Shareholder Settlement Payment**") will also be delayed.[4] In this scenario, the Fourth Shareholder Settlement Payment will be due on February 28, 2025 and the Fifth Shareholder Settlement Payment will be due on July 31, 2025. The remaining Original Shareholder Settlement Payments are due to be paid over the next five (or six) years according to a schedule set forth in the Shareholder Settlement Agreement.

11. The amount and timing of the SOAF Settlement Payments will proceed according to a set schedule as set forth in Attachment A to the Settlement Term Sheet. The first four SOAF Settlement Payments—$25 million each, totaling $100 million—are each due to be paid to SOAF on the same day as the First, Second, Third and Fourth Shareholder Settlement Payments. The remaining

[4] Under the terms of the Shareholder Settlement Agreement, if the Supreme Court grants a writ of certiorari before the date that the Third Settlement Payment becomes due, the Third Settlement Payment and all subsequent payments will be paid into an escrow account, and not to MDT, pending the final resolution of any appeals of the Confirmation Order. (Shareholder Settlement Agmt. at § 2.08(a).)

SOAF Settlement Payments are due to be paid yearly over a nine year period starting on June 30, 2031.

C. The Creditor Trusts Will Make Distributions for Abatement Purposes and Distributions to Personal Injury Claimants

12. Distributions to claimants will be made not by MDT, but by the Creditor Trusts discussed above. Each of the Creditor Trusts is charged with holding, managing, and investing funds received from, among others, the Debtors and the MDT, maintaining funds to pay its expenses, and administering, processing, resolving, and liquidating claims that the Plan and Confirmation Order will channel to such Creditor Trust. The five private creditor Trusts ("**Private Creditor Trusts**") are the Hospital Trust, the TPP Trust, the NAS Monitoring Trust, the PI Trust, and the PI Futures Trust, while the two Public Creditor Trusts are NOAT and the Tribe Trust. (*See* Plan § 5.7.) Each Creditor Trust has its own trust distribution procedures.[5]

- The purpose of the Hospital Trust is to make distributions to be used solely for opioid abatement purposes on account of certain claims filed by hospitals and other providers of health treatment or other social services. The Plan contemplates that the Hospital Trust will receive a total of $250 million in distributions over time, with an initial payment of approximately $25 million on the Effective Date

[5] The schedule of payments under each Private Creditor Trust is subject to changes given the parties' ongoing negotiation. In the event that the Effective Date is delayed after the specified dates for payments to Private Creditor Trusts under the schedule, such payments may be due to be paid on the Effective Date.

and five subsequent payments in the amounts specified under § 5.2(d)(i)(A) of the Plan.

- The purpose of the TPP Trust is to make distributions to be used solely for opioid abatement purposes on account of certain claims filed by TPPs. The Plan contemplates that the TPP Trust will receive a total of $365 million in distributions over time, with an initial payment of approximately $5 million on the Effective Date and three subsequent payments in the amounts specified under § 5.2(d)(i)(B) of the Plan.

- The NAS Monitoring Trust will be established to address claims that (i) are filed on account of an NAS Child, (ii) are related to medical monitoring support, educational support, vocational support, familial support or similar related relief, and (iii) are not for an alleged personal injury suffered by an NAS Child. (*See* Plan §§ 1.1, 4.9(a).) The Plan contemplates that the NAS Monitoring Trust will receive a total of $60 million in distributions over time, with an initial payment of approximately $1 million on the Effective Date and two subsequent payments in the following amounts specified under § 5.2(d)(i)(C) of the Plan.

- The purpose of the PI Trust is to make distributions directly to qualified personal injury claimants, on account of (i) alleged opioid-related personal injury or similar claims and (ii) alleged opioid-related personal injury to an NAS Child or similar opioid-related claim asserted by or on behalf of an NAS Child. The Plan contemplates that the PI Trust will receive a total of between $700 to $750 million in distributions over time, with an initial payment of at least $296 million on the Effective Date and three subsequent payments as specified under § 5.2(d)(i)(D) of the Plan.

- The PI Futures Trust will be established to address claims filed on account of an alleged opioid-related personal injury or a similar opioid-related claim that arises from or relates to the use of an opioid that is manufactured by or placed in the stream of commerce by NewCo or any successor owner of NewCo's opioid business. The Plan contemplates that the PI Futures Trust will receive $5 million in distributions on the Effective Date, with subsequent payments specified under §§ 5.2(d), 5.7(f) of the Plan.

13. NewCo's residual cash, after making the distributions to the Private Creditor Trusts described above and accounting for payments owed to the DOJ under the resolution approved by the Court on November 18, 2020 between PPLP and the DOJ ("**DOJ Resolution**") and for NewCo's operating cash requirements, will be transferred to the Public Creditor Trusts.

14. The total distribution of value from the Debtors' estates to the Public Creditor Trusts, including cash currently on the Debtors' balance sheet, residual cash from NewCo, and payments under the Shareholder Settlement Agreement, is estimated to exceed $4.5 billion over time.

D. Under the Plan, Purdue's Businesses Will be Operated by New Entities for the Public Benefit

15. Under the Plan, PPLP, PPLP's general partner Purdue Pharma Inc. ("**PPI**"), and several of PPLP's subsidiaries will cease to exist. The Debtors' businesses will be transferred to and operated by a new entity, **NewCo**. NewCo will be wholly owned by a new entity, **TopCo**. TopCo, in turn, will be owned by the NOAT and the Tribe Trust. As I set forth in my declaration submitted in support of confirmation of the Plan, the Plan establishes a comprehensive system of safeguards designed to ensure that NewCo will operate the Debtors' businesses for the public benefit. These include, among other things, an operating agreement that requires NewCo to operate in a responsible and sustainable manner (*see* NewCo Operating Agreement § 2.3(a)) and covenants set forth in the Confirmation

Order designed to ensure that, among other things, NewCo pursues and implements certain public health initiatives to develop and distribute medicines to treat opioid addiction and reverse opioid overdoses ("**Public Health Initiatives**").[6]

16. On the Effective Date, NewCo will receive substantially all of PPLP's non-cash assets and $200 million of unrestricted cash and cash equivalents. In broad overview, the proceeds of NewCo's business will be used to fund the Public Health Initiatives and to make distributions to TopCo, which will, in turn, make distributions to NOAT and the Tribes Trust. (Plan §§ 1.1, 5.2(d)(iii); NewCo Operating Agreement §§ 6.2, 6.5.)

II. A Stay Would Delay Distributions to Creditors Under the Plan

17. A delay in issuing the mandate will have the effect of delaying the Effective Date. The total amount of funds that may be delayed will depend on the length of delay in issuing the mandate ("**Stay Period**").

18. In total, it is estimated that approximately $1.339 billion would be paid to creditors on the Effective Date, with an additional $25 million to be

[6] The Debtors' Public Health Initiatives include three separate products (1) Buprenorphine / Naloxone Sublingual tablets, which are FDA approved and are used for addiction treatment; (2) over-the-counter intranasal Naloxone, which is awaiting FDA approval; and (3) Nalmafene, an opioid overdose rescue medication that is even more potent than naloxone, that is FDA approved as a vial, and that is still in development as a pre-filled syringe and autoinjector.

transferred to SOAF, assuming an Effective Date of December 31, 2023.[7] This includes an estimated $754 million[8] that would be transferred from the Debtors' estates to the Abatement Trusts (including in particular an estimated $673 million that would be distributed specifically to NOAT)[9] for the purpose of funding programs and efforts to abate the opioid crisis. This also includes $296 million that would be transferred to the PI Trust for distribution to individual personal injury claimants.[10] In addition, $250 million (consisting of the $225 million DOJ Forfeiture Payment and a $25 million payment on account of the Federal Government Unsecured Claims) will be transferred to the United States on or

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[7] For the purposes of this estimation and others contained in this Declaration, I have relied on the financial projections contained in the most recent business plan forecasts provided by Purdue's management.

[8] This amount is subject to payments of professional fees as set forth in section 5.8 of the Plan.

[9] The final amount of the initial NOAT distribution on the Effective Date is subject to adjustment for, among other things, year-to-date budget to actual adjustments for both operating and non-operating results, items outside of the Debtors' control, including but not limited to, higher than forecasted restructuring-related professional fees and potential cash collateral necessary to secure insurance coverage for NewCo and TopCo, and other adjustments.

[10] The $296 million excludes approximately $4 million that was advanced in 2021 pursuant to the Bankruptcy Court's order entered on September 15, 2021. This figure also excludes $5 million which would be transferred to the PI Futures Trust on the Effective Date. This transfer, however, is included in the total estimated Effective Date distributions to Creditor Trusts described above.

around the Effective Date.[11] Generally speaking, the longer any Stay Period lasts, the greater the amount of funds delayed that would have been transferred to the Creditor Trusts. The consequence is that creditors will be delayed in utilizing the funds for abatement purposes as provided by the Plan and in receiving compensation for personal injuries. This harm is further compounded when the future value of these payments is adjusted to present value to account for the time value of money.

19. In October 2021, I provided testimony in support of the Debtors' opposition to the U.S. Trustee's motion for a stay pending appeal of the Confirmation Order ("**2021 Declaration**") in which I illustrated the harm caused by delaying the distribution of abatement and compensation funds. In that declaration, my team and I calculated the total amount of distributions to the United States and to the Creditor Trusts that would have otherwise been made during six illustrative stay periods (of 3, 6, 9, 12, 18, and 24 months, respectively) assuming an Effective Date of December 31, 2021. My team and I then calculated the present value loss of these payments due to delay caused by the various stay periods using a discount rate of 9%. For a 24-month stay scenario, the results of

[11] Under the terms of the DOJ Resolution and the Plan, the DOJ Forfeiture Payment must be made within three business days following the entry of a judgment of conviction pursuant to the Plea Agreement.

this calculation showed that there would be a net present value loss of distributions of $205.6 million.

20. Notably, my 2021 Declaration did not account for the additional settlement consideration that will now be provided by the Incremental Shareholder Settlement Payments. These additional payments have the effect of increasing the net present value loss of distributions associated with a delay of the Effective Date under my current calculations in this Declaration. Assuming that the Debtors would have been able to emerge on June 30, 2022 (approximately three months after the Incremental Shareholder Settlement was finalized), the net present value loss to distributions caused by a delay in emergence from December 31, 2021 to December 31, 2023 is approximately $400 million (including the impact of delay of SOAF distributions). This likely underestimates the net present value lost due to delay to date. Among other things, interest rates have increased significantly since October 2021, when I estimated the losses using a 9% discount rate.

21. As to the harm that will be created by delaying the distribution of funds further, my team and I again prepared six illustrative delay scenarios based on a hypothetical Stay Period of 3 months, 6 months, 9 months, 12 months, 18 months, and 24 months, respectively, with each Stay Period beginning on an assumed effective date of December 31, 2023. As a basis for this analysis, my team and I relied on financial projections contained in the most recent business

plan forecasts provided by Purdue's management. As with my 2021 Declaration, my team and I then calculated the total distributions to the United States and to the Creditor Trusts that would otherwise have been made during the various Stay Periods, which in each case exceeded $5 billion. My team and I then calculated the present value loss of these payments due to the delay caused by the various Stay Periods using a discount rate of 9%. Although, as noted above, interest rates have increased significantly since October 2021, my team and I have used the same 9% discount rate that we used in 2021 to simplify comparison. This likely underestimates the net present value loss due to the current higher rate environment. The results of these calculations are summarized in the chart below ($ in millions):

Hypothetical Stay Period	Amount of MDT Distributions Delayed by Stay Period	Net Present Value Loss of MDT Distributions Delayed by Stay Period (at 9.0% Discount Rate)	Amount of SOAF Distributions Delayed by Stay Period	Net Present Value Loss of SOAF Distributions Delayed by Stay Period (at 9.0% Discount Rate)
3 Months	$2,941.6	$49.8	$100.0	$2.0
6 Months	$2,941.6	$105.9	$100.0	$4.0
9 Months	$3,247.7	$166.8	$100.0	$6.0
12 Months	$3,247.7	$219.9	$100.0	$7.9
18 Months	$4,228.8	$355.4	$100.0	$11.6
24 Months	$4,684.9	$502.8	$100.0	$15.1

22. For example, during a three-month hypothetical Stay Period, all distributions from the Debtors' estates to creditors and the federal government that would have otherwise been made on the Effective Date—totaling approximately $1.339 billion—would be delayed by three months. In addition, under a three-month delay scenario, due to provisions in the Shareholder Settlement Agreement and Plan that would delay the second distribution date in the event of a delay of the Effective Date, it is estimated that approximately $368.7 million in additional distributions would be delayed by three months. Similarly, such provisions would also delay the next three distribution dates. Accordingly, a hypothetical three-month stay would, in total, result in the delay of approximately $2.942 billion in distributions to creditors.

23. Importantly, in calculating the present value loss of delayed distributions during each Stay Period, I have not accounted for any delays in recoveries on causes of action that MDT and TopCo may pursue under the Plan, such as from potential recoveries against pre-petition insurance policies. Delays in such recoveries would have the effect of increasing the present value loss associated with a stay of the Confirmation Order. Therefore, the above present value loss estimates almost certainly underestimate the loss of present value that would result from delaying distribution payments during each of the hypothetical Stay Periods. For the avoidance of doubt, such present value loss calculations do

not include other costs and losses that could be associated with a delay of distributions to creditors, including, without limitation, the human costs of a delay, any multiplier effects of abatement as discussed in the testimony of Dr. Gautam Gowrisankaran at the confirmation hearing, professional fees and costs (discussed more below), and risks to the Debtors' business and the future viability of NewCo and its Public Health Initiatives (also discussed more below), among potentially many others.

III. A Stay Would Increase the Incurrence of Professional Costs by the Estates

24. One element that will positively impact the Debtors' post-emergence financial picture is the significant decrease in assumed litigation expenses. Between September 15, 2019, the date the bankruptcy petitions were filed, and May 31, 2023, the Debtors have incurred approximately $763 million in non-recurring professional fees based on the Debtors' monthly operating reports. In the event the issuance of the mandate is delayed, and the Debtors are unable to emerge from bankruptcy, the Estates will continue to incur professional fees in connection with the chapter 11 cases. This will include fees and costs exclusive of fees that would be incurred regardless of whether a stay was imposed. In other words, the Estates would continue to incur fees as a result of remaining in chapter 11 above and beyond fees incurred through, for example, litigation of creditor motions for a stay pending a petition for a writ of certiorari, the litigation before the Supreme

Court, or post-emergence planning (such incremental chapter 11 costs, "**Incremental Professional Fees**"). The total amount of Incremental Professional Fees incurred by the Estates as a result of a delay in issuing the Mandate will depend on the length of the Stay Period.

25. In my 2021 Declaration, my team and I calculated the Incremental Professional Fees that might be incurred based on a hypothetical stay period of 3 months, 6 months, 9 months, 12 months, 18 months, and 24 months, respectively, assuming a monthly run rate for each of the Debtors' legal advisors and financial advisors that was approximately 15% of the average monthly run rate incurred by these professionals during the first six months of 2021. I estimated that a stay period of 18 and 24 months would incur Incremental Professional Fees of $60 million and $80 million, respectively.

26. As I noted in my 2021 Declaration, the actual amount of professional fees incurred could be higher due to the uncertainties associated with remaining in chapter 11. In my 2021 Declaration, I had assumed an Effective Date of December 31, 2021. During the subsequent 17 month period ending May 31, 2023, the actual amount of incremental non-recuring bankruptcy fees was approximately $115 million. This higher run rate reflects the true costs incurred by the Estate due to the delay of the Effective Date of the Plan and underscores the need to avoid delaying the Effective Date of the Plan any further.

27. In calculating the Incremental Professional Fees that the Estates might be expected to incur if the Effective Date of the Plan is delayed past December 31, 2023, my team and I assumed a monthly run rate of $5 million. This figure is between the average monthly amount of $6.8 million in fees incurred over the previous 17 months and the $4.5 million monthly average for the first five months of 2023, for each of the Debtors' legal and financial advisors, as well as the legal and financial advisors of the Debtors' various other stakeholders that are retained through the Bankruptcy Court. The results of these projections are provided in the chart below ($ in millions).

Assumed Stay Period	Projected Incremental Professional Fees Incurred During Assumed Stay Period
3 Months	$15.0
6 Months	$30.0
9 Months	$45.0
12 Months	$60.0
18 Months	$90.0
24 Months	$120.0

28. It bears emphasis, however, that the Estates incurred on average approximately $17 million in non-recurring professional fees and costs each month during the course of these chapter 11 cases, and it is possible that, due to uncertainties of remaining in chapter 11, that the above Incremental Professional Fees projections could be significantly higher. Under the Plan, with exception of payments to the PI Trust and the DOJ and the NewCo Initial Cash Distribution

(and for certain other legal fees and costs), the value of the Debtors will be transferred for the purpose of abating the opioid crisis. Accordingly, any incremental value expended on professional fees during any Stay Period is value that otherwise would be transferred for purposes of abatement in the absence of delay in issuing the Mandate.

IV. A Stay Would Increase Operational and Other Risks to the Debtors' Businesses

29. As described above, the Plan provides that PPLP will be dissolved and the Debtors' assets, including their operational businesses, will be transferred to NewCo. NewCo will then operate these businesses in a responsible manner for the benefit of creditors. Among other things, NewCo's business will be used to fund the Public Health Initiatives and to make distributions to the Public Creditor Trusts.

30. Continuing to remain in bankruptcy could also present an existential risk to the Debtors' business and, therefore, NewCo's future viability. Throughout the pendency of the chapter 11 cases, the Debtors have continually promised their various stakeholders, such as their employees, customers and vendors, that although the timeline to emergence was long, there was a light at the end of the tunnel: the Debtors would emerge from bankruptcy and transition to their new life as a public benefit company. The uncertainty and delay introduced by a stay risk upsetting those expectations with potentially disastrous effects on the financial

viability of the Company and the ability to make the level of cash distributions contemplated in the plan. For example, customers who have continued to work with the Debtors could decide to decline to do business with the Debtors as a result of ongoing reputational or other concerns that would have been abated by emerging from chapter 11. Moreover, continuing to remain in bankruptcy will have negative consequences for morale and the retention of employees. As described more fully in my previously declaration filed in conjunction with the Debtors' 2023 KEIP and KERP plans, the Debtors' have experienced particularly high employee attrition during the bankruptcy given the prolonged wait for emergence, the recent adverse ruling the Debtors received with respect to certain patent litigation, and hiring obstacles brought by challenges throughout the labor market. Confirmation of the Plan and the expectation that the Debtors' assets will soon be transferred to a new operating company that will operate in the public interest would provide important finality and give employees and business partners confidence in the long-term viability of the company.

31. Moreover, operating a complicated pharmaceutical company in bankruptcy requires a significant amount of time and focus from numerous employees across the Debtors' businesses. Emergence will help relieve the pressure on the Debtors and their employees, and will enable the Debtors' employees to turn their full attention to NewCo and its public health mission.

32. Finally, one central feature of NewCo, which will operate as a public benefit company, is not only that NewCo will provide cash for abatement, but also, as noted above, that it will continue to develop and bring to market three opioid overdose and rescue medications. The Plan also calls for NewCo to develop and distribute these medicines for no profit. I understand that this is an essential characteristic of the Plan for many stakeholders. A stay of the Confirmation Order could jeopardize NewCo's ability to bring these medicines to market at all, or could delay for years the availability of these potentially life-saving medicines.

Pursuant to 28 U.S. Code § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 17, 2023

/s/ Jesse DelConte
Jesse DelConte