No. 7:21-cv-07966 and No. 7:21-cv-7969

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re PURDUE PHARMA L.P., et al., Debtors.

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, Appellant,

v.

PURDUE PHARMA L.P., et al., Appellees.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION BY APPELLANT WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, FOR A STAY PENDING APPEAL

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INTRODUCTION

Justice Department official William K. Harrington, the United States Trustee (the "United States Trustee" or "the government"), has appealed the bankruptcy court's order and modified bench ruling confirming the chapter 11 plan of Purdue Pharma L.P. and its affiliated debtors,[1] Ex. 9[2] (the "Confirmation Order"), Ex. 8 (the "Modified Bench Ruling"), and an order allowing the debtors to take certain actions to further the plan, Ex. 7 (the "Advance Order").[3]

This Court may stay a bankruptcy court order pending appeal when such a stay was first sought from the bankruptcy court but it has either denied the stay or not yet ruled. Fed. R. Bankr. P. 8007(b)(2)(B). That is the case here. The government moved for a stay on September 15, 2021. The bankruptcy court declined to stay the Advance Order. And it declined to hear the motion to stay the Confirmation Order until November 9, 2021. The bankruptcy court also refused to enter an interim stay to maintain the status quo until then—even though the automatic stay of the Confirmation Order under Bankruptcy Rule 3020(e) expired on October 1, 2021.

The government thus respectfully asks this Court to enter (1) an emergency stay of the Confirmation and Advance Orders pending appeal and (2) an immediate stay pending a decision on this motion. In the alternative, the government asks this Court to stay those orders pending the bankruptcy court's decision on a stay pending appeal. If this Court grants no other relief, the government requests at least a two-week stay to allow time to seek a relief in the Second Circuit.

The urgency of this request is driven by the Second Circuit's law on equitable mootness,

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[1] The debtors in these cases are: 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. (N/A), Paul Land Inc., Quidnick Land L.P., Rhodes Pharmaceuticals L.P., Rhodes Technologies, UDF LP, SVC Pharma LP, and SVC Pharma Inc.

[2] Exhibits cited are the exhibits to the Declaration of Linda A. Riffkin, submitted with this Motion. "Dkt." refers to the docket numbers in bankruptcy court, Case No. 19-23649. Where applicable, cited page numbers are to the ECF pagination at the top of the referenced document.

[3] The government filed separate notices of appeal of the Advance Order and Confirmation Order, but will move to consolidate those appeals. It thus is filing this motion in both appeals.

which requires parties to exercise all due diligence in seeking to vindicate their rights before "substantial consummation" of a bankruptcy plan. Although the government believes equitable mootness should not apply here, the Second Circuit has found substantial consummation when only a few steps have been taken, so the fact that the Purdue reorganization plan spans nine years provides no guarantee that a court will not dismiss the government's appeal without Second Circuit or Supreme Court review.

This Court should grant a stay because the government has a likelihood of success on the merits—at the very least, the case raises sufficiently serious questions going to the merits to make them a fair ground for litigation—and the balance of harms weighs in favor of granting a stay. This bankruptcy case arises because the debtors (collectively, "Purdue") and their owners, members of the Sackler family, were a fundamental cause of the opioid crisis afflicting the nation, which has led to thousands of deaths and untold suffering from opioid addiction. Purdue's bankruptcy enables it to resolve claims against it based on its role in the opioid crisis and receive a bankruptcy discharge for most pre-petition debts.

The Sacklers, by contrast, did not file for bankruptcy. Yet, Purdue's bankruptcy plan includes a broad release that enables the Sacklers and countless other non-debtors—so vaguely identified that no one can determine who is actually released—to walk away from their personal opioid liabilities while keeping most of their net worth. The release precludes future lawsuits and extinguishes hundreds of pending lawsuits, including lawsuits brought by states who are also appealing the bankruptcy court's order, and provides a shield even against claims that the Sacklers could not have discharged in bankruptcy.

The government and many others objected to this release because it violates the fundamental constitutional rights of those whose property it takes—without compensation, consent, notice, or an opportunity to be heard—and is impermissible under Bankruptcy Code. The bankruptcy court confirmed Purdue's plan, nevertheless, leading to this appeal.

This Court should grant a stay pending appeal to prevent irremediable harm that would result absent a stay. The Confirmation Order irreparably harms both the public and countless individuals by extinguishing opioid victims' direct causes of action against the Sacklers and other non-debtors without compensation, consent, or adequate notice, and without the releasees even filing for bankruptcy. And if a stay is denied, appellees may attempt to evade appellate review by an Article III court by arguing that the appeal has become equitably moot.

The possibility that initial Plan distributions may be delayed by a stay does not outweigh the harms of denying one. The Plan has been years in the making, and any delay in initial distributions is outweighed by the outright elimination of non-debtors' rights against other non-debtors. In any event, Purdue claims the Plan cannot become effective immediately. Dkt. 3626 at 3. And any potential delay in initial distributions will be minimized if the appeal is expedited, as Purdue, the government, and this Court have all stated it should be. Oct. 6, 2021 Order at 2.

STATEMENT OF THE CASE

I. Statutory Framework

Under chapter 11, the debtor is given an opportunity to reorganize its affairs by successfully proposing a plan. A bankruptcy discharge releases a chapter 11 debtor from liability for most debts that arose before confirmation of a plan. 11 U.S.C. § 1141(d). A discharge may be granted only after a debtor files for bankruptcy and complies with a detailed set of statutory procedures and requirements, *see, e.g.*, *id*. §§ 727, 1328, 1129, 1141, and only as part of a public judicial process in which all creditors can participate, *see id*. §§ 341, 1109.

For a debtor to solicit acceptances of a proposed plan, it must provide a disclosure statement, along with a copy or summary of the proposed plan. 11 U.S.C. § 1125(b). The disclosure statement must be approved by the court "as containing adequate information," to "enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan." *Id*. § 1125(a).

"The court shall confirm a plan only if it complies with all" of the requirements of section 1129(a), which include that "[t]he Plan complies with the applicable provisions of [the Bankruptcy Code]." *Id*. § 1129(a). Purdue, as the plan proponent, bore the burden to prove that it met the requirements for confirmation by a preponderance of the evidence. *In re Charter Commc'ns*, 419 B.R. 221, 243 (Bankr. S.D.N.Y. 2009) (citing *Heartland Fed. Savs. & Loan, Ass'n v. Briscoe Enters. (In re Briscoe Enters.)*, 994 F.2d 1160, 1165 (5th Cir. 1993). Bankruptcy judges have an independent duty to inspect and disapprove improper plans. *See United States Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 277 (2010).

II. Statement of the Facts

A. Purdue Files for Bankruptcy then Provides Notice of Its Proposed Plan After the Deadline to File Proofs of Claim Against It Has Expired.

Purdue sought bankruptcy relief on September 15, 2019. Purdue is ultimately owned by members of the Raymond Sackler family and the Mortimer Sackler family. Dkt. 17 at 19. Having only Purdue (but not the Sacklers) file for bankruptcy was the means that Purdue and the Sacklers picked to resolve their collective opioid liabilities. Ex. 2 ¶¶ 57-59.

Early in the case, the bankruptcy court enjoined thousands of lawsuits against Purdue and hundreds of lawsuits against the Sacklers. Ex. 8 at 89 n.5; *see also* Dkt. 2983 at 171 (stating the Sacklers were defendants in about 400 civil actions). The court acknowledged that absent this injunction "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." Ex. 8 at 89 n.5. This Court affirmed that preliminary injunction. *Dunaway v. Purdue Pharma. L.P. (In re Purdue Pharma. L.P.)*, 619 B.R. 38 (S.D.N.Y. 2020). (The United States Trustee was not a party to that appeal and did not participate in it.)

The bankruptcy court set a July 30, 2020, deadline for everyone holding a pre-petition claim against Purdue to file proofs of claim against it. Dkt. 1221. There was no deadline or procedure to file proofs of claim against the Sacklers because they were not debtors.

Nearly a year later, over the government's objection, Dkt. 2686, the bankruptcy court approved Purdue's disclosure statement describing its proposed plan.[4] Ex. 1. Later that month,

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[4] The United States Trustee has also appealed the interlocutory order approving the disclosure statement, which merged into the final confirmation order.

Purdue sent the disclosure statement and proposed plan to those who requested to receive service in the case and those entitled to vote on the plan, *id*. at 21—which does not include everyone with claims against Purdue, much less everyone with claims against the Sacklers, *id*. at 22.

The forms of notice that Purdue provided of the confirmation hearing varied, but did not explain the full breadth of the Non-Debtor releases. Ex. 1 at 8, 247, 289, 297. The notices stated they were using terms defined in the Plan, such as "Shareholder Released Parties," without including the definitions or explaining the terms. They state, for example:

> The Plan contemplates a Shareholder Settlement by *and among the Debtors, the Master Disbursement Trust, and certain of the Shareholder Released Parties (including members of the Sackler families and certain other individuals and related entities*). *The Plan provides for the release* of any actual or potential claims or causes of action against the Shareholder Released Parties relating to the Debtors (including claims in connection with Opioid-Related Activities) and the channeling injunction described below, *in exchange for the payment by certain of the Shareholder Released Parties of $4.275 billion* and the relinquishment of their equity interests in the Debtors.

Ex. 1 at 247-48 (emphasis added); *see also id*. at 298. While this states that the "Shareholder Settlement" will be with "Shareholder Released Parties" who include "members of the Sackler families and certain other individuals and related entities," it does not explain that "certain other[s]" actually means hundreds of individuals and entities. Nor did the notices state that the Plan would pay nothing for the causes of action being released against the Sacklers and the multitude of other non-debtors. *Id*. at 246-69, 288-99.

B. The Government and Others Object to the Plan's Incomprehensibly Broad Releases of the Sacklers and Other Non-Debtors.

Although the Sacklers were not debtors, section 10.7(b) of Purdue's proposed plan (the "Non-Debtor releases") released causes of action against all "Shareholder Released Parties," which it defined to include the "Sackler Family Members"—which it in turn defined to include Raymond and Mortimer Sackler, any of their descendants (even those not yet alive), current and former spouses, and any of their estates—as well as six other broad categories that encompass potentially thousands of individuals and entities. Ex. 6 at 40, 41-42, 132-34.

On July 19, 2021, the United States Trustee objected to confirmation of the plan, arguing that the Non-Debtor releases are unconstitutional, violate the Bankruptcy Code, and are inconsistent with Second Circuit law. Dkt. 3256.

Although the Non-Debtor releases do not apply to the United States, *see* Dkt. 3185 at 144-47, the United States Attorney for the Southern District of New York filed a statement echoing the due process and other concerns expressed by the United States Trustee. Dkt. 3268. Many others, including victims, state and local governments, insurers, and industry participants, also objected or expressed similar concerns. *See, e.g.*, Dkt. 3235, 3264, 3270, 3272, 3274, 3275, 3276, 3278, 3279, 3280, 3292, 3306.

Between the morning that the confirmation hearing began and the day *after* the bankruptcy court rendered its oral ruling stating it would confirm the plan, Purdue amended its plan six times. *See* Dkt. 3545, 3632, 3652, 3682, 3706; Ex. 6. The United States Trustee filed supplemental objections to the amended plans re-asserting his prior objections and objecting to amendments being filed after evidence closed in the confirmation hearing. Dkt. 3636, 3710.

The bankruptcy court rendered an oral ruling on September 1, 2021, stating it would confirm the proposed plan if two changes were made to it. *See* Ex. 15 at 134-35, 154-55. Purdue filed the final version of its plan (the "Plan") the next day. Ex. 6.

The Plan varied from the proposed plan that was provided with Purdue's disclosure statement. Among other things, the Plan expanded the definition of the "Causes of Action" being released. *Compare* Dkt. 2967 at 9-10 *to* Ex. 6 at 10. It also narrowed the Non-Debtor releases to some extent, such as by excluding certain non-opioid claims. Ex. 6 at 31, 132. But, as described in more detail below, the Plan continues to shield the Sacklers and hundreds of other non-debtors from opioid-related liability.

1. The Plan bars a vast array of claims against the Sacklers and others, including claims that could not be discharged in bankruptcy.

The Plan provisions extinguishing, without compensation, non-debtors' direct opioid causes of action against the Sacklers and other non-debtors are expansive yet drafted in the most confusing manner possible. Section 10.7(b), which contains the Non-Debtor releases, is over a page long and cross references several other definitions. Ex. 6 at 132-33.

Section 10.7(b) provides, in relevant part, that "the Shareholder 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" that are "based on or relating to, or in any manner arising from, in whole or in part, . . . the Debtors" and "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." *Id*. at 132.

The Plan does not define what it means for a debtor's conduct, omission, or liability to be an "otherwise legally relevant factor" to a "Cause of Action" when such conduct, omission, or liability is not the "legal cause" of the "Cause of Action."

And the definition of a "Cause of Action" is expansive—24 lines long. The Plan defines a "Cause of Action" as "any Claim"—separately defined as having "the meaning set forth in section 101(5) of the Bankruptcy Code," *id*. at 10—as well as any

> action, class action, claim, cross-claim, counterclaim, third-party claim, cause of action, controversy, dispute, demand, right, Lien, indemnity, contribution, rights of subrogation, reimbursement, guaranty, suit, obligation, liability, debt, damage, judgment, loss, cost, attorneys' fees and expenses, account, defense, remedy, offset, power, privilege, license or franchise, in each case, of any kind, character or nature whatsoever . . . whether arising before, on or after the Petition Date

under any theory of law, including fraud and willful misconduct. *Id*. The definition expressly includes any "Cause of Action" held by those "not yet born." *Id*.

As is obvious from the long list of things included in the definition of a "Cause of Action," the Plan releases far more than bankruptcy "Claims," which the Bankruptcy Code defines as a "right to payment" or equitable remedies "for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5). The released "Causes of Action," by contrast, extend to claims and defenses "of any kind, character or nature whatsoever." Ex. 6 at 10. Moreover, the Non-Debtor releases include claims that individual debtors could not have discharged in bankruptcy, such as fraud and willful misconduct. *See* 11 U.S.C. § 523(a)(2).

2. The Plan shields the Sacklers and others from opioid claims held by everyone with (a) a pre-petition claim against Purdue or (b) a post-petition opioid "Cause of Action" "related to" Purdue.

The Plan's definition of "Releasing Parties"—those being stripped of their direct causes of action against the Sacklers and other non-debtors—is similarly opaque. Like section 10.7(b), it, too, cross-references several other definitions, which in turn cross reference more definitions. *See* Ex. 6 at 40 (definition of "Releasing Parties," which includes the defined terms "Holders," "Interests," "Debtors," "Future PI Channeled Claims," and others).

The Plan defines the "Releasing Parties" as including, among others, both (1) "all Holders of Claims . . . against" Purdue, even if the Claims are not "treated under" the Plan, and (2) "all Holders of Future PI Channeled Claims." *Id*.

The first of these groups includes anyone who holds a pre-petition bankruptcy claim against Purdue, whether or not related to opioids. *Id*. at 10 (definition of "Claim"). This would include the 2,683 personal injury victims who voted against the Plan, and over 70,000 personal injury victims who did not vote on the plan at all. Ex. 25 at 5, 10.

The second group is not limited to those with claims against Purdue, but includes anyone with an opioid-related claim *relating to* Purdue if that claim arose after it filed for bankruptcy. The Plan defines a "Future PI Channeled Claim" to include "any alleged opioid-related personal injury or similar opioid-related Cause of Action against any Released Party or Shareholder Released Party," "based on or *relating to*, or in any manner arising from, in whole or in part, the Debtors," other than certain claims that arose before Purdue filed for bankruptcy. Ex. 6 at 17-18 (emphasis added); *see also id*. at 27, 31, 33 (definitions of "PI Channeled Claim," "NAS PI Channeled Claim," and "Non-NAS PI Channeled Claim").[5] An extinguished "Future PI Channeled Claim" thus includes post-petition opioid-related "Causes of Action" "relating to" Purdue, whether or not the "Holder" of the cause of action also had a claim against Purdue.

[5] The Plan categorizes opioid-related personal injury claims into three types: (1) claims based on intrauterine exposure to opioids that arose pre-petition ("NAS PI Claims"), (2) any other opioid-related claims that arose pre-petition ("Non-NAS PI Claims"), and (3) opioid-related claims that arose post-petition ("Future PI Channeled Claims"). *See* Ex. 6 at 17-18, 26, 27, 31.

Thus, regardless of whether they actually filed a claim against Purdue, or even knew that they had one, everyone who has either (i) a bankruptcy claim of any sort against Purdue that arose before it filed for bankruptcy, or (ii) an opioid-related claim relating to Purdue that arose after it filed for bankruptcy, is being stripped of their separate direct opioid-related claims against the Sacklers and hundreds of other non-debtors. The release thus extends even to someone *with no claim against Purdue* but who has a Purdue-*related* opioid claim against the Sacklers that arose after bankruptcy.

3. The Plan shields the Sacklers and hundreds of others, named and unnamed, from direct opioid-related claims against them.

Like section 10.7(b), the Plan's definition of the "Shareholder Released Parties"—those non-debtors getting off the hook through Purdue's Plan—is impenetrable, too.

The Plan lists seven capacious categories of releasees, releasing hundreds, potentially thousands, of individuals, entities, and assets. Ex. 6 at 43. As with section 10.7(b) and the definition of "Releasing Parties," the definition of "Shareholder Released Parties" cross-references other definitions. *Id*. Among these are the "Sackler Family Members," *id*., defined to include Raymond and Mortimer Sackler, any of their descendants (including those as-yet unborn), any current and former spouses, and any of their estates, *id*. at 41.

But looking at the Plan alone is not enough to determine who is included in the definition of the "Shareholder Released Parties" because it also includes "the Persons identified on Exhibit X" to the Shareholder Settlement Agreement approved with the Plan. Ex. 6 at 43; Ex. 5. Exhibit X has over a thousand line entries, Ex. 5 (Exhibit X), some of which list categories without names such as certain persons' "spouses, children and grandchildren" and such vague terms as "assets, businesses and entities." *See*, *e.g.*, *id*. at 306, 309, 310, 314.

The Non-Debtor releases even release "property possessed or owned at any time" by the "Sackler Family Members," all the persons identified on Exhibit X, and others. Ex. 6 at 43.

4. The Plan pays nothing to opioid victims in return for extinguishing their direct claims against the Sacklers and other non-debtors.

The Plan provides compensation for opioid-related injuries only to those who are creditors of Purdue who timely filed a claim against Purdue unless permission is granted for a late claim. *See* Ex. 6 at 115; Ex. 10 at 218, 220; *id*. at 277, 279; *id*. at 318. The compensation provided is only to Purdue creditors on claims against Purdue and is as little as $3,500 and—in installments for as many as ten years—no more than $48,000, even to those with catastrophic injuries. *See* Dkt. 2983 at 15; Ex. 10 at 246. But the actual compensation will be less after attorney's fees and holdbacks are paid. Dkt. 2983 at 15.

And the Plan denies the victims of the opioid crisis any compensation for their separate direct claims against the Sacklers, which it eliminates against them and other non-debtors. The Plan documents expressly prohibit any value being paid for pre-petition direct causes of action against the Sacklers or other non-debtors for opioid-related personal injury claims. *See* Ex. 10 at 219 ("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 278 ("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). The same is true for every opioid-related cause of action arising post-petition. *See id*. at 319 ("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).

C. Certain Transactions Will Occur Before the Plan's Effective Date.

The Plan states that the Non-Debtor Releases shall be deemed effective on the Plan's Effective Date. Ex. 6 at 70. The Effective Date also triggers a number of other events. For example, beginning on the Effective Date, certain trusts will begin to receive distributions with which to pay claims against Purdue. *Id*. at 63-64, 67, 80-81, 108, 111. And as set forth in the Shareholder Settlement Agreement, the Sacklers' payments, to be made over the course of ten years, begin with a $300 million payment on the Effective Date. Ex. 5 at 28.

The Plan defines its "Effective Date" as "the date selected by the Debtors for the consummation of the Plan, or as soon thereafter as reasonably practicable." Ex. 6 at 15. The Plan includes a list of conditions precedent to the Effective Date. One is that the Confirmation Order "shall not have been modified or vacated on appeal." *Id*. at 123. Another is entry of a judgment of conviction in accordance with Purdue's federal plea agreement. *Id*. at 10, 15, 30-31, 35, 123-24. Under the plea agreement, the Plan cannot become effective until seven days after the sentencing hearing, which will be held at least seventy-five days after the Confirmation Date. Dkt. 1828 at 37. Because the Confirmation Order was entered on September 17, 2021, the sentencing could take place as early as December 1, 2021. Under the Plan, the conditions precedent are all waivable except for one: execution of the Shareholder Settlement Agreement and receipt of the initial payment due under it. Ex. 6 at 123-24.

The Plan also provides that certain "Restructuring Transactions" must occur "on *or before*" the Effective Date, or as soon thereafter as possible, such as: the creation of at least two entities (NewCo and TopCo) that will receive Purdue's assets; the creation of eight trusts being established for the purpose of making distributions under the Plan; and the transfer to those entities and trusts of various assets and funds. *Id*. at 40, 62, 76, 78, 89 (emphasis added). *See also* Ex. 4 at 886-89. On or before the Effective Date, Purdue also will provide $10 million to fund an escrow account for the payment of certain directors and employees. *Id*. at 13, 74-75.

In addition, the Advance Order authorizes Purdue to begin implementing the Plan before its Effective Date, including by advancing nearly $7 million to eight trusts and Topco. Ex. 7. Purdue has stated that these funds will be spent for things such as retaining professionals, building technology to analyze and process claims, providing accounting and legal services, and compensating the TopCo managers and the trustees of the various Plan trusts. Ex. 3 at 7-16. The Advanced Order also authorizes disclosure of PI Data—including names and social security numbers—to the Proposed PI Trustee and others. Ex. 7 at 5-6.

D. After the Government Appeals, the Bankruptcy Court Declines to Promptly Decide the Government's Stay Motion, Allowing the Default Stay of the Confirmation Order to Expire with No New Stay Put in Place.

On September 15, 2021, the government appealed the bankruptcy court's oral ruling confirming the Plan and the Advance Order. Dkt. 3776, 3777.

Two days later, the bankruptcy court entered the Confirmation Order and Modified Bench Ruling, Exs. 8, 9, and the government filed an amended notice of appeal.[6] The Bankruptcy Rules imposed a default stay of the Confirmation Order until October 1, 2021, Fed. R. Bankr. P. 3020(e), but the Advance Order was effective "upon its entry." Ex. 7.

On the same day that it appealed, the government filed a motion for a stay pending appeal, Dkt. 3778, which it amended after entry of the Confirmation Order, Dkt. 3801 (the "Stay Motion"). In its Stay Motion, the government expressed the concern that if a stay is denied, appellees may attempt to evade appellate review altogether by arguing that the appeal has become equitably moot.[7] The government thus moved for an expedited hearing on the Stay Motion on or before September 29, 2021. Dkt. 3779 at 7 (the "Motion to Expedite"). Washington, Connecticut, Maryland and certain Canadian governmental entities have also sought a stay pending appeal. Dkt. 3789, 3845, 3873.

On September 17, 2021, the same day the Confirmation Order was entered, Ex. 9, Purdue's counsel emailed chambers opposing the Motion to Expedite, Ex. 18 at 4-8. Later that

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[6] To date, the Confirmation Order has also been appealed by Washington, Maryland, Connecticut, Washington D.C., California, Vermont, Delaware, Rhode Island, Oregon, certain Canadian governmental entities, and several pro se individuals. Dkt. 3724, 3725, 3774, 3775, 3780, 3784, 3810, 3812, 3813, 3818, 3832, 3839, 3849, 3851, 3853, 3877, 3878.

[7] Equitable mootness is a judge-made "prudential doctrine that is invoked to avoid disturbing a reorganization plan once implemented." *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 144 (2d Cir. 2005) ("*Metromedia*"). The government believes that it is inapplicable here, may run afoul of the Supreme Court's recent invalidation of similar prudential doctrines, and conflicts with a federal court's "virtually unflagging" obligation to "hear and decide a case" and "to exercise the jurisdiction [they were] given." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014). This is no less true in bankruptcy cases. *See, e.g., In re VeroBlue Farms USA, Inc.*, 6 F.4th 880 (8th Cir. 2021); *In re One2One Commc'ns, LLC*, 805 F.3d 428, 438-41 (3d Cir. 2015) (Krause, J., concurrence).

day, the court notified the parties that it would hold a status conference on September 30, 2021. Ex. 19.

On September 22, 2021, faced with the prospect of the default fourteen-day stay expiring before a hearing on the Stay Motion, the government asked the bankruptcy court to extend the automatic stay of the Confirmation Order and for a limited stay of the Advance Order pending resolution of the Stay Motion. Dkt. 3802 (the "Bridge Motion"). It also asked for an expedited hearing on the Bridge Motion. Dkt. 3804.

Purdue stated in an email that it opposed an expedited hearing, asserting that there was no emergency because it will not "be consummating the plan and 'going effective' prior to November." Ex. 20. Purdue claimed that the hearing on the Stay Motion could "easily take a day or more" and "could require cross examination of multiple witnesses." Ex. 23 at 2. Opponents also sought to delay saying they may seek discovery, including a 30(b)(6) deposition of the United States Trustee (which he will move to quash). Exs. 22, 23. But the Stay Motion can be decided without discovery, on the extant record, *see, e.g.,* Dkt. 3918. Any additional delay without a stay risks other parties trying to block Article III review of the Confirmation Order.

At the September 30, 2021, status conference, the bankruptcy court denied the Bridge Motion and declined to stay the Advance Order. Ex. 17 at 22-23. The court stated that because the actions that Purdue is taking before the Effective Date "can be undone," they could not be a basis for arguing that the appeal is equitably moot, and Purdue would be judicially estopped from arguing to the contrary. *Id*. at 23. The court did not explain how the Sacklers and others would be estopped. The court also did not address the impact of Purdue's sentencing hearing, but Purdue's counsel conceded only that "the ministerial things happening *before sentencing*" could not support an equitable mootness argument. *Id*. at 24 (emphasis added).

Faced with a choice between a hearing on October 14, 2021, or November 9, 2021, the government requested the earlier date, but Purdue pushed for the later one. *See* Ex. 17 at 20; Ex. 23 at 2; Ex. 24. The bankruptcy court scheduled it for November 9, 2021. Ex. 24 at 1.

In the meantime, the United States Trustee proposed an expedited briefing schedule for this appeal as follows: appellants' opening briefs due October 14, 2021; appellees' briefs due October 28, 2021; reply briefs due November 4, 2021. Ex. 21. Purdue has agreed to expedited briefing in concept, but the parties have not yet settled on specific dates. Ex. 17 at 17-18; Ex. 23 at 3. On October 6, 2021, this Court entered an order stating that the appeal can be briefed swiftly, and setting a scheduling conference for October 12, 2021.

Because the automatic stay of the Confirmation Order has now expired, and the bankruptcy court has refused to grant an interim stay to maintain the status quo, the government asks this Court for a stay pending appeal to preserve its appellate rights and the constitutional rights of those whose claims have been extinguished by the Plan. It is particularly appropriate for this Court to take up the stay now as it appears that merits briefing will begin, and may even be completed, before the bankruptcy court even holds a hearing on the Stay Motion.

ARGUMENT

This Court should grant a stay pending appeal because there are sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of the harms weighs in favor of a stay.

To determine whether to grant a stay pending appeal, a court considers: whether the movant is likely to succeed on the merits on appeal; whether the movant will suffer irreparable injury if the stay is denied; whether issuance of the stay will substantially injure the other parties interested in the proceeding; and where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 426 (2009). Where the government is a party, the injury and public interest factors merge. *Id*.

There is substantial overlap between these factors and those that govern preliminary injunctions. *Id*. at 434. Under Second Circuit law, "[f]or a preliminary injunction to issue, the movant must establish (1) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor, and (2) irreparable harm in the absence of the injunction." *Kelly v. Honeywell Int'l, Inc.*, 933 F.3d 173, 183-84 (2d Cir. 2019) (internal quotation marks omitted); *accord Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35-38 (2d Cir. 2010); *Mohamed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002); *ACC Bondholder Grp. v. Adelphia Commc'n Corp. (In re Adelphia Commc'n Corp.)*, 361 B.R. 337, 346-47 (S.D.N.Y. 2007).[8]

"Before issuing a stay, it is ultimately necessary to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (internal alteration and quotation marks omitted). The balance of equities favors granting a stay here.

I. The Government Has a Likelihood of Success on the Merits.

The government is likely to succeed on this appeal—at the very least, this case raises sufficiently serious questions to make them a fair ground for litigation. The Confirmation Order's non-consensual extinguishment of opioid victims' direct claims against the Sacklers and other non-debtors is not permitted by the Constitution, the Bankruptcy Code, or Second Circuit law. And because the only purpose of the Advance Order is to further the Plan, the Advance Order only has merit to the extent the Confirmation Order itself is likely to survive appeal.

A. The Non-Debtor Releases Are Unconstitutional.

1. The Non-Debtor releases violate the Due Process Clause.

The Due Process Clause provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "[L]egal claims are sufficient to constitute property such that a deprivation would trigger due process scrutiny." *Elliott v. General Motors LLC (In re Motors Liquidation Co.)*, 829 F.3d 135, 158 (2d Cir. 2016).

The Confirmation Order violates due process because it permanently denies victims of the opioid crisis of their direct claims against the Sacklers and hundreds of other non-debtors, without their consent, an opportunity to be heard, or adequate notice.

[8] The Second Circuit applies a more stringent likelihood-of-success standard when a party is seeking to enjoin government action. *See Trump v. Deutsche Bank AG*, 943 F.3d 627, 637 (2d Cir. 2019), *vacated on other grounds by Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

a. The Non-Debtor releases deprive opioid victims of their direct third-party claims without their consent or an opportunity to be heard.

The Non-Debtor releases violate opioid victims' rights to due process by depriving them of their opportunity to be heard. The "deep-rooted historical tradition that everyone should have his own day in court" is a fundamental right guaranteed by the Due Process Clause. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)). But here, opioid victims are deprived of their day in court and given no opportunity to voluntarily litigate or settle their direct claims against the Sacklers and non-debtors—depriving them of these claims without due process. *Motors Liquidation*, 829 F.2d at 158. As the bankruptcy court explained to one of the many victims who lost a loved one to opioids, even for the 140,000 claims filed against Purdue in these cases, "[t]he merits . . . have not yet been determined" and would not be until after the Plan is confirmed. Ex. 12 at 51-52. But the merits of the released opioid-related causes of action against the Sacklers and other non-debtors will never be determined because those claims will never be heard by any court.

The opioid victims' right to due process was also denied because they never gave knowing and informed consent to the extinguishment of their claims against the Sacklers and others (without compensation). The bankruptcy court reasoned that the release "is part of the settlement of the claim that channels the settlement funds to the estate." Ex. 8 at 113. But there is no settlement with victims who did not agree to release their claims. Of those who filed proofs of claim against Purdue, over 70,000 did not vote and 2,683 voted against the Plan. Ex. 25 at 5, 10. As the bankruptcy court noted, a settlement "takes an agreement." Ex. 8 at 100. Courts may not impose a settlement to which a party has never agreed. *See Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland,* 478 U.S. 501, 529 (1986); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011). This absence of knowing and informed consent creates a likelihood of success warranting a stay pending appeal. *See Adelphia*, 361 B.R. at 358.

b. The Non-Debtor releases deprive opioid victims of their direct third-party claims without compensation.

It is no answer to say that these victims of the opioid crisis can receive compensation through the Plan for their claims against Purdue. They receive no compensation for their separate, extinguished claims against the Sacklers and hundreds of other non-debtors. *See* Ex. 10 at 219, 278, 319. The Sackers' full-throated demand for these releases, despite their estimated net worth estimated of $11 billion, Dkt. 2983 at 172, makes clear the involuntary extinguishment of these claims has value.

c. The Non-Debtor releases deprive opioid victims of their direct third-party claims without adequate notice.

The Non-Debtor releases also violate the opioid victims' constitutional right to adequate notice. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Many never received notice of the Non-Debtor releases, and if they had some notice, were unable to understand them. And no one was given an option to opt in or out of the releases.

Although the bankruptcy court described the publication notice of the Plan as "simple" because it stated that "the plan contemplated a broad release of the Sacklers and their related entities," Ex. 8 at 7, that notice did not make clear the vast extent of the other non-debtors being released. For example, much of the advertising cited as providing notice mentioned only the Sacklers "and certain other individuals and related entities," Ex. 1 at 287-299, without disclosing that the releases included layers of trusts, unborn descendants, lawyers, and an unidentified array of others, *id.*; Ex. 6 at 43. And the notice did not disclose that the Plan would make no payment based on claims being released against non-debtors.

Nor did any of this notice render it possible for the victims to know who they may and may not sue. Because it was impossible to identify who was released and what claims were extinguished, any notice was illusory. In fact, the definition of "Shareholder Released Parties" is so complex and imprecise that no one—not even Purdue's CFO or Mortimer Sackler himself—can identify who is released. *See* Ex. 11 at 110-12; Ex. 14 at 135-36, 139. Dr. Richard Sackler testified that although he tried to read the Non-Debtor releases, they were so "extremely dense" and would take such "an enormous amount of time to fully understand" that he gave up. Ex. 13 at 133. As Purdue's CFO testified, given that even he cannot identify who is being released, the average opioid victim would not be able to do so, either. *See* Ex. 11 at 110 ("Q: And would it be possible for an average opioid victim based on publicly available information to identify all of these assets and individuals that are getting released?" "A: I would presume if I'm not, they wouldn't be able to, no."). Although Dr. Sackler and Purdue's CFO were testifying about a prior version of the plan, the Non-Debtor releases in the current version are no more understandable.

Moreover, the notice that the Plan included these Non-Debtor releases came too late for those who had not filed proofs of claim against Purdue to do so. And the notice of the deadline for proofs of claim said nothing about the releases of the Sacklers or other non-debtors. Ex. 11 at 90-91. Thus, anyone who decided not to bother filing a proof of claim against bankrupt Purdue and instead only pursue the Sacklers (or any of the other released non-debtors) was unable to change their mind upon learning of the Non-Debtor releases.

2. The Bankruptcy Clause does not authorize taking opioid victims' direct non-bankruptcy claims against the Sacklers and other non-debtors.

Because the elimination of direct causes of action held by non-debtor victims against other non-debtors involves non-bankruptcy claims, it also falls outside the powers conferred by the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4.

"Congress' power under the Bankruptcy Clause 'contemplate[s] an adjustment of a failing debtor's obligations.'" *Railway Lab. Executives' Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982) (quoting *Continental Ill. Nat'l Bank & Tr. Co. of Chicago v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648, 673 (1935)). It thus permits bankruptcy courts to approve settlements between debtors and those who have liability to them, such as a settlement between Purdue and the Sacklers requiring the Sacklers to make payments to the estate. That's the stuff of bankruptcy.

But releasing claims by non-debtors against other non-debtors falls outside of this power because it adjusts a non-debtor's obligations—not those of a debtor who is within the bankruptcy court's in rem jurisdiction. While the Bankruptcy Clause authorizes courts to issue "ancillary" orders to enforce their "in rem" adjudications, *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370 (2006), the involuntary Non-Debtor releases here do not do so, *see* Dkt. 3256 at 21-22.

3. The bankruptcy court lacked constitutional authority to force opioid victims to release direct state-law claims against non-debtors.

Under Supreme Court precedent, bankruptcy judges as non-Article III judges do not have authority to enter a final judgment on state law claims between private parties absent all parties' knowing and informed consent. *Stern v. Marshall*, 564 U.S. 462, 482, 493 (2011); *In re Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 669 (2015). Given that Article I judges cannot enter final judgment on such claims it is even more apparent that they cannot permanently extinguish the non-debtors' direct claims against non-debtors. But the court below did just that.

As an Article I judge, the bankruptcy court lacked constitutional authority to enter the Confirmation Order imposing these involuntary Non-Debtor releases forever barring those opioid victims from bringing direct state law claims against the Sacklers and other non-debtors. Even as to non-opioid claims excluded from the release, Ex. 6 at 31, the Confirmation Order exceeds the bankruptcy judge's constitutional authority by empowering him to enter a judgment barring those claims. The Plan precludes any "Person" from litigating such a claim in an Article III court without first obtaining leave of the bankruptcy court. *Id*. at 148. The Plan thus establishes a perpetual, post-confirmation gate-keeping role for the bankruptcy court before anyone—even those who are not Purdue's creditors, *see id*. at 33 (defining "Person")—may assert an excluded non-opioid claim against released non-debtors. *Id*. at 148. If the bankruptcy court determines that such a claim cannot proceed, that disposes of the claim.

B. The Non-Debtor Releases Violate the Bankruptcy Code.

1. The Bankruptcy Code does not authorize extinguishing non-debtors' claims against non-debtors in non-asbestos cases such as this one.

The Non-Debtor releases extinguish opioid victims' direct claims against the non-debtor Sacklers without those claims ever being ruled upon, and without seeking or obtaining the victims' consent to the releases. The releases are effectively a court-ordered discharge of a potentially limitless group of non-debtors for world-wide opioid-related liability. The Non-Debtor releases are so broad that they discharge the Sacklers from liability without a determination of the merits even for fraud and willful misconduct, *see* Ex. 6 at 10, 132-33.

Remarkably, the law would not allow the Sacklers to be discharged from such liability even if they had filed for bankruptcy because those debts are not dischargeable, *see, e.g.*, 11 U.S.C. § 523(a)(2), (6) & (7).

The Bankruptcy Code, however, prohibits courts from extinguishing the claims of non-debtors against other non-debtors with only one exception that does not apply here. The Code specifies that "[a] 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). Rather, the Code provides only for a discharge of the debtor's liabilities. *Id*. §§ 524(a), 1141(d)(1)(A).

Congress authorized bankruptcy courts to impose non-debtor releases in one narrow circumstance inapplicable here. Section 524(g) is the *only* congressional authorization of third-party releases, and it applies exclusively to asbestos cases where the plan can enjoin claims against a limited set of non-debtors. 11 U.S.C. § 524(g). Because Congress expressly authorized only this one exception, courts may not create others. *Cf. Law v. Siegel*, 571 U.S. 415, 424, (2014) ("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."); *accord Czyzewski v. Jevic Holdings Corp.*, 137 S. Ct. 973, 987 (2017).

Thus, the Fifth, Ninth, and Tenth Circuits have held that section 524 "prohibits the discharge of debts of nondebtors." *In re Zale Corp*., 62 F.3d 746, 760 (5th Cir. 1995); *accord In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995); *In re Western Real Estate Fund Inc*., 922 F.2d 592, 600 (10th Cir. 1990); *but see Blixseth v. Credit Suisse*, 961 F.3d 1074, 1084-85 (9th Cir. 2020) (holding section 524(e) did not preclude exculpation clause extending to non-debtors).

The Second Circuit has likewise recognized that, while some cases have allowed such releases, "the only explicit authorization in the Code for nondebtor releases is 11 U.S.C. § 524(g)." *Metromedia*, 416 F.3d at 142-43. And the power to impose such releases in non-asbestos cases cannot derive from section 105(a)—which provides that the court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," 11 U.S.C. § 105(a)—because "[a]ny power that a judge enjoys under § 105 must derive ultimately from some other provision of the Bankruptcy Code." *Metromedia,* 416 F.3d at 142 (internal quotation marks omitted).

Put simply, only section 524 addresses releases and it does not authorize the releases imposed here. Section 524 thus renders the Plan unconfirmable because section 1129(a)(1) prohibits confirmation of a plan that does not comply with "applicable provisions" of the Bankruptcy Code. In addition, section 1141(d) specifies the scope of discharge upon confirmation, and it does not include non-debtors. The residual equitable powers of section 105(a) do not allow what the governing statutory structure and section 524 neither authorize nor permit—and indeed, expressly prohibit. *Law*, 571 U.S. at 421. Because the Confirmation Order effectively discharges the Sacklers and other non-debtors for any world-wide opioid-related liabilities that they bear, it violates the Bankruptcy Code.

2. Second Circuit precedent does not authorize these Non-Debtor releases.

The Second Circuit's decision in *Metromedia* further shows that the Non-Debtor releases here are impermissible. *Metromedia*'s acknowledgement that some cases have tolerated non-debtor releases in "rare" circumstances, *Metromedia*, 416 F.3d at 141-43, notwithstanding the lack of explicit statutory authority for them, cannot be read as holding to the contrary.

First and foremost, the Second Circuit did not authorize releases in the face of the constitutional violations at issue here. *Id*.

Second, *Metromedia* dismissed the appeal as equitably moot, *id*. at 143-45, rendering its statements regarding non-debtor releases dicta.

Third, *Metromedia* disapproves of the types of non-debtor releases at issue here. Unlike the cases described in *Metromedia* as allowing non-debtor releases, the Plan's Non-Debtor releases extend to persons who would have no claim for indemnity or contribution, the released claims are not channeled to a settlement fund "rather than extinguished," and the Plan does not provide full payment of the released claims. *Id*. (internal quotations omitted). Indeed, contrary to Purdue's assertion below that the claims "are not extinguished under the Plan but are instead channeled to the Creditor Trusts," Dkt. 3461 at 107, no one is entitled to any distribution based on their direct claims against the Sacklers or other non-debtors. *See* Ex. 10 at 219, 278, 319.

As *Metromedia* explained, non-debtor releases lend themselves to abuse because they "may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code" and the "potential for abuse is heightened when releases afford blanket immunity." 416 F.3d at 142. The Non-Debtor releases here are emblematic of this sort of abuse. The Sacklers' attempt to hold Purdue's reorganization hostage unless the Non-Debtor releases are imposed does not justify taking third parties' property—their claims against non-debtors—without their consent, adequate notice, or an opportunity to be heard.

Likewise, *In re Quigley Co.*, 676 F.3d 45, 56 (2d Cir. 2012), an inapposite decision on which bankruptcy court heavily relied, Ex. 8 at 126-30, provides no support for the Non-Debtor releases. *Quigley* was an asbestos case governed by section 524(g). Section 524(g) is the only third-party release expressly authorized anywhere in the Bankruptcy Code and it is limited to asbestos cases. The Plan's third-party releases are not related in any way to asbestos liability. Even if section 524(g)'s provisions for asbestos cases applied here, which they do not, the Non-Debtor releases do not satisfy its threshold requirements. Section 524(g) requires that: (i) the releasees are identifiable from the terms of the injunction; (ii) they are "alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor"; *and* (iii) that liability must "arise by reason of" one of four "statutory relationships." 11 U.S.C. § 524(g)(4)(A)(ii); *In re W.R. Grace Co.*, --- F.4th ---, No. 20-2171, 2021 WL 4186678, *1 (3d Cir. Sep. 15, 2021). *Quigley* held that the claims at issue against the debtor's parent—based on the use of its name on the debtor's asbestos products—could *not* be enjoined because the alleged liability was not "by reason of" any of the four "statutory relationships." 676 F.3d at 49, 60-61. Section 524(g)'s requirements are not met here either because, aside from not being an asbestos case, the Non-Debtor releases preclude claims against *unidentified* non-debtors and claims for which a debtor's conduct is *either* a "legal cause" *or* "an otherwise legally relevant factor." Moreover, section 524(g) requires an abundance of other statutory protections not present here, such as the appointment of a future claimants' representative. *See* 11 U.S.C. § 524(g)(4)(B)(i).

II. The Balance of Harms Weighs in Favor of a Stay.

Not only does the government have a likelihood of success on appeal, the balance of the harms also weighs in favor of granting a stay.

When the government is a party, the injury and public interest factors merge. *Cf. Nken*, 556 U.S. at 426. That is particularly true here, where the United States Trustee is acting as the congressionally designated "bankruptcy watch-dog[]," H.R. Rep. No. 95-595 at 88 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6049, and fulfilling his "responsibility to represent and protect the public interest," *Adams v. Zarnel (In re Zarnel)*, 691 F.3d 156, 162 (2d Cir. 2010).

There is no dispute that this case implicates important public interests. Opioid abuse is "the worst manmade epidemic in history," with over 290,000 deaths in the United States since 2015. Dkt. 3276 at 1. Over 615,000 bankruptcy proofs of claim were filed against Purdue. Dkt. 3372 at 5. And those proofs of claim do not include the untold number of additional direct claims against the Sacklers and other non-debtors that Purdue's Plan extinguishes. According to Purdue, when it sought bankruptcy protection, the Sacklers were defendants in approximately 400 civil actions nationwide. Dkt. 2983 at 171. The Plan permanently extinguishes not just these filed claims but also a broad array of opioid-related causes of action, including claims based on "fraud" or "willful misconduct," even if unknown, unforeseen, unsuspected, and unaccrued. *See* Ex. 6 at 10, 132. The permanency of the Non-Debtor releases renders them unlike the preliminary injunction that this Court affirmed in *Purdue Pharma.*, 619 B.R. at 62 ("[The preliminary] injunction . . . does not immunize Dr. Sackler against personal liability.").

Many who have lost, cared for, or financially supported their loved ones begged the court not to release the Sacklers and objected to the deprivation of their due process rights. *See, e.g.,* Dkt. 3235, at 2 ("[P]leading with you to not let the Sacklers gain immunity from . . . any future lawsuits against them."); Ex. 16 at 150-51 (objecting to deprivation of due process and that "[m]any of these aggrieved families that had a love one pass on that was precipitated by

OxyContin, also should be able to file claims against the Sacklers."); Dkt. 3582 at 15-18 (letter from "an advocacy organization with over 12,000 followers" objecting to non-Debtor releases). *See also* Dkt. 2966, 3028, 3125, 3271, 3292, 3368, 3404, 3648, 3677, 3742, 3793. Thousands of others either voted against the Plan or didn't vote at all. Ex. 25 at 5, 10. And the Plan would bar the 400 civil complaints referenced in the disclosure statement from proceeding. Dkt. 2983 at 171. Should a stay be denied, opioid victims will be irreparably harmed by having their causes of action extinguished without their knowing and informed consent and in many cases without notice.

A stay pending appeal preserves the public's right to meaningful appellate review of the Non-Debtor releases. *Adelphia*, 361 B.R. at 349. Purdue itself boldly predicted that "absent a stay pending appeal . . . any appeal of the Confirmation Order may become equitably moot." Dkt. 2983 at 320. Although Purdue and the bankruptcy court have (correctly) asserted that any equitable mootness argument based on the Advance Order would be meritless, Dkt. 3743 at 4, Ex. 7 at 2, 5, neither Purdue's nor the bankruptcy court's opinion binds other parties or an appellate court. And Purdue conspicuously has refused to concede that an appeal would not be equitably moot based on either the passing of the Effective Date or its sentencing under its plea agreement—which will occur before the Effective Date, and possibly as early as December 1, 2021. The "loss of appellate rights is a quintessential form of prejudice" and satisfies the irreparable harm requirement. *Adelphia*, 361 B.R. at 348 (internal quotation marks omitted). Appellees cannot be heard to argue that denying a stay will not irreparably harm those whose rights are extinguished and also seek to evade the appellate review that could restore those rights.

Further, the government's appeal raises an issue that is fundamental to maintaining public confidence in the bankruptcy system, which relies on its procedures and its transparency. The Confirmation Order erodes that confidence by allowing the Sacklers to use Purdue's Plan to evade responsibility for their misconduct without filing bankruptcy themselves and submitting to the transparency required in the bankruptcy process. *Cf. Bank of NY Trust Co., NA v. Official Unsecured Creditors Comm. (In re The Pacific Lumber Co.)*, 584 F.3d 229, 251 (5th Cir. 2009) (explaining that appellate review of non-debtor releases was "consequential to the integrity and transparency of the Chapter 11 process") (internal quotation marks omitted). Imposition of a stay would serve the public interest by ensuring that opioid victims' rights to sue the Sacklers and other non-debtors are protected while the Confirmation Order is reviewed on appeal.[9]

By contrast, although Purdue has argued that a stay will delay initial distributions under the Plan (assuming it is affirmed), any delay can be minimized by expediting the appeal, as this Court and the government stand willing to do. Direct certification under 28 U.S.C. § 158(d)(2), which has been requested from the bankruptcy court but Purdue opposes, could expedite resolution even more quickly. And given that Purdue's pre-Effective Date activities presumably are intended to be accomplished before the Plan could go effective on December 8, 2021, a stay of those activities could cause no more than a couple of months' delay in distributions.

Finally, any delay in initial Plan distributions does not outweigh the outright elimination of rights effected by the Non-Debtor releases. There is no doubt about the importance of affording relief to victims of the opioid crisis. But that fact weighs in favor of a stay given the countless (and uncounted) victims who—without their consent—will have their claims against the Sacklers and other non-debtors forever barred.

CONCLUSION

For these reasons, the government respectfully asks this Court to enter (1) an emergency stay of the Confirmation and Advance Orders pending appeal and (2) an immediate stay pending a decision on this motion. In the alternative, the government asks this Court to stay those orders pending the bankruptcy court's decision on the Stay Motion. If this Court grants no other relief, the government requests a two-week stay to allow time to seek relief in the Second Circuit.

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[9] Purdue's claim that there is overwhelming support for the Plan is vastly overstated and does not show that denying a stay would be in the public interest. Purdue bases its claim on the idiosyncratic way votes for a plan are counted in bankruptcy under 11 U.S.C. § 1126, which looks only to the votes actually cast. So while Purdue asserts that 95% voted to approve its Plan, that is only 95% of the less than 20% who voted. Moreover, those who did vote were not given the choice to opt in or out of the Non-Debtor releases.

October 8, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Judge McMahon's Individual Rules and Practices because it is in 12-point Times New Roman font and does not exceed the twenty-five-page limit.

By *<u>/s/ Linda A. Riffkin</u>*
LINDA A. RIFFKIN
Assistant United States Trustee

CERTIFICATE OF SERVICE

I certify that on October 8, 2021, I caused to be served the foregoing MEMORANDUM IN SUPPORT OF EMERGENCY MOTION BY APPELLANT WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, FOR A STAY PENDING APPEAL via the CM/ECF Electronic Filing system.

By *<u>/s/ Linda A. Riffkin</u>*
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