No. 23-124

IN THE

Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT AD HOC GROUP OF INDIVIDUAL VICTIMS OF PURDUE PHARMA, L.P., *ET AL.*

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QUESTION PRESENTED

Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent.

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STATEMENT OF THE CASE

The Ad Hoc Group of Individual Victims of Purdue Pharma L.P., et al. ("**Ad Hoc Group**") joins in the Statement of the Case set out by the Debtors and only sets out below those factual and procedural aspects of the appeal that are most germane to the Group's argument.

A. The Ad Hoc Group

The Ad Hoc Group is comprised of over 60,000 individuals who were injured either directly or indirectly by exposure to Purdue's opioid products. It includes individuals suffering from addiction and those who are in recovery. It includes incarcerated individuals, individuals who are living in poverty, family members who have lost loved ones to addiction, and children born with neonatal abstinence syndrome ("NAS"). Each member of the Ad Hoc Group filed a timely proof of claim against Purdue seeking recovery for personal injuries caused by exposure to Purdue's opioid products. Together, the Ad Hoc Group members make up over half of those who filed personal injury claims in the bankruptcy cases below ("**Cases**") and approximately 50% of Purdue's voting creditor body by number.[1]

After Purdue commenced the Cases in 2019, the Ad Hoc Group was formed specifically to ensure that any resolution of litigation involving the Debtors and the

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1. *See* Final Decl. of Christina Pullo of Prime Clerk LLC re Solicitation of Votes and Tabulation of Ballots Cast on the Fifth Amended Joint Ch. 11 Plan Reorg. of Purdue Pharma L.P. and Affiliated Debtors et al. [hereinafter Pullo Decl.] Ex. A, *In re Purdue Pharma L.P., et al.,* No. 19-23649 (Bankr. S.D.N.Y. Aug. 2, 2021), Docket No. 3372 [hereinafter Bankr. Docket].

Sacklers[2] regarding opioids protected the needs of all personal injury victims. From its inception, the Ad Hoc Group actively advocated for personal injury victims' interests in the Cases and in the settlement negotiations that gave rise to Purdue's Plan.[3] The Ad Hoc Group was the party most involved in advocating for the specific interests of personal injury victims throughout the confirmation hearing, including on the topic of third-party releases and their impact on individual victims. And, the Ad Hoc Group ultimately was the party that devised the trust distribution procedures by which personal injury victims will receive compensation from the Debtors' estates for their claims against the Debtors and the Sacklers (the "**PI TDP**").

B. The Global Settlement Embodied in the Plan

Through active engagement by the Ad Hoc Group, the opioid victim community has reached a remarkable achievement in the Cases. The global settlement with the Sacklers and Purdue embodied in the Plan provides for:

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2. The term "Sacklers" refers to members of the Mortimer D. Sackler family (also known as "Side A" of the Sackler family) and the Raymond D. Sackler family (also known as "Side B" of the Sackler family).

3. *See* Order Appointing Mediators ¶ 4, Bankr. Docket No. 895 (identifying the mediation parties, among whom the Ad Hoc Group was the only group speaking for opioid personal injury victims); *see also* Twelfth Amended Joint Ch. 11 Plan Reorg. of Purdue Pharma L.P. and Affiliated Debtors, *In re Purdue Pharma L.P., et al.* (the "**Plan**"), Bankr. Docket No. 3726 (excerpted at J.A. 191-296).

- up to $750 million for direct injury reimbursements to personal injury victims which will be distributed through the PI TDP in a streamlined process that compensates personal injury victims for their claims against both the Debtors and the Sacklers, J.A. 561;

- more than $ 5.5 billion specifically allocated for use in the abatement of the opioid crisis, J.A. 811-15;

- a structure to ensure that non-federal government recoveries in the Cases must be spent on abatement of the opioid crisis and not for general government purposes.[4] *See, e.g.*, Decl. of Jon Lowne ¶¶ 5-6, Bankr. Docket No. 3440 (Plan will allocate the funds to nine creditor trusts, five of which will fund opioid abatement programs); Decl. of Jesse DelConte ¶ 31, Bankr. Docket No. 3456 (noting that two of the eight abatement trusts to be funded, the National Opioid Abatement Trust and a trust benefiting Native American tribes, are together expected to receive over $4 billion);

- the public disclosure of millions of documents (including privileged documents that could not be obtained through regular litigation discovery) that will provide unparalleled transparency into how Purdue and the Sacklers were able to operate as they did for over a decade after Purdue pleaded

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4. As addressed below, the United States is the only governmental entity that refused to commit its recoveries in the Cases to funding abatement programs. *See infra* at 38; *see also* J.A. 331.

guilty to federal and state crimes, J.A. 238-63 [Plan § 5.12];

- the permanent removal of the Sacklers, who had owned and operated Purdue for decades, from the prescription opioid business, J.A. 35-36;

- through carefully drafted third-party releases ("**Releases**"), a framework for ensuring that abatement money and personal injury reimbursement funds do not flow back to the Sacklers through potential indemnity and contribution claims,[5] J.A. 237-38, 277-79 [Plan §§ 4.16; 10.7(b-c)]; and

- a consensual resolution with the Sacklers which the Bankruptcy Court found (without challenge) was far better than creditors could have reasonably achieved through active litigation with the Sacklers. J.A. 365 ("Under the most realistic scenarios described in [the "best interest" liquidation] analysis, there would literally be *no* 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." (emphasis in original)).

5. Absent the Releases, the Debtors likely would need to litigate whether they are required to pay twice for claims that are based on virtually identical sets of facts—first, on various creditors' allowed claims against the Debtors, and second, on the indemnification claims asserted against the Debtors by those Sacklers serving as prepetition directors and officers. *See* J.A. 740-47.

Notably, this Plan settlement explicitly preserves (i) all personal injury victims' rights to assert unique personal claims against the Sacklers that are not based generally on Purdue's conduct, J.A. 274-75 [Plan § 10.7(b)] (indicating that the claims subject to the Releases 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")[6] and (ii) any governmental entity's right to bring criminal claims against the Sacklers, J.A. 198-99, 290-91.

Although no amount of money could fully compensate individual victims for the injuries caused by Purdue's and the Sacklers' misleading marketing of OxyContin, the Ad Hoc Group believes that the Plan settlement represents a watershed moment in the ongoing opioid crisis and constitutes the best (and perhaps only) path forward for Purdue's creditor body. In light of these facts, as a group, personal injury victims voted overwhelmingly in favor of the Plan (including the tailored Releases of the Sacklers), with more than 96% of the estimated personal injury class voting in favor of the Plan. Pullo Decl., ¶¶ 10-12, Ex. A., Bankr. Docket No. 3372.

C. The Appeals

1. The Appellants

Of the hundreds of thousands of creditors who participated, and are entitled to share, in the achievements

6. As the Second Circuit confirmed, the Bankruptcy Court limited the Releases "to *only* claims that directly affected the Debtors' estate and for which Purdue's conduct was a legal cause, or a legally relevant factor, of any released cause of action against the Sacklers." J.A. 842 (emphasis in original).

embodied in the Plan, only a scant few have ever sought to overturn that result on appeal. Over time, the appealing creditors have included eight states and the District of Columbia, an uncertified class of Canadian municipalities and indigenous nations, and six of the approximately 130,000 personal injury victims who filed timely proofs of claim in these Cases. J.A. 840. Joining these creditors in their opposition to the Releases is the U.S. Trustee.

Although the U.S. Trustee is not a creditor in the Cases, has no economic stake in the outcome of these proceedings, and has no ties to the opioid crisis, the U.S. Trustee constructs his appeal ostensibly on behalf of personal injury victims whose prepetition claims against the Debtors and the released Sacklers are all resolved by the Plan. *See, e.g.*, Pet'r's Br. 14 ("Nonconsensual releases enable tortfeasors to obtain legal immunity from the claims of their victims without taking on the obligations required by the Code. And they deprive tort victims of their day in court without consent."); *id.* at 44-45 ("The court of appeals' decision is a roadmap for corporations and wealthy individuals to misuse the bankruptcy system to avoid mass-tort liability. Such releases deprive tort victims of their day in court without consent."); *id.* at 45-46 ("Basic principles of fairness forbid nonconsenting claimants from being forced to forgo their claims against the Sacklers, while the Sacklers retain much of their fortune."). As discussed *infra* at 34-39, attempts by the U.S. Trustee to carry the mantle of personal injury victims are misplaced in this appeal. The victims are here, represented by the Ad Hoc Group, and they want closure, not more litigation.

As it stands, most appellants have now resolved their objections to the Plan and the Confirmation Order.[7] Today, the only parties who continue to press their appeals are the U.S. Trustee (represented by the Solicitor General), the Canadian Appellants, and one family of personal injury victims.

2. The Nature of Individuals' Prepetition Claims Affected by the Releases

Because the primary issue on appeal has been the legality and propriety of the Releases, a recurring question in the proceedings below has been exactly what types of prepetition claims and causes of action belonging to creditors are covered by the Releases. Each of the three courts that considered this issue distinguished between two types of prepetition creditor claims that could be brought against the Sacklers: "direct claims" and "derivative claims."

As the Second Circuit summarized: "In this context, direct claims are causes of action brought to redress a direct harm to a plaintiff caused by a nondebtor third party . . . . By contrast, derivative claims are 'ones that arise from harm done to the estate and that seek relief against [the] third part[y] that pushed the debtor[s] into bankruptcy.'" J.A. 870. The District Court articulated this distinction as follows: "'Derivative' claims are those that seek to recover from the estate indirectly 'on the basis of

7. Findings of Fact, Conclusions of Law, and Order Confirming the Twelfth Amended Joint Ch. 11 Plan Reorg. of Purdue Pharma L.P. and Affiliated Debtors (the "**Confirmation Order**"), Bankr. Docket No. 3787; *see also* J.A. 419-555.

[the debtor's] conduct,' as opposed to the nondebtor's own conduct. 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." J.A. 750 (internal citations omitted). By contrast, direct claims, as parsed by the District Court, "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 nondebtor's conduct." J.A. 751 (internal citations omitted).

The Bankruptcy Court first considered the import of, and the distinction between, creditors' direct and derivative claims at the confirmation stage. It began by ruling that estate claims against the Sacklers included avoidable transfer claims as well as "claims based on theories of alter ego, piercing the corporate veil, and breach of fiduciary duty/failure to supervise." J.A. 358. The Bankruptcy Court explained that these claims "appear to stem from allegations against the 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." J.A. 369 As for any potential direct claims against the Sacklers that would be the subject of the Releases, the Bankruptcy Court noted that they all would necessarily depend on the same factual allegations. *Id.* ("[V]ery closely related, indeed usually the same, factual allegations also underlie

the objecting third-party state's claims against the Sackler family members."); *see also* J.A. 381 ("[T]he 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.").

Given the assumed legality of the Releases at the confirmation stage, there was no need for the Bankruptcy Court to engage in a more nuanced analysis of whether particular creditors' claims against the Sacklers were truly "direct." Instead, the Bankruptcy Court assumed *arguendo* that such claims existed and then analyzed its constitutional and statutory authority to release them. Months later, however, when considering the U.S. Trustee's and other appellants' motions for a stay pending appeal, the Bankruptcy Court had the opportunity to reconsider the exact nature of the creditors' claims against the Sacklers that the U.S. Trustee argued were being improperly released. At a hearing held on November 9, 2021, the Bankruptcy Court concluded that all claims that the U.S. Trustee had identified were derivative, not direct. *See* J.A. 625-31. Specifically, in discussing why the Plan treats personal injury claims as receiving a distribution based on liquidation of the underlying claim against the Debtor, the Bankruptcy Court explained that such treatment "does not mean that the personal injury claimants are not receiving value on account of their third-

party claims, but it reflects I believe, that their third-party claims are overlapping, and though entitling them perhaps to a direct recover[y] as opposed to a recovery through the Debtor, viewed as derivative claims under the analysis by the circuit in the Tronox case as well as by other courts that have distinguished claims that may be direct but are asserted because of harm to all of a debtor's creditors as opposed to individual creditors as discussed in the Tronox case, which is referenced and discussed at some length in my opinion." J.A. 629-30.

The direct/derivative issue next arose at the District Court level. As the District Court noted in its opinion, no party had challenged the Bankruptcy Court's power to release creditors' derivative claims against the Sacklers. J.A. 751. Rather, the appellants at that stage argued that the Releases applied not just to derivative claims but also to certain "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." J.A. 636.

Because the Releases definitionally apply only to claims for which the Debtors' conduct was "the legal cause" or "a legally relevant factor," J.A. 275, the Ad Hoc Group at that time questioned whether there were, in fact, any viable creditor claims against the Sacklers that could properly be characterized as direct. *See* Ad Hoc Group of Individual Victims' (I) Appellee Br. and (II) Joinder to Appellee Brs. of Debtors and Off. Comm. Unsecured Creditors 19-29, No. 21-cv-7532 (S.D.N.Y. Nov. 15, 2021), Docket No. 157 [hereinafter Dist. Docket]. The

District Court joined in that inquiry. *See* Order Consol. Newly-Docketed Appeals and Addressing Other Matters 2, Dist. Docket No. 75 (requesting the identification of "some claims (preferably actual claims, but if not then hypothetical claims) as to which the defendant would have no claim on the Debtors' estates, but which are being released under the challenged third-party release").

In response, the U.S. Trustee sought judicial notice of eight complaints ("**Sample Complaints**") filed by individuals and organizations in courts around the country. *See* Appellant U.S. Trustee's Notice Mot. and Mot. Judicial Notice, Exs. 1-8, Dist. Docket No. 89. The Sample Complaints each named various Sacklers as defendants, as well as (at times) Purdue and other entities. In various levels of detail, each Sample Complaint alleged that the named Sacklers acted wrongfully in their roles as Purdue's board members and officers by directing Purdue to aggressively market OxyContin while downplaying the risk of addiction ("**Marketing/Distribution Conduct**"). Certain Sample Complaints also alleged that the Sacklers, as shareholders, had profited from Purdue's misconduct and improperly removed billions of dollars from the company ("**Improper Shareholder Conduct**"). All of the Sample Complaints sought to recover directly against the Sacklers based on their role in such conduct.

The Sample Complaint styled *Heden v. Johnson & Johnson et al.*, No. 19-00586 (D.R.I. Nov. 12, 2019), Docket No. 7-1 [hereinafter Heden Compl.], is illustrative.[8]

8. The Heden Complaint was attached as Exhibit 3 to the U.S. Trustee's motion for judicial notice. *See* Appellant U.S. Trustee's Notice Mot. and Mot. Judicial Notice, Dist. Docket. No. 89-3.

Prior to the commencement of the Cases, the plaintiff—Mr. Heden—sued various pharmaceutical companies, including Purdue, Teva, and Mallinckrodt (among others), and some of their directors and officers, for the defendants' roles in fueling the opioid epidemic. Among others, the Heden Complaint names as defendants several Purdue executives, specific Sacklers, and "[t]he Sackler [f]amily."[9] Heden Compl. 1-2. The Heden Complaint alleges that (i) defendants created a dangerous and addictive product, OxyContin, (ii) Purdue and others perpetrated a massive fraud by lying about the risk of addiction to patients, (iii) defendants marketed OxyContin and other opioids for pain of all types without proper warnings to the public, and (iv) defendants caused the overprescription of OxyContin and created an environment conducive to addiction, causing an opioid epidemic and a public nuisance on a massive scale. *Id.* at 3-4. The Heden Complaint then describes, in detail, the wreckage that this conduct caused in Mr. Heden's life, including his addiction to OxyContin and how that addiction undermined his health, caused him to lose his job, and inflicted significant emotional harm on his family. *See, e.g.*, *id.* at 6 ("I was in such bad shape on Oxy[C]ontin, my mother and father asked me how I'd like my funeral if and when I died.").[10]

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9. The Heden Complaint specifically names as defendants Richard, David, and Mortimer Sackler, as well as "the Sackler [f]amily."

10. The Ad Hoc Group singles out Mr. Heden here only because his complaint is in the record below and not because his story is uniquely egregious. The tragedy of these Cases is that there are hundreds of thousands of personal injury victims with similarly heartbreaking stories of loss and destruction occasioned by OxyContin.

With respect to the named Sacklers, the Heden Complaint includes two specific Marketing/Distribution Conduct allegations against Richard Sackler, alleging that he (i) "allowed for a Blizzard of Prescriptions to be flooded out to the market for pure earnings per share gains, and . . . joked about treating the patients he got addicted to OxyContin with more Purdue Pharma drugs down the line," and (ii) "reveled in the sales, and the hurt he caused. No matter who he hurt, it was business as usual at Purdue Pharma L.P., as well as all other companies listed above with Richard Sackler and others pushing a purified street drug." *Id.* at 9, 12. The Heden Complaint further alleges that the Sacklers "took home tens of billions of dollars so far to this day on sales of Oxycodone and Oxycontin." *Id.* at 2; *see also id.* at 3 ("the Sackler family alone has taken home between 5 and 15 billion dollars to this day selling the pain killer that has become the poster-drug of the opioid crisis.").

Based on these allegations, the Heden Complaint seeks (i) recovery "from each company with corresponding C.E.O.," with half of the recovery to be used for abatement in Rhode Island, and half to compensate the plaintiff's personal injuries, and (ii) a judgment that "the Sackler [f]amily be forced to divest ownership of not only Purdue Pharmaceuticals L.P. as mentioned, but Rhodes Pharmaceuticals L.P. of Coventry, Rhode Island." *Id.* at 9-10. It further seeks an order (i) determining that the defendants engaged in unfair and deceptive acts and practices in violation of Rhode Island law, created a public nuisance, and were negligent, (ii) requiring the defendants to pay restitution to all who suffered as a result of their conduct, "massive civil penalties under the law," and the plaintiff's costs and attorneys' fees, (iii) requiring the

defendants to disgorge all payments received as a result of their unlawful conduct, and (iv) requiring the defendants to abate the public nuisance that they created. *Id.* at 14.

In reviewing the appellants' submissions, the District Court specifically acknowledged that "the interconnectedness of the claims against the Sacklers with those against the Debtors is patent." J.A. 742. Based on its review, the District Court then characterized creditors' prepetition claims against the Sacklers that would be subject to the Releases as falling broadly into two buckets:

First, the District Court identified claims against "members of the Sackler family who played no role in running the affairs of the company," i.e., claims of Improper Shareholder Conduct. J.A. 744. As to those claims, the District Court noted that "despite months of my asking, no one can identify any claim against [the Sacklers] 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." J.A. 744. The District Court concluded that "any claims relating to those transfers rightfully belong to the Debtors . . . . And those claims are not implicated by the Section 10.7 Shareholder Release." J.A. 744; *see also* J.A. 740 (noting the "congruence between the only claim that anyone has identified against the other Sacklers and Purdue's own claim for fraudulent conveyance"). Thus, no party (including the U.S. Trustee) challenged the District Court's conclusion that claims relating to transfers of money from Purdue rightfully belong to the Debtors (i.e., are derivative), or identified any direct claims against the Sacklers *qua* shareholders that could not be released.

<u>Second</u>, the District Court identified other claims against those Sacklers who were former directors and officers of Purdue, or as the District Court referenced them, the "'insider' or 'managerial' Sacklers." J.A. 742. The District Court acknowledged that

> the direct and derivative claims against the "insider" or "managerial" Sacklers, [i.e., the Marketing/Distribution Conduct claims], 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 . . . . 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. 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.

J.A. 742-43 (internal quotation and citations omitted). Despite having concluded that the conduct underlying both the direct claims and estate claims were "essentially congruent," the District Court nevertheless concluded that at least some of those claims were direct. It then held that the Bankruptcy Code did not authorize their release. *See* J.A. 802-03.

3. The Second Circuit Decision

On appeal, the Second Circuit reversed.

The Second Circuit began with the premise that the Releases covered both derivative and direct claims against the Sacklers. As to the former, the Second Circuit observed that, "[a]s conceded by the parties, fraudulent transfer claims, for example, are typically derivative claims in that the real injury is to the Debtors' estate, and it is well-settled that a bankruptcy court may approve not only third-party releases which are consensual, but also third-party-releases of derivative claims because those claims really belong to the estate of the debtor." J.A. 871. As to any non-derivative claims, the Second Circuit found that some claims against the Sacklers who are former directors and officers of Purdue could be characterized as direct. *See* J.A. 871 n.15 ("[C]ertain consumer protection act claims at a minimum constitute direct claims in that the injury belongs directly to the claimant, and not to the Debtors. We need not define the exact claims which fall under the umbrella of direct claims but note that certain state law claims under consumer protection acts likely do."). The Second Circuit concluded, however, that the Bankruptcy Court "possessed both jurisdiction and statutory authority to approve the Releases because the limitations on the scope of the releases are significant and no other argument bars their imposition." J.A. 872.

In so holding, the Second Circuit (like the Bankruptcy Court and the District Court before) specifically acknowledged the overlap between creditors' claims against those Sacklers who were former directors and officers and their claims against the Debtors. J.A. 891-

92. The Second Circuit also confirmed that litigation of the overlapping claims against the Sacklers who were directors and officers would necessarily affect the Debtors' estates because, without the Releases, "the Debtors would, in all likelihood, be required to litigate indemnity and contribution claims brought against them by the Sacklers, which would likely deplete the *res*, no matter the ultimate outcome of those claims." J.A. 892.

Given these findings of congruity (by three courts now), none of which are challenged here, the issue at bar becomes more narrow. This Court does not need to address the propriety writ large of bankruptcy plan releases of creditors' claims against nondebtors that are wholly unrelated to a debtor's conduct or to a debtor's underlying liability. On the contrary, the question here relates to bankruptcy plan releases of direct claims that are so intertwined with derivative claims that litigation of the former is effectively litigation of the latter. In short, the question addressed below concerns the Bankruptcy Court's authority to release those hypothetical direct claims against the Sacklers that have already been found to be wholly factually duplicative of, and to have significant legal overlap with, the derivative claims against Purdue.

SUMMARY OF THE ARGUMENT

Rather than repeat the other Respondents' arguments regarding the constitutional and statutory underpinnings of the Releases, in which arguments the Ad Hoc Group joins, the Ad Hoc Group addresses two key points that particularly affect its members.

First, as set out in Part I, the answer to the Question Presented is definitively "yes." Indeed, if the term "release" in the Question Presented is interpreted to mean to prevent, either directly or indirectly, the commencement or prosecution by a creditor of an action to recover on its prepetition claim, then there is no dispute that the Bankruptcy Code authorizes the nonconsensual "release" of claims held by creditors against third parties.[11] As set

11. Although the Question Presented uses the term "release," the Petitioner and amici use that term to refer to a variety of distinct concepts such as discharge of debt and enjoinment of claims. *See, e.g.*, Amicus Curiae Br. of Hon E. Wedoff & Law Professors Supp. Pet'r 6 ("Further, the Purdue Plan permitted a discharge of debt for claims which the Code expressly states *cannot be discharged* as to individual debtors." (emphasis added)); Amicus Curiae Br. of Bankr. Law Professors Ralph Brubaker & Bruce A. Markell, et al. Supp. Pet'r 5 ("The entire purpose and function of a nonconsensual nondebtor-release provision is to discharge debts of a nondebtor, in precisely the same fashion that the Bankruptcy Code authorizes discharge of a debtor's debts."); Amici Curiae Br. of Bankr. Law Professors Supp. Pet'r 9 ("The Sackler Release would enjoin, among others, direct claims. . . ."); Amicus Curiae Br. of Martin J. Bienenstock & Daniel S. Desatnik Supp. Pet'r 12 ("When it comes to individuals, their discharges in bankruptcy cases are limited by a multitude of nondischargeable claims . . . ."); Amicus Curiae Br. of Nexpoint Advisors, L.P. & Nexpoint Asset Mgmt., L.P. Supp. Pet'r 4 ("Under the express terms of the Bankruptcy Code, a discharge affects only the debtor, not third parties who have not themselves declared bankruptcy."); Amicus Curiae Br. of "Texas Two-Step" Victims Supp. Pet'r 7 ("The first question, then, is whether a bankruptcy court has jurisdiction to enjoin a claimant from recovering against a nondebtor third party without that claimant's consent."); Amicus Curiae Br. of Adam J. Levitin Supp. Pet'r 8 n.16 ("[T]he label does not affect the constitutional issue, but the Sackler release actually is a discharge for the Sacklers."); Amicus Curiae Br. of Insolvency

out below, and as specifically noted by the Second Circuit, decades of well-settled Circuit Court jurisprudence authorize the permanent release of creditors' prepetition derivative claims without the creditors' consent. All of that jurisprudence is deeply rooted in the Bankruptcy Code's grant of exclusive authority to bankruptcy courts over claims and causes of action that directly or indirectly affect the bankruptcy *res*. Indeed, the U.S. Trustee acknowledges and embraces a bankruptcy court's authority to oversee the disposition of creditors' prepetition claims that are found to be derivative in nature. *See, e.g.*, U.S. Trustee Appellant Br. 42, Dist. Docket No. 91 ("[A] claim based on the fraudulent conveyance of assets from the debtor to a third party is one that properly belongs to the estate."); U.S. Trustee Reply Br. 20, Dist. Docket No. 191 ("The release of derivative claims was effected by the Plan's unchallenged section 10.6(b) (deeming released any "derivative claims asserted or assertible by or on behalf of the Debtors or their estates')."). The U.S. Trustee makes this concession even though there is no provision in the Bankruptcy Code sanctioning that result with the specificity that is found in section 524(g) of the Bankruptcy Code. Thus, the main legal principle on which the U.S. Trustee bases this appeal—that, outside the narrow strictures of section 524(g), the Bankruptcy Code does not authorize a bankruptcy court to adjust the debts of third-party plaintiffs and nondebtor defendants—is demonstrably wrong.

Law Comm. Bus. Law Sec. of Cal. Law. Ass'n in Supp. of Neither Pet'r nor Resp'ts 11 ("A full payment by or on behalf of a third party to the creditor may not result in the third party's discharge of the type that is prohibited by 11 U.S.C. § 524(e)."). For purposes of the analysis, the Ad Hoc Group utilizes a similarly expansive view of what "release" means practically.

If, however, this Court were to accept the U.S. Trustee's invitation to rule that a bankruptcy court may never, except as provided in section 524(g) of the Bankruptcy Code, approve a plan releasing any claim that was or could have been brought by a creditor against a nondebtor prior to bankruptcy without consent, it will open the proverbial floodgates of litigation. Disturbing the bankruptcy courts' authority to approve plans containing nonconsensual third-party releases, particularly in complex chapter 11 cases such as the one *sub judice*, would authorize and indeed invite creditors to seek individual recoveries from third parties for conduct that harmed the entire creditor body (referred to herein as "duplicative direct claims"), thereby hoarding recoveries for themselves. That result is the very "race to the courthouse" that the Bankruptcy Code was designed to prevent by creating a centralized process for resolving all claims affecting property of the estate. It is only the ability of a bankruptcy court to release the prosecution of duplicative direct claims that prevents this unjustifiable and value-destructive result.

Second, as set out in Part II, the U.S. Trustee's brief at times provides an incomplete and inaccurate presentation of the record with respect to personal injury victims and their prepetition claims, the PI TDP, and the U.S. Trustee's purported authority to speak for victims, all of which are corrected below. Save for one personal injury appellant, the actual victims here want this Plan, want the Releases, and want closure, not the opportunity for endless, damaging, and assumedly futile litigation against the Sacklers.[12] In fact, the only party that will be

12. Nowhere in the briefs of the U.S. Trustee, the supporting respondents, or the supporting amici, do those advocating for the preservation of victims' claims against the Sacklers point this

economically benefitted by a reversal here is the United States, which stands to recover $2.0 billion ahead of all of Purdue's creditors if the Plan fails, as addressed in Part II(A), *infra*.

ARGUMENT

I. REVERSING THE SECOND CIRCUIT'S DECISION WOULD UPEND DECADES OF BANKRUPTCY JURISPRUDENCE REGARDING THE NONCONSENSUAL RELEASES OF CREDITORS' PREPETITION CLAIMS

Although the U.S. Trustee has framed this appeal as a vehicle for considering the propriety of all "nonconsensual third-party releases" in bankruptcy cases, *see* Pet'r's Br., the Second Circuit only addressed the Bankruptcy Court's authority to approve the very specific nonconsensual release of prepetition claims held by Purdue's creditors against those Sacklers (i) who were directors and/or officers of the Debtors, (ii) for conduct taken in their capacity as directors and officers of the Debtors, (iii) which claims are based on "virtually identical sets of facts" as related claims against the Debtors, J.A. 742, (iv) in exchange for which the Sacklers contributed $5.5 to 6 billion of value. All other direct third-party claims of personal injury victims and all criminal prosecutions by governmental authorities against the Sacklers are expressly preserved. As set out below, the Second Circuit correctly affirmed the Bankruptcy Court's approval of these specific Releases in the Confirmation Order.

Court to a single instance in which a personal injury victim ever obtained a judgment against any of the Sacklers prior to Purdue's bankruptcy filing. The Ad Hoc Group is aware of none.

Upon the commencement of a case under the Bankruptcy Code, the debtor's property generally becomes property of the newly-created bankruptcy estate. *See Commodity Futures Trading Comm'n v. Weintraub*, 417 U.S. 343, 351 (1985) (citing 11 U.S.C. §§ 323, 541). That "estate," as defined in the Bankruptcy Code, includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). A debtor's estate thus includes any claims or causes of action that the debtor could have brought before it filed for bankruptcy. *See United States v. Whiting Pools*, 462 U.S. 198, 205 n.9 (1983); *Bd. of Trs. of Teamsters Loc. 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 169 & n.5 (3d Cir. 2002).

Under the Bankruptcy Code, the trustee is vested with the right to pursue, settle, sell, abandon, or release all such estate claims. 11 U.S.C. § 323 (providing that the trustee "is the representative of the estate" with the "capacity to sue and be sued" on its behalf). Although section 323 of the Bankruptcy Code only speaks of "capacity," courts have interpreted that provision to provide the trustee with exclusive authority to bring claims that are property of the estate. *See Artesanias Hacienda Real S.A. de C.V. v. N. Mill Cap., LLC (In re Wilton Armetale, Inc.)*, 968 F.3d 273, 280 (3d Cir. 2020) ("[O]nce a cause of action becomes the estate's property, the Bankruptcy Code gives the trustee, and only the trustee, the statutory authority to pursue it."). This judicial gloss of "exclusivity" on section 323 exists not because of any language in the Bankruptcy Code that expressly provides that the trustee's authority is "exclusive," but because of the fundamental bankruptcy principle (recognized by this Court in *Weintraub*, 471 U.S. at 351) that the trustee "has the duty to maximize

the value of the estate," and is deemed to be the most appropriate party to pursue estate claims that inure to the benefit of all creditors. "This [standing concept] promotes the orderly distribution of assets in bankruptcy, and comports with 'the fundamental bankruptcy policy of equitable distribution to all creditors that should not be undermined by an individual creditor's claim.'" *Emoral, Inc. v. Diacetyl (In re Emoral, Inc.)*, 740 F.3d 875, 879 (3d Cir. 2014) (quoting *Koch Refin. v. Farmers Union Cent. Exch., Inc*, 831 F.2d 1339, 1344 (7th Cir. 1987)).

As such, courts have universally held that, once a bankruptcy case has commenced, "creditors lack standing to assert claims that are 'property of the estate.'" *Emoral,* 740 F.3d at 879 (quoting *Foodtown*, 296 F.3d at 169). This is true even if such claims—such as state law fraudulent conveyance claims—were validly held by creditors prepetition. *Schimmelpenninck v. Byrne (In re Schimmelpenninck)*, 183 F.3d 347, 359 (5th Cir. 1999) ("[E]ven if a claim 'belongs to' the creditor [prepetition], the trustee is the proper party to assert the claim, for the benefit of all creditors" where the action is one "by the estate that belong to the estate" or "by individual creditors asserting a generalized injury to the debtor's estate, which ultimately affects all creditors."). Courts define such "derivative claims" broadly in the context of bankruptcy as ones that "arise[] from harm done to the estate" and that "seek[] relief against third parties that pushed the debtor into bankruptcy." *Picard v. JPMorgan Chase Bank & Co. (In re Bernard L. Madoff Inv. Sec. LLC)*, 721 F.3d 54, 70 (2d Cir. 2013).

For example, prior to commencement of a bankruptcy case, claims against corporate fiduciaries of a debtor

alleging misconduct, mismanagement, or neglect of duty can be brought by shareholders on behalf of the corporation, but after the filing of bankruptcy such claims vest exclusively in the trustee of that debtor. *See Pepper v. Litton*, 308 U.S. 295, 307 (1939) ("While normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action, it is, in the event of a bankruptcy of the corporation, enforceable by the trustee. For that standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders."); *see also Koch Refin.* in, 831 F.2d at 1344 ("It has long been held that rights of action against officers, directors and shareholders of a corporation for breaches of fiduciary duties, which can be enforced by either the corporation directly or the shareholders derivatively before bankruptcy, become property of the estate which the trustee alone has the right to pursue after the filing of a bankruptcy petition.").

Similarly, once a debtor files for bankruptcy, any claims that a creditor might have brought against a third party who received a fraudulent transfer from that debtor become the exclusive property of the debtor's estate. This is because the creditor's alleged injury is deemed secondary to and derivative of the harm to the debtor, and any recovery will inure to the benefit of all creditors of the bankruptcy estate. *See, e.g.*, *Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 708-09 (7th Cir. 1994) ("[T]he right to recoup a fraudulent conveyance, which outside of bankruptcy may be invoked by a creditor, is property of the estate that only a trustee or debtor in possession may pursue once a bankruptcy is under way.").

In the same vein, creditors' prepetition claims against third parties relying on theories of indirect liability (such as alter ego, veil piercing, or successor liability) have routinely been found to be property of the bankruptcy estate, because establishing that a third party is indirectly liable for claims against a debtor benefits the entire creditor body by "increas[ing] the pool of assets available to all creditors." *Tronox Inc. v. Kerr-McGee Corp. (In re Tronox Inc.)*, 855 F.3d 84, 99-100, 103 (2d Cir. 2017) ("Congress's intent was to protect all creditors by making the trustee the proper person to assert claims against the debtor. This reasoning extends to common claims against the debtor's alter ego or others who have misused the debtor's property in some fashion." (quoting *St. Paul Fire & Marine Ins. Co. v. Pepsico, Inc.*, 884 F.2d 688, 701 (2d Cir. 1989)).[13]

In distinguishing derivative claims from particularized or "direct" claims exclusive to individual creditors, "labels are not conclusive, since plaintiffs often try, but are not permitted, to plead around a bankruptcy." *Id.* at 100. Accordingly, the Second Circuit, for example, has long held that, "[i]f a claim is a general one, with no particularized

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13. In *Tronox,* for example, the Second Circuit affirmed the district court's classification of the plaintiffs' claims as "generalized, derivative claims comprising estate property" because, while establishing the "underlying tort claim" against the debtors would "benefit only the . . . [p]laintiffs as individual creditors," establishing the alter ego claim "would benefit all creditors . . . generally." 855 F.3d at 107; *see also Koch Refin.,* 831 F.2d at 1346-49 (finding state law allowed the trustee to bring an alter ego action on behalf of the debtor corporation and, thus, the trustee had the exclusive right to bring all "general" alter ego claims that were "common to all creditors").

injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action." *St. Paul Fire & Marine*, 884 F.2d at 701.

Significantly, the migration of standing to assert prepetition claims against certain nondebtor third parties, from creditors prepetition to the trustee postpetition, has been extended to creditors' causes of action that are, in fact, based on a nondebtor's prepetition wrongful conduct that harmed the debtor. The Second Circuit decision in *Marshall v. Picard (In re Bernard L. Madoff Inv. Secs. LLC)*, 740 F.3d 81, 89 (2d Cir. 2014) illustrates this point. In *Madoff*, former customers of the bankrupt Madoff estate (Bernard L. Madoff Investment Securities LLC or "BLMIS") sued Madoff's co-conspirator, Jeffry Picower, in the Southern District of Florida, asserting state law tort claims.[14] The Second Circuit addressed whether those lawsuits by nondebtors against nondebtor third parties violated the permanent injunction entered by the bankruptcy court barring parties from asserting any claim "duplicative or derivative of the claims brought by the Trustee, or which could have been brought by the Trustee." *Id.* at 87 (emphasis omitted). The plaintiffs argued they did not, because their lawsuits asserted claims under Florida law for civil conspiracy, conversion, and conspiracy to commit violations of Florida's Civil

14. *See Fox v. Jeffry M. Picower Estate et al.*, No. 10-cv-80252 (S.D. Fla. Feb. 16, 2010), Docket No. 1; *Marshall v. Jeffry M. Picower Estate et al.*, No. 10-cv-80254 (S.D. Fla. Mar. 15, 2010), Docket No. 7.

RICO Act.[15] Specifically, they argued that their state law causes of action (i) had different elements than the trustee's fraudulent transfer claims—and did not rely on the existence of fraudulent transfers at all,[16] and (ii) were based on the nondebtor defendants' own improper conduct, such as "preparing false documentation, recording fictional profits and concealing BLIMIS's true state of affairs from investors and the public."[17] Notwithstanding these contentions, the Second Circuit found that all of the plaintiffs' tort and statutory claims were, in fact, derivative of the trustee's fraudulent conveyance claims under sections 550(a)(1) and 548 of the Bankruptcy Code, and therefore, the bankruptcy court was authorized to enjoin those actions. *Madoff*, 740 F.3d at 90-93.

Applying these principles to the Heden Complaint, discussed *supra* at 11-13, that pleading alleges both

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15. Fox Compl., *supra* note 14, 18-25; Marshall Compl., *supra* note 14, 20-25.

16. Fox argued, for example, that under Florida law her civil conspiracy claim did not turn on the existence of a transfer from the debtors, or the debtors' intent in making that transfer. It only required "(i) an agreement between two or more parties; (ii) to do an unlawful act or to do a lawful act by unlawful means; (iii) an overt act in pursuance of the conspiracy; and (iv) resulting damage to the plaintiff." Reply Br. for Claimant-Appellant Adele Fox, *In re Bernard L. Madoff Inv. Secs. LLC*, No. 12-1645, 2012 WL 4322050, at *9 (2d Cir. Sept. 14, 2012). She further argued that the Picower defendants "agreed and conspired to participate" in Madoff's criminal scheme through their own acts, and "[t]hese acts give rise to a statutory right of action under Florida law against the Picower defendants that exists independently of any fraudulent transfers." *Id.* at *11, 13.

17. *Id.* at *9.

that certain officer and director Sacklers engaged in Marketing/Distribution Conduct and also that the "Sackler [f]amily" engaged in Improper Shareholder Conduct. As a remedy, the Heden Complaint seeks a determination that the Marketing/Distribution Conduct violated Rhode Island laws giving rise to damages, civil penalties, injunctive relief, and disgorgement of all the funds that the Sacklers improperly received. The U.S. Trustee concedes that Mr. Heden's claim for Improper Shareholder Conduct—which is based solely on the money that the Sacklers distributed out of Purdue—is properly released by the Plan. *See, e.g.*, U.S. Trustee Appellant Br. 42; U.S. Trustee Reply Br. 20, *supra* at 19. The Second Circuit specifically noted that concession in its decision. *See* J.A. 871. Similarly, the U.S. Trustee did not appeal the Bankruptcy Court's holding that any prepetition alter ego or veil piercing claims that could have been brought by a creditor against the Sacklers are derivative in nature. J.A. 369 ("[C]laims 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."); *see also* J.A. 871.

Those concessions—that the Bankruptcy Code properly permits the release of creditors' prepetition direct claims that become derivative postpetition—is where the U.S. Trustee's argument falls apart.[18] At the

18. Indeed, several of the amici supportive of the U.S. Trustee concede that, at least in some circumstances, bankruptcy courts

centerpiece of his appeal, the U.S. Trustee contends that explicit language, such as that found in section 524(g) of the Bankruptcy Code, is the constitutional and statutory prerequisite for a bankruptcy court's ability to release a claim of one nondebtor against another on a nonconsensual basis. *See* Pet'r's Br. 21 ("[W]ith the exception of a single, narrow provision addressing liability related to asbestos exposure, 11 U.S.C. 524(g)—which is undisputedly inapplicable here—the Code provides no express authority to release nondebtors from personal liability to other nondebtors . . . . No provision in the Code specifically authorizes a release of non-asbestos claims against a nondebtor."); *id.* at 33 ("Although the Bankruptcy Code contains hundreds of provisions addressing the relationship between a debtor and its creditors, only one [section 524(g)] actually authorizes enjoining nondebtors' claims against other nondebtors.").

Yet, if it is true that there is no provision in the Bankruptcy Code addressing the release of creditors' non-asbestos-related direct claims, then there surely is

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are authorized to approve the nonconsensual release of creditors' direct claims against nondebtors. *See, e.g.*, Amicus Curiae Br. of Bankr. Law Professors Ralph Brubaker & Bruce A. Markell, et al. Supp. Pet'r 31-32 (conceding that bankruptcy courts are empowered "to enjoin third party nondebtor claims that directly affect the *res* of the bankruptcy estate, such as when creditors seek to collect out of the proceeds of the debtor's insurance policies, which is an asset of the bankruptcy estate" (internal citations and quotation marks omitted)); *id.* at 32 n.9 (attempting to gloss over the problems posed by this issue by stating that "there are a number of uncontroversial releases and injunctions that are not at issue in this case and that the Court need not address"). No amicus cites to any explicit Bankruptcy Code provision drawing a distinction between direct and derivative claims.

no provision in the Bankruptcy Code that specifically authorizes a bankruptcy court to release derivative claims.

Rather, in authorizing the release of derivative claims for decades, courts have created a judicial gloss on the Bankruptcy Code—that preventing individual creditors from pursuing causes of action that any peer creditor could maintain furthers the fundamental bankruptcy goals of promoting an orderly resolution of claims, an equitable distribution of a debtor's assets, and the prevention of creditors from racing to the courthouse to obtain preferential recoveries. *See, e.g.*, *Emoral*, 740 F.3d at 879; *Koch Refin.*, 831 F.2d at 1344; *see also Am. Nat'l Bank v. MortgageAmerica Corp. (In re MortageAmerica Corp.)*, 714 F.2d 1266, 1275-76 (5th Cir. 1983) (recognizing the breadth of property of the estate and relying upon the "fundamental bankruptcy policy of equitable distribution among creditors" that should not be undermined by an individual creditor's claim). As the Second Circuit explained: "The whole point of channeling claims through bankruptcy is to avoid creditors getting ahead of others in line of preference and to promote an equitable distribution of debtor assets. That is why, after a company files for bankruptcy, creditors lack standing to assert claims that are estate property. Instead, the trustee is conferred the right to recover for derivative, generalized claims; only the estate is charged with ensuring equitable distribution of estate assets and preventing individual creditors from pursuing their own interests and thus diminishing the *res* available to the rest of the creditors." *Tronox*, 855 F.3d at 106 (internal citations omitted).

The very same reasoning by which derivative Improper Shareholder Conduct claims against the Sacklers are properly released applies equally to the direct Marketing/Distribution Conduct claims. As specifically found by the Bankruptcy Court, the District Court, and the Second Circuit (all of whose findings on the subject are unchallenged by the U.S. Trustee), all creditors' prepetition Marketing/Distribution Conduct claims are based on congruent allegations that the Sacklers caused Purdue to misrepresent OxyContin's effectiveness and risk of addiction. *See supra* at 8-10, 5-19. That is the same course of conduct underlying the estates' alter ego and breach of fiduciary duty claims against the Sacklers, as set out in the declaration the Official Committee of Unsecured Creditors submitted into evidence in support of Plan confirmation:

> The UCC investigated the manner in which the Sacklers and other fiduciaries carried out, or breached, their fiduciary duties to the Debtors. . . . This investigation also required consideration of the degree to which the Sacklers and others exposed the Debtors to liability through aggressive marketing tactics and/or enriched the Sacklers at the expense of the Debtors and the Debtors' creditors. Specifically, the UCC investigated the degree to which the Sacklers failed to exercise reasonable care as directors, failed to implement reasonable steps to monitor or address red flags related to the opioid businesses and otherwise breached their fiduciary duties. The UCC also investigated the extent to which the Sacklers overstepped the bounds of ordinary director behavior and

> actively managed or micromanaged the Debtors' opioid marketing and other activities. The UCC also investigated the Sacklers' domination and control of the non-family directors who served on the Debtors' board. Finally, among other things, the UCC conducted extensive analysis regarding questions of standing [and] the strength of breach of fiduciary duty claims.[19]

The uncontested record below thus establishes that all creditors of Purdue can assert claims that the Sacklers who served as the Debtors' directors and officers injured them by driving Purdue's misleading and aggressive marketing of OxyContin. And, although different creditors can frame those allegations in relation to various state law causes of action (thereby articulating what might be considered "direct" claims), the underlying course of conduct and theories of liability are entirely duplicative of the Debtors' own estate claims. All creditors have an interest in recovering on such claims, and allowing only certain creditors to develop the litigation strategy, execute on that strategy, and then accept all recoveries, if any, for their own account would be demonstrably inequitable to the others.

In this regard, the U.S. Trustee cannot have it both ways: If the plain language of the Bankruptcy Code provides no basis for a bankruptcy court to properly release creditors' prepetition state law Marketing/

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19. Decl. of Michael Atkinson Supp. Statement of Off. Comm. of Unsecured Creditors Supp. Confirmation of the Sixth Amended Joint Ch. 11 Plan Reorg. of Purdue Pharma L.P. and Affiliated Debtors 15, Bankr. Docket No. 3460.

Distribution Conduct claims against the Sacklers, then it provides no basis for the release of their Improper Shareholder Conduct derivative claims either. To the extent that this Court determines that the Bankruptcy Code does not provide for the release of any creditor's causes of action based upon Marketing/Distribution Conduct, the necessary corollary is that it also does not provide for the release of claims based on Improper Shareholder Conduct (or indeed any claims based on theories of alter ego or successor liability). There is no principled basis for distinguishing between the two.

To be clear, the Ad Hoc Group joins in the Debtors' arguments that the Bankruptcy Code—specifically sections 105 and 1123(b)(6)—does authorize the release of the types of direct, but duplicative, claims at issue here. And, given the congruence between the estate's claims against the Sacklers who are former directors and officers, and creditors' direct Marketing/Distribution Conduct claims against the same, the Ad Hoc Group submits that the Second Circuit was wholly correct in holding that the Bankruptcy Court here was authorized to approve the Releases as written. There should be no mistake, though, regarding the unavoidable consequence of accepting the U.S. Trustee's central legal premise here—that only the exactitude of language found in section 524(g) of the Bankruptcy Code can support a bankruptcy court's authority to release one nondebtor's claim against another nondebtor. That would require this Court to upend decades of jurisprudence plainly permitting the nonconsensual release of creditors' prepetition claims, including those arising under fraudulent conveyance laws, which are deemed to be derivative postpetition, which could result in hundreds of thousands of personal

injury victims pursuing, for example, their own personal fraudulent conveyance claims against the Sacklers. That is a result that no creditor wants.

II. CERTAIN STATEMENTS BY THE U.S TRUSTEE ARE INCOMPLETE AND INACCURATE STATEMENTS OF THE RECORD

Taking the U.S. Trustee's statutory argument at face value, there can never be a nonconsensual release of any creditor's non-asbestos-related direct claims against nondebtor third parties regardless of how duplicative they might be of estate claims, how much the third party pays to obtain the release, how egregious or not the third party's conduct was, or what the third party's legal relationship was to the debtor prepetition. Notwithstanding, the U.S. Trustee highlights throughout his brief various factors that have little to do with any antiseptic constitutional and statutory arguments but seem intended to fan a theme of impropriety of the Sacklers having bought peace with billions of dollars. We address three of the U.S. Trustee's arguments below.

A. The U.S. Trustee Does Not Represent the Interests of Personal Injury Victims

Throughout this appeal, the U.S. Trustee has attempted to present himself as a disinterested bankruptcy "watchdog" standing up for the interests of personal injury victims. *See* Reply Supp. Mot. to Stay Mandate Pending Disposition of Pet. for Writ of Cert. 4, *In re Purdue Pharma L.P.*, No. 22-110 (2d Cir. July 24, 2023), Docket No. 1035 [hereinafter 2d Cir. Docket] ("Indeed, Congress empowered the United States Trustee—who

is part of the Department of Justice and "serve[s] as [a] bankruptcy watch-dog[] to prevent fraud, dishonesty, and overreaching in the bankruptcy arena . . . ."); Appl. Stay of 2d Cir. Mandate Pending Filing and Disposition of Pet. for Writ of Cert. 28, No. 23A87 (S. Ct. July 28, 2023), Docket. No. 1 [hereinafter Pet. Appl.] ("Th[e] [R] eleases deprive tort victims of their day in court without consent."); Pet'r's Br. 28 (arguing that the Releases are impermissible because, among other things, "the Sackler release would extinguish claimants' personal-injury and wrongful-death claims against the Sacklers and other nondebtors without preserving their jury rights.") But the U.S. Trustee is not a disinterested advocate for personal injury victims.

First, while the U.S. Trustee may not have an economic stake in this matter, the United States, which is not a petitioner before this Court, does.[20] Early in the Cases, the United States entered into court-approved settlements with the Debtors to resolve the government's investigations into Purdue's opioid-related practices

20. The Solicitor General does not formally prosecute this appeal on behalf of the United States (nor could he, as the United States did not appeal the Confirmation Order on any ground and has waived any right to challenge the legality of the Releases). But the Solicitor General is a Department of Justice official, and the Department of Justice has a clear financial interest in the outcome of this case. Given that the Solicitor General chose to press the U.S. Trustee's appeal in this case, the Ad Hoc Group believes those interests bear mention. *See* Pet. Appl. 3 ("Given the substantial legal problems and serious threat to the public interest posed by nonconsensual third-party releases, the Solicitor General has determined to seek review of the court of appeals' decision in this Court . . . .").

(the "**DOJ Settlements**"). *See* Order Authorizing and Approving Settlements Between the Debtors and U.S. ¶ 3, Bankr. Docket No. 2004 [hereinafter Settlement Order]. The DOJ Settlements provide that the federal government has an allowed $2 billion superpriority administrative expense claim against the Debtors and may therefore be entitled to recover ahead of any other creditor. *Id.*; *see* 11 U.S.C. §§ 503(b), 507(a)(2). The federal government, however, has agreed to forgo $1.775 billion of that claim only if a confirmed plan of reorganization meets certain requirements, including that the States and other public claimants agree to use their recoveries for abatement. J.A. 351-52. The Bankruptcy Court expressly commented on the potential effect of this conforming plan concept on the Debtors' other creditors:

> 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.

J.A. 365. In short, while formally speaking on behalf of a disinterested "watchdog," the Solicitor General also stands for the interests of the one creditor (the United States) that stands to recover billions in the event of this Court's reversal of the Second Circuit decision and a resulting failure of the Plan.

Second, the U.S. Trustee does not represent the interests of personal injury victims, much less stand in their shoes, and has never identified any victim who authorized the US Trustee to vindicate his or her constitutional right to sue the Sacklers in perpetuity. Undeterred, the U.S. Trustee purports to advocate for personal injury victims who (i) did not vote on the Plan, (ii) voted against the Plan, or (iii) objected to the Plan. Pet'r's Br. 6. As to the first group, of the roughly 70,000 personal injury victims who filed proofs of claim against the Debtors but did not vote, about half, or approximately 35,000, are members of the Ad Hoc Group. Those 35,000 nonvoters have authorized the Ad Hoc Group's counsel to speak in opposition to the U.S. Trustee. As to personal injury victims who voted against the Plan, the record is devoid of any evidence as to why those individuals voted the way they did, despite the U.S. Trustee having had multiple opportunities to put on such evidence. Finally, as to the personal injury victims who objected to the Plan, only six appealed its confirmation. J.A. 840. None asserted that they had their own direct claims against the Sacklers that are being released by the Releases. *See* Amended Statement of Issues filed by Ronald Bass, Sr., *In re Purdue Pharma et al.*, Dist. Docket No. 71; Ellen Isaacs' Statement of Issues and Designations of Records on Appeal, Dist. Docket No. 26 (solely incorporating the U.S. Trustee's and other appellants' statements of issues); Br. in Opp'n to Restructuring of Purdue Pharma filed by Maria Ecke, et al., *In re Purdue Pharma et al.*, Dist. Docket No. 29. Indeed, neither Ms. Ecke nor Mr. Bass asked this Court to overturn the Second Circuit decision, and Mr. Bass appears to support it. Mot. for Extension of Time to File Appeal 4, 2d Cir. Docket No. 995 ("I agree with the decision of the United States Court of Appeals

for the Second Circuit and the releasing of the 'Sackler family.'"). Although Ms. Isaacs supports the U.S. Trustee's petition in this Court, she has never contended that her own direct claims against the Sacklers are being released and does not do so now. *See* Br. for Ellen Issacs as Resp't Supp. Pet'r filed by Ellen Isaacs, on behalf of Patrick Ryan Wroblewski.

Third, any protest by the U.S. Trustee as to the quantum of consideration being provided by the Sacklers to personal injury victims under the Plan, *see, e.g.*, Pet'r's Br. 5, is a hollow one. The U.S. Trustee did not appear in the mediation and never advocated for increased recoveries for personal injury victims. Unlike all other government creditors who have committed funds to assist current and future victims, the United States has not committed to use any of its Plan recoveries on abatement. J.A. 331 ("[T]he 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."). Most important, the U.S. Trustee never objected below to the settlement on the basis that $750 million is insufficient to compensate victims and has never articulated what, if any amount, would be sufficient.[21] As such, the U.S. Trustee has waived any such argument in this Court. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

21. As part of Plan confirmation, the federal government insisted on taking a deemed transfer of $26 million from the personal injury victims' recoveries. *See* Plan § 5.2(h) (providing that, on the Effective Date, the PI Trust shall be deemed to have irrevocably assigned to the United States its right to $26 million of its share under the Plan).

In any event, for personal injury victims, many of whom live on the edge of poverty, facing risks such as potential eviction or repossession of their cars, the thousands of dollars of recovery offered under the Plan are not minimal. Indeed, these funds are desperately needed, and the U.S. Trustee is harming personal injury victims by putting these recoveries at risk.

B. The Plan Compensates Victims for Their Claims Against the Sacklers

In a second attempt to carry the mantle of victims, the U.S. Trustee argues that the Plan denies personal injury victims any compensation for their separate direct claims against the Sackler family. Pet'r's Br. 33. As an initial matter, the argument is a red herring. Under the U.S. Trustee's argument, if the Releases are legally impermissible, it would not matter how much the Sacklers paid or did not pay for those Releases. As the Second Circuit noted, the U.S. Trustee conceded at oral argument "that it would oppose the releases even if the Sacklers contributed $10 billion." J.A. 895 n.23. In any event, the U.S. Trustee's position—based on a misreading of a single paragraph in a single PI TDP claim form—is materially inaccurate, for the reasons set out below.

1. Purdue's Bankruptcy Filing Was Always Intended to Encompass a Global Settlement Between the Debtors, the Sacklers, and Plaintiff Constituencies

Throughout the proceedings below, the U.S. Trustee also claimed that personal injury victims are not being compensated for any release of their direct claims against

the Sacklers. The Bankruptcy Court disagreed in a ruling on November 9, 2021, stating:

> The U.S. Trustee is clearly wrong that personal injury claimants and other creditors are receiving nothing on account of their third-party claims against the released parties. It is clear that it is the settlement of those third-party claims that enables the entire plan and the distributions under the plan, without which they would receive in my view as I found based on the analysis of the evidence, including the rights of the United States in the DOJ settlement to a super-priority claim and the limited recoveries that they would have in the free-for-all litigation that would ensue, literally no recovery. The plan treats personal injury claims as receiving a distribution based on the liquidation of the underlying claim against the Debtor. That does not mean that the personal injury claimants are not receiving value on account of their third-party claims, but it reflects I believe that their third-party claims are overlapping . . . .

J.A. 629. As the Bankruptcy Court also found, the Sacklers are contributing "$4.325 billion to the estates" under the Shareholder Settlement Agreement, an amount that totals "at least twice the value of the Debtors as a going concern." J.A. 459. The Bankruptcy Court thus found that the Sacklers are, in fact, providing payments in exchange for the Releases:

> The Shareholder Settlement would not be possible without the Shareholder Releases

> because the Sackler Families would not enter into the Shareholder Settlement, and cause the payments and other concessions contemplated therein, without the Shareholder Releases and Channeling Injunction. The Plan Settlements, including the intercreditor allocation agreements and settlements reached in Mediation, are premised upon the consideration under the Shareholder Settlement Agreement, and the term sheets agreed to by the private claimants in Mediation were conditioned on the participation of the Sackler Families in the Plan.

J.A. 457-58. The U.S. Trustee presented this Court with no basis to challenge these findings.

2. The Plan Provides that Funds from the Sacklers Are Being Used to Pay Whatever Direct and Third-Party Claims Exist Within the Scope of the Releases

To some extent, the U.S. Trustee's argument regarding a lack of consideration for the Releases confuses the issue of what the Sacklers are paying for and how their settlement funds are being distributed to personal injury victims under the PI TDP. But, contrary to the U.S. Trustee's contentions, the PI TDP does, in fact, distribute funds to personal injury victims on account of claims against both the Debtors and the Sacklers.

Specifically, the Plan channels to the PI Trust a set of claims defined as "PI Channeled Claims." *See* J.A. 194, 230, 232. "PI Channeled Claims" consists of (1) "PI Claims," which are prepetition opioid-related personal

injury claims against any Debtor; and (2) prepetition opioid-related personal injury claims against certain non-Debtor parties, including the Sacklers. J.A. 203, 205-06, 209. The PI TDP then performs both the claim allowance and the claim valuation process for all PI Channeled Claims, including those against the Sacklers. For valid reasons of efficiency and fairness, the PI TDP does not separately evaluate and compensate multiple claims held by a single Personal Injury Victim against different Debtor entities, e.g., one claim against Purdue Pharma L.P. and one claim against Purdue Pharma Inc.[22] Likewise, it does not separately evaluate that victim's claims against each Sackler separately from that victim's claims against each Debtor. Rather, the claim allowance and evaluation process only requires PI Claimants to submit a single form with evidence of their injuries and their use of Purdue-brand opioids. *See generally* J.A. 588-91.

This does not mean, however, that the Plan releases personal injury victims' claims against the Sacklers for no compensation. Rather, it reflects the reality that claims against Purdue and released claims against the Sacklers

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22. If a PI Claimant holds multiple claims for multiple injuries, e.g., one claim for that claimant's own addiction and another claim on behalf of a deceased person's estate, then those claims will be evaluated and paid separately under the PI TDP. J.A. 589-90 ("If you hold multiple Non-NAS PI Claims against the Debtors on account of injuries to more than one person who used opioids, then fill out one Claim Form for each of those Non-NAS PI Claims. If you hold multiple Non-NAS PI Claims on account of multiple injuries to the same person who used opioids, then fill out only one Claim Form."); J.A. 621 ("If you represent the interests of more than one NAS Child, you must file a Claim Form on behalf of each individual NAS Child.").

are based, as all courts below have found, on a single course of conduct: Purdue's aggressive and misleading marketing of opioids. Thus, the PI TDP properly assumes that the strength of any one of these claims, namely, the sufficiency of evidentiary support provided and the extent of injury suffered, rises and falls together with the strength of each other claim. Put differently, if an individual's claim against Purdue Pharma L.P. is disallowed because that individual cannot show that she actually used a Purdue-brand opioid product, then her claim against Dr. Richard Sackler is likely to also fail for the same reason. While this assumption may not be perfect, trust distribution procedures by their nature make approximations based on credible evidence, rather than subjecting claimants to the expense of adversarial litigation. *See Thorpe Insulation, Co. v. J.T. Thorpe Settlement Tr. (In re J.T. Thorpe, Inc.)*, 870 F.3d 1121, 1123 (9th Cir. 2017) ("Trusts often compensate claimants through a streamlined procedure less clunky than traditional litigation. This system diverts fewer resources away from compensating claimants, which is generally a good thing.").

Thus, instead of evaluating separately every conceivable claim of each individual—a task which could multiply the work (and cost) of the administrator of the PI Trust by an order of magnitude, as well as burden PI Claimants with complex evidentiary submissions—the PI TDP evaluates each victim's entire package of claims based on that victim's injury, and then it provides compensation for the entire package of claims related to that injury.

This process is clearly set forth in the PI Claim Form and the PI TDP:

> One Claim Form submitted for a Non-NAS PI Claim shall be deemed to be a Claim Form in respect of that Non-NAS PI Claim and also any Non-NAS PI Channeled Claims against a Released Person or Shareholder Released Person that are associated with that Non-NAS PI Claim.

J.A. 590, and,

> 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. *However, any Distribution to a Non-NAS PI Claimant on account of his/her Non-NAS PI Claim is deemed to be a distribution in satisfaction of all Non-NAS PI Channeled Claims held by such Non-NAS PI Claimant with respect to the injuries that are the subject of his/her Non-NAS PI Claim.*

J.A. 562-63 (emphasis added); *see also* J.A. 610 (same language for NAS claims). The language emphasized above makes clear that PI TDP distributions, in fact, are being made on all "PI Channeled Claims," which definitionally includes claims against the Sacklers. J.A. 562-63.

3. The TDP Provides Personal Injury Victims with Important Procedural Protections

The U.S. Trustee also contends that the Plan deprives tort victims of their day in court and their "jury-rights" against the Sacklers, without consent. Pet'r's Br. 14. This contention is incomplete.

First, the right to pursue one's tort claim in court is not a free-floating right to litigate in perpetuity—it is the right to prove up one's claim against a tortfeasor with evidence and seek compensation in a court-supervised process. The U.S. Trustee's blithe references to "a day in court," Pet'r's Br. 14, 45, gloss over the reality that state and federal litigation against the Sacklers would take thousands of "days" and require resources (fiscal and emotional) that most personal injury victims do not have, all with no guarantee of compensation at the end. The U.S. Trustee's entreaty for more litigation here seems based on the irresponsible (and unsupported) assumption that hundreds of thousands of personal injury victims would prefer to trade the streamlined processes of the PI TDP for lengthy and expensive litigation against the Sacklers. It is telling, however, that of the handful of individuals who objected to the Plan, only six chose to appeal the Confirmation Order and, of those, only one has expressed support for the U.S. Trustee's petition to this Court to overturn the Second Circuit decision.

Second, as a practical matter, the PI TDP does compensate personal injury victims more quickly, more easily, and with recoveries higher than the expected value of costly litigation, while at the same time imposing significantly lower burdens on individuals than litigation

would. For example, the PI TDP does not require opioid victims to abide by rigorous rules of evidence in proving up their claims. Moreover, as an additional safety net for individuals who may not have received notice of the bar date, the Bankruptcy Court retains jurisdiction to consider late claims, Plan §11.1, and the PI TDP allows the claims administrator broad discretion to extend the deadline for submitting a claim form, as individual circumstances warrant. J.A. 563-64 n.6 [PI TDP § 3] (allowing for late-filed claims where good cause exists); *see* J.A. 611 n.5 [NAS TDP § 3] (same). The PI TDP also contemplates recovery even for those who—perhaps because they are incarcerated—cannot locate records otherwise required to prove up their claims. J.A. 570-72 [PI TDP § 5(g)] (contemplating alternative evidentiary options for a claimant who cannot locate records otherwise required to evidence his or her claims.).

Third, the PI TDP does, in fact, allow personal injury victims who wish to voice their story concerning Purdue in the court system by filing suit against the PI Trust, to which all the PI Channeled Claims are channeled under the Plan. J.A. 593-94 ("If a Non-NAS PI Claimant timely filed a proof of claim in the Chapter 11 Cases asserting his or her Non-NAS PI Claim, then he or she may elect to liquidate such Non-NAS PI Claim in the tort system rather than under the Non-NAS PI TDP by checking the box so indicating on his or her Non-NAS PI Claim Form. . . . If the Non-NAS PI Claimant makes such election, then the Non-NAS PI Claimant may file a lawsuit regarding only his or her Non-NAS PI Claim (and no other claims) against only the PI Trust (and including no other parties as defendants). . . ."). Thus, the PI TDP will allow an individual to opt out and liquidate his or her claims in a

court. To be clear though, the opt-out contains certain features designed to protect those who opted in to the settlement from outsized jury awards obtained by those who opted out, i.e., the court-determined value of a claim in the opt-out system is pared by the same percentage as it would have been if the holder had opted in, and the resulting number is subject to a cap to prevent any one victim's judgment in the tort system from sapping substantial value from the limited funds to be shared by all victims. J.A. 596-97 [PI TDP § 3] ("Non-NAS Maximum Value"); J.A. 597-98 [PI TDP § 4] ("Non-NAS Payment Percentage"). But, any PI Claimant who wants to incur the costs, both pecuniary and emotional, of proving up his or her injury in a court can do just that.

CONCLUSION

In sum, the U.S. Trustee and supporting Respondents anchor their appeal on the notion that what happened below was an abuse of the bankruptcy process by corporations and shareholders seeking to avoid liability for their own bad acts. The uncontested record below establishes otherwise. What happened below, and what the Releases made possible, is a triumph of the bankruptcy process which allows for an efficient, creative, flexible economic solution to an otherwise intractable, value-destructive litigation firestorm. The decision of the Court of Appeals should be upheld.

Respectfully submitted,

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