No. 23A741

IN THE

Supreme Court of the United States

LUJAN CLAIMANTS, *et al.*,

Applicants,

v.

BOY SCOUTS OF AMERICA, *et al.*,

Respondents.

TO THE HONORABLE SAMUEL ALITO,
ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT
AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT

On Application for a Stay of the Bankruptcy Plan Being Implemented in the United States Bankruptcy Court for the District of Delaware

AMICI CURIAE BRIEF OF LAW PROFESSORS RALPH BRUBAKER, DAVID EPSTEIN, GEORGE KUNEY, DAVID KUNEY, JONATHAN LIPSON, JULIET MORINGIELLO, CHRYSTIN ONDERSMA AND LAWRENCE PONOROFF IN SUPPORT OF APPLICATION FOR A STAY OF THE BANKRUPTCY PLAN BEING IMPLEMENTED IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

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INTEREST AND IDENTITY OF THE *AMICI*[1]

Amici curiae are law professors Ralph Brubaker (University of Illinois College of Law), David Epstein (University of Richmond, School of Law), George Kuney (University of Tennessee College of Law), David Kuney (Georgetown University Law Center), Jonathan Lipson, (Temple University Beasley School of Law), Juliet M. Moringiello (Widener University Commonwealth Law School), Chrystin Ondersma (Rutgers Law School) and Lawrence Ponoroff (Tulane University Law School). The *amici* have taught bankruptcy law for many years, have spoken at national conferences on bankruptcy law, and have published articles on key bankruptcy issues, including nonconsensual third-party releases and equitable mootness as applied in the bankruptcy context.[2]

Amici urge this Court to grant the Application for a stay of the plan of reorganization currently being implemented in the United States Bankruptcy Court in the District of Delaware in *Boy Scouts of America*.[3] The Plan is currently being

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae funded the preparation or submission of this brief.

[2] *See e.g*. Brubaker, *infra* at n. 11: G. Kuney, *infra* at n. 38.

[3] The Bankruptcy Court decision is reported at *In re Boy Scouts of America and Delaware BSA, LLC*., 642 B.R. 504 (Bankr. D. Del. 2022) ("*BSA*"). The District Court decision is reported at *In re Boy Scouts of America and Delaware BSA, LLC,* 650 B.R. 87 (D. Del. 2023) ("*BSA II*"). The relevant plan is the Third Modified Firth Amended Chapter 11 Plan of Reorganization (with technical modifications) for Boy Scouts of America and Delaware BSA, LLC, (the "Plan") filed in Case No. 20-10343 on September 6, 2022, at ECF Dkt. 10296.

appealed to the Third Circuit Court of Appeals by a group of sexual abuse claimants (the "D&V Claimants") as well as by the Lujan Claimants (the "D&V Appeal").[4]

The D&V Appeal argues that the Plan of Reorganization, approved by the Confirmation Order,[5] is unlawful and/or unconstitutional because it contains nonconsensual third-party releases which bar the Applicants from seeking recourse in state or federal courts for the harm they suffered. The same issue is now before this Court in *Harrington v. Purdue Pharma, L.P.*, 2023 WL 5116031, Case No. 23-124 (cert. granted August 10, 2023).

The Application asks this Court to stay the implementation of the Plan.[6] Amici agree and fully support this request. By the same token, the D&V Appeal should be stayed along with the Plan implementation. One follows the other. Whether the Plan may be legally implemented is of course the key question in the Appeal. Just as there is good reason to stay the Plan's further implementation, so too is there good reason to issue a stay of the D&V Appeal until this Court rules on the identical issues in *Purdue Pharma*. Such relief was fairly implicit in the Application as we read it.

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[4] Dumas & Vaughn Claimants v. Boy Scouts of America and Delaware BSA, LLC., Third Circuit Court of Appeals, Case No. 23-1666.

[5] The Confirmation Order approving the Plan was entered on September 8, 2022.

[6] The Application for a stay is on behalf of two groups, the D&V Claimants, and the Lujan Claimants. This amicus brief addresses the need for a stay for the D&V Claimants. However, the interests of both groups substantially overlap and the arguments in this brief should apply equally to both.

There is no valid reason to permit further implementation of the Plan or the D&V Appeal in view of the *Purdue Pharma* case pending before this Court. There is no good reason for the Third Circuit to rule on the validity of third-party releases prior to this Court's ruling in *Purdue Pharma.* This Court heard oral argument in *Purdue Pharma* on December 4, 2023. Despite the assertion by Purdue that third-party releases have been the accepted practice for the past thirty-years, the impropriety of third-party releases has been recognized by the courts for at least the past thirty-eight years. *See, e.g.*, *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985) ("[The] bankruptcy court has no power to discharge the liabilities of a nondebtor pursuant to the consent of creditors as part of a reorganization plan."). Two other circuits also outlaw them.[7]

Third-party releases have been at the center of a fierce debate as to their legitimacy. The issue is not settled in any sense, but rather has been correctly described as "the great unsettled question" of bankruptcy law today.[8] The U.S. Solicitor General recently noted the same. In the application for a stay on similar grounds as here, in *Purdue Pharma*, the Solicitor General argued that certiorari was

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[7] *Landsing Diversified Properties v. First Nat'l Bank & Trust Co of Tulsa* (*In re W. Real Estate Fund Inc*, 922 F.2d 592, 600 (10th Cir. 1991); *Matter of Zale Corp.*, 62 F.3d 746, 760 (5th Cir. 1995); *Bank of N.Y. Trust Co. v. Off. Unsecured Creditors' Comm.* (*In re Pac. Lumber Co.*), 584 F.3d 299 (5th Cir. 2009); *Underhill v. Royal*, 769 F.2d 1426.

[8] *In re Purdue Pharma, L.P.,* 635 B.R. 26, 37 (S.D.N.Y. 2021).

"warranted because this case concerns an important and recurring issue of nationwide significance. The question whether nonconsensual releases are lawful arises with some regularity. *See e.g.*, *In re Boy Scouts of America & Delaware, BSA*, 650 B.R. 87, 135-14.,183 (D. Del. 2023)."[9]

In addition to the split among the Circuit Courts, there has been persistent and well-recognized academic scholarship that has called into question the lawfulness and constitutionality of third-party releases. Respected academic writers view third-party releases as part of a trend toward lawlessness in bankruptcy jurisprudence. ("The perpetrators of lawless Chapter 11s use an array of legal devices to insulate themselves against liability for their wrongdoing [including third party releases].").[10] Professor Ralph Brubaker writes, "[n]ondebtor releases are an illegitimate and unconstitutional exercise of substantive lawmaking powers by the federal courts."[11] Commentators have written that third-party releases have led to substantial abuses within the bankruptcy system, and that they permit a distortion

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[9] Application for a Stay of the Mandate of the United States Court of Appeals for the Second Circuit Court of Appeals Pending the Filing and Disposition of a Petition for a Writ of Certiorari, Supreme Court Case No. 23A87, now Case 23-124, p.16.

[10] *See* Lynn LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANK. L. J. 247 (2022).

[11] Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L. J. F. 960, 960 (2022).

of bankruptcy law that is wholly outside the carefully articulated Congressional scheme found in Title 11.[12]

Oral argument before this Court brought into focus the divergent views of both this Court and the litigants. The Solicitor General argued in favor of a broad prohibition against nonconsensual releases. "This release extinguishes personal property rights, the creditors' state law choses in action that do not belong to the bankruptcy estate. That result is not supported by any historical analogue in equity, and it raises significant constitutional questions that should be avoided in the absence of a clear command from Congress."[13] A somewhat different view focused on a key statutory question of whether the catch-all provision of 11 U.S.C. § 1123(b)(6) could fairly be read to grant bankruptcy courts unfettered power to grant third-party releases as long as the provision is "appropriate" or whether the key test is whether such releases are "inconsistent" with the Code. Again, the Court appeared to have different views of the correct interpretation of this key section.[14] Your *amici* argued in their *Purdue* brief that there are indeed inconsistencies of a profound nature, which arises when third-parties are given releases without complying with the

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[12] *See e.g.*, Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L. J. 1062 (2022). Third-party releases have led to abuse by "grifters."

[13] Transcript of Oral Argument, December 4, 2023, in *Harrington v. Purdue Pharma*, at p. 5.

[14] *Id.* at p. 29, Justice Jackson noting that the Government's argument more properly focused on the word "inconsistent" in § 1123(b)(6) as opposed to "appropriate."

disclosure, distribution and discharge provisions of the Code.[15] Justice Gorsuch put his finger on these fatal flaws.[16]

The D&V Appeal at the Third Circuit should be stayed until this Court resolves these unsettled issues.

It is precisely because these issues pertaining to third-party stays are unsettled, and because the District Court believed that the D&V Claimants had a reasonable chance of succeeding on the merits of their Appeal, that justifies staying both Plan implementation and the D&V Appeal. The Third Circuit would be best served by permitting this Court to resolve these issues rather than proceeding as if the issues were fixed or resolved. This Court's ruling will provide critical guidance for the Circuit Courts. Yet, despite this Court having now taken the matter under advisement, the D&V Claimants have been unable to obtain a stay of the pending Appeal which will consider the exact same issues as this Court now has before it.

The urgent need for a stay of the D&V Appeal and the further implementation of the Plan and the risk of irreparable harm arises because shortly after this Court granted certiorari in *Purdue Pharma* the debtors in *Boy Scouts* and a group known as the "Settling Insurers" (*see infra*) filed motions to dismiss the D&V Appeal based

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[15] Amici curiae brief of the Honorable Eugene Wedoff (ret.) et al., filed in Case No. 23-124. *See* pages 5 *et. seq* and 20-32. Notably, the failure to contribute all their assets meant that the release was inconsistent with the requirement that a plan of reorganization must provide a dissenting creditor with at least the amount it would receive in a chapter 7.

[16] Tran. p. 42-44.

on assertions of equitable and statutory mootness.[17] On December 14, 2023, the Third Circuit entered an order on the docket referring the motions to the merits panel and stating the Court was unpersuaded at this preliminary stage that equitable or statutory mootness apply in the particular circumstances of this case.[18]

Despite the referral to the merits panel, the assertion of mootness raises serious concerns both in this case and in future cases. The motions to dismiss are based on highly flawed notions of mootness and are in direct conflict with this Court's rulings in *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288 (2023) as well as *Chafin v. Chafin*, 568 U.S. 165 (2013). The pending motions to dismiss the D&V Appeal are predicated upon an unjustified, if not radical, expansion of the doctrine of equitable and statutory mootness and could prove harmful not only to D&V but to the ability in future cases for parties to obtain effective appellate review of errant bankruptcy decisions. The assertion of equitable mootness has consequences well beyond this case.

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[17] Appellee's [Debtors'] Motion to Dismiss Appeals as Moot, ECF Dkt. 124.1 ("App. Mtn."); Appellees Settling Insurers' Motion to Dismiss Appeals of Dumas & Vaughn and Lujan Claimants, ECF Dkt. 123 ("Set. Ins. Mtn.").

[18] "The foregoing motions [to dismiss] come before us while the appeal is in the midst of briefing and an outstanding motion to stay is also pending. The Appellees' arguments leave us unpersuaded at this preliminary stage that equitable or statutory mootness apply in the particular circumstances of this case. Therefore, the motion to dismiss is hereby referred to the merits panel in accordance with 3d Cir. I.O.P. 10.3.5."

A dismissal based on mootness could still occur before this Court rules in *Purdue Pharma.* A stay of both the further implementation of the Plan (and the Confirmation Order) as well as the D&V Appeal is necessary to ensure that if this Court determines that nonconsensual third-party releases are unlawful and/or unconstitutional, the Applicants will not be bound by a prior dismissal of their Appeal, based on equitable and statutory mootness. Such an outcome would bind the D&V Claimants to a plan of reorganization which would be in direct contravention of this Court's ruling in *Purdue Pharma.*

STATEMENT

Prior to the filing of the bankruptcy case, the D&V Claimants had filed lawsuits alleging claims for, among other things, negligence, fraud, constructive fraud, vicarious liability for intentional torts and willful and malicious conduct; the claims sought compensatory and punitive damages.[19] The claims are mostly against nondebtor parties, namely, certain Local Councils[20] and Chartered Organizations[21]

[19] Appeal brief of the D&V Claimants filed in the U.S. District Court for the District of Delaware, Case 1:22-cv-01237, ECF No. 41, at 2. (the "D&V Br."). *See also, BSA*, 642 B.R. at 526.

[20] There are 250 Local Councils which are separate, independent nonprofit entities organized under the laws of their respective states. "Each Local Council is responsible for its own operations, including programming, fund raising and recruiting membership into the Scouting program." *BSA*, 642 B.R. at 522.

[21] "To accomplish its mission, BSA relies on tens of thousands of Chartered Organizations which work directly with Local Councils to help deliver Scouting in their respective communities. Chartered organizations can be religious, civic or community institutions." *BSA*, 642 B.R. at 523.

that operate many of the activities of the Boy Scouts. According to the Bankruptcy Court, the sexual abuse lawsuits "detail horrific allegations ranging from harassment to inappropriate touching to penetration." *BSA*, 642 B.R. at 525.

The Bankruptcy Court subsequently confirmed a plan of reorganization that contained a nonconsensual release, injunction and discharge that effectively precluded the D&V Claimants from seeking state law remedies against the Local Councils, Chartered Organizations and Settling Insurers.[22] The D&V Claims were identified in the Plan as the "Direct Abuse Claims," and "Abuse Claims."[23] The release of Abuse Claims was set forth in Plan § X.J.3[24] which stated that "all holders of Abuse Claims shall be deemed to expressly … *discharge and release* [the Protected Parties] from all Abuse Claims."[25] The Bankruptcy Court summarized the releases as "nonconsensual third-party releases" that "ran in favor of the Settling Insurance Companies, Local Councils, Chartered Organizations and their Representatives."[26]

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[22] *See* Plan. Section X.J.3.

[23] "Direct Abuse Claims" were defined as an Abuse Claim that is not an Indirect Abuse Claim. Plan, p. 19. "Indirect Abuse Claims" were defined as a "liquidated or unliquidated Abuse Claim for contribution, indemnity, reimbursement or subrogation. . ." (Plan, p. 27).

[24] Plan, X.J.3., p. 128.

[25] "Protected Parties" were defined as the Debtors, Reorganized BSA, and "the Related Non-debtor entities: the "Local Councils" and the Contributing Chartered Organizations" and the Settling Insurance Companies. Plan, Article I.A., ¶ 236. page 40.

[26] *BSA*, 642 B.R. at 586.

The Plan also included an injunction prohibiting the D&V Claimants from pursuing any "Claim" (e.g., broader than "Abuse Claims") which includes any claim or cause of action, regardless of whether the claim was direct or derivative, and whether for fraud, malicious harm, or willful wrongdoing.[27]

The Plan has as one of its funding devices, the "sale" of BSA's insurance policies back to a group of insurance companies, known mostly as the "Settling Insurers," and who are deemed "Protected Parties" because they are to be granted the nonconsensual releases from liability by the victims of sexual abuse. The sale was to provide $1.6 billion of proceeds, which were then to be put into a Settlement Trust and used to pay claims.[28]

This "sale" however is far from complete. As noted below, the sale remains contingent upon the completion of all appeals and the Settling Insurers are entitled to a refund if the Confirmation Order is not affirmed on appeal, including at this Court. Thus, only $189.8 million was put into the Settlement Trust and the rest remains in escrow. The D&V Claimants contend that this Plan is therefore contingent on the outcome of all appeals and is not a "substantially consummated" plan as such term is used in the Bankruptcy Code.

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[27] Plan, § X.L.1, p. 132.

[28] "The Settling Insurance Companies. . . have bought back their policies in exchange for $1.656 billion contribution to the Settlement Trust pursuant to the Insurance Settlement Agreements." App. BSA's Con. Br, Case No. 23-1666, p. 22.

The D&V Appeal, the Motions to Stay and the Motions to Dismiss

Following the entry of the Confirmation Order, the D&V Claimants, along with the Lujan claimants timely filed their appeal in the U.S. District Court, and subsequently in the Third Circuit Court of Appeals, the latter of which remains pending. The legal question presented in the appeal is whether "the Bankruptcy Court erred in confirming a plan of reorganization that authorized the granting of [third-party non-consensual] releases and channeling instructions to nondebtors?"[29]

Shortly after the appeal was filed this Court granted certiorari to resolve the "great unsettled question." The question presented was this: "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."[30]

Because the issues in this case and *Purdue Pharma* are identical, both the D&V Claimants and the Lujan claimants, repeatedly sought a stay of the further implementation of the Plan as well as the appeal to the Third Circuit. However, on October 3, 2023, the U.S. District Court for the District of Delaware entered a Memorandum Decision denying the stay motions.[31] Nevertheless, and significantly,

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[29] *See* Notice of Appeal, filed in the U.S. Bankruptcy Court for the District of Delaware (Case No. 20-10343-LS) on September 22, 2022, at ECF Dkt. 10412, 2.

[30] Brief for Petitioner.

[31] Civ. No. 22-1237-RGA, ECF Dkt. 254.

the District Court expressly acknowledged that this Court's recent granting of certiorari in *Purdue Pharma* "signals *at least* a reasonable chance that Claimants may succeed on their challenge [to the third-party releases]."[32]

Shortly after the District Court ruled that the D&V Claimants had at least a reasonable chance of prevailing on their appeal to the Third Circuit, both BSA and the Settling Insurers filed motions to dismiss the D&V Appeal as either statutorily or equitably moot. The central premise of the motions to dismiss was that the D&V Appeal is barred by the so-called absolute mootness provision supposedly found in § 363(m) which governs sales out of the ordinary course under § 363(b) of the Bankruptcy Code. The Settling Insurers acknowledged that the sale of the insurance policies was pursuant to the Plan (and hence the Confirmation Order). "The Confirmation Order authorized the sale of the insurance policies issued by the Settling Insurers to both BSA and the Local Councils back to the Settling Insurers."[33] Further, § 363(m) was the subject of this Court's ruling in *MOAC Mall* where this Court held that § 363(m) does *not* contain a jurisdictional or absolute barrier to appellate review.

The motions to dismiss are now pending at the Third Circuit although recently referred to the merits panel. Both motions are based on flawed theories of mootness,

[32] *Id*. at 14 (emphasis added).

[33] Set. Ins. Stay Opp., Case 23-1664 and 23-1666, ECF Dkt. 115, p. 3.

and both motions should be denied. However, the D&V Claimants are at risk of an adverse ruling on the motions which would almost certainly preclude any appellate review of the Plan and could well result in an outcome entirely contrary to the future ruling by this Court in *Purdue Pharma*.

Only a stay by this Court can avoid the loss of meaningful appellate review of one of the most important issues in bankruptcy law, as well as the improper application of statutory and equitable mootness.

SUMMARY OF ARGUMENT

The Application for a stay is entirely warranted and we urge this Court to grant the request for a stay.

First, as noted, the pending appeal at the Third Circuit in *Boy Scouts* raises the identical issues before this Court in *Purdue Pharma*—whether non-consensual third-party releases of nondebtor parties are permitted under the Bankruptcy Code. Judicial economy, comity, and deference to this Court all mandate a moderate stay of the Third Circuit reviewing the exact issue now before this Court. *Landis v North American Co.*, 299 U.S. 248 (1936). Any stay should be of relatively short duration and will not have any material impact on the other parties. BSA argues that the releases are the "cornerstone" of its plan.[34] That cornerstone may be legally infirm. Should this Court determine that nonconsensual third-party releases are unlawful it

[34] App. BSA's Con. Br., Case 23-1666, ECF Dkt. 115, p.3.

would be hard to find any justification for permitting the exact same unlawful provision to be the basis for the Plan in the *BSA* case.

Second, various parties recently moved to dismiss the D&V Appeal based on flawed arguments of equitable or statutory mootness. As with third-party releases, the application of equitable and statutory mootness has met with both judicial skepticism and harsh academic criticism.[35] The motions incorrectly assert that an appeal which challenges a plan of reorganization can be *statutorily* moot under § 363(m) if the plan is tethered to a sale under § 363. There is no Bankruptcy Code provision, however, which limits appellate review of a plan of reorganization. Further, even if statutory mootness somehow applied (which we dispute) the motions to dismiss incorrectly argue that § 363(m) is an absolute barrier to appellate review, which is directly contrary to the recent decision by this Court in *MOAC Mall.*

Third, the motions to dismiss raise arguments over equitable mootness which are in direct conflict with this Court's ruling that equitable mootness only pertains if there is no possibility of effective relief. Effective relief however is available in this case. The possibility of effective relief is the touchstone of any proper finding of mootness. ("But a case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'") *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). Because the issue of mootness was not raised in the first appeal, at

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[35] *See* Levitin, *infra* at n. 44. *See generally*, *In re One2One Communications, LLC.*, 805 F.3d 428 (3d Cir. 2015).

the District Court, there was never any ruling on the possibility of effective relief. Thus, dismissal now based on mootness would be in contravention of this Court's prior rulings on mootness, and quite possibly in violation of its merits' determination in *Purdue Pharma*.

ARGUMENT

I. The Stay Application Should Be Granted to Preserve the D&V Claimants' Ability to Obtain Effective Appellate Review of Their Challenge to the Lawfulness of the Plan of Reorganization in the Boy Scouts of America bankruptcy case.

A. The Pending Appeal in the Third Circuit Raises Issues Identical to the Purdue Pharma Case. Without a stay, the Third Circuit may affirm a plan of reorganization directly in conflict with this Court's future ruling in Purdue Pharma.

On October 3, 2023, the U.S. District Court for the District of Delaware entered a Memorandum Decision denying the stay requests of the D&V Claimants but acknowledging that this Court's recent granting of certiorari in *Purdue Pharma* "signals *at least* a reasonable chance that Claimants may succeed on their challenge [to the third-party releases]." Yet, that reasonable chance of appellate review and success may be wrongfully put beyond the reach of the D&V Claimants by the improper granting of the pending motions to dismiss.

Presumably aware that this Court may well find that the underlying releases are unlawful, the Settling Insurers, and the Debtor, BSA, moved the Third Circuit Court of Appeals to dismiss the appeals on the grounds of mootness—both statutory and equitable—and thus to avoid reaching the merits of the appeal. These motions

are designed to achieve an improper strategic purpose—namely to urge the Third Circuit to dismiss the appeals without ever reaching the merits of whether third-party releases are lawful, and to thereby preempt this Court's future ruling in *Purdue Pharma* and to also permit a ruling to stand which may be directly contrary to this Court's ruling.

Without a stay, the D&V Claimants will suffer irreparable harm. The dismissal of the Appeal would leave intact the ruling by the U.S. District Court which affirmed the lawfulness of third-party releases. The dismissal of the Appeal would then bind the D&V Claimants to a plan of reorganization which coerces them into surrendering their right to pursue their claims under state law, and to granting a release to various "Protected Parties." The *Boy Scout* Plan may be based on an entirely unlawful structure should this Court rule that nonconsensual third-party releases are unlawful or unconstitutional. If this were to occur the D&V Applicants would be precluded from appellate review and the chance to establish effective relief through a hearing before the bankruptcy or district court.

This Court has recognized that a party may be properly required to defer its litigation if similar issues are pending in another court. In *Landis v. North American Co.*, 299 U.S. 248, 256 (1936) this Court held that a stay of moderate duration could well be appropriate where another pending case will resolve complex issues of national importance. ("Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not

oppressive in its consequences if the public welfare or convenience will thereby be promoted.")

The stay of the implementation of the Plan and the Third Circuit Appeal fit into this category precisely; this Court heard oral argument on December 4, 2023, and may issue its decision in early 2024. The case is one of extraordinary public moment, and the stay sought is moderate in extent and not oppressive. That the D&V Applicants have a meritorious appeal has already been noted by the U.S. District Court. Accordingly, the short stay of the D&V Appeal and the underlying Plan should be stayed until this Court issues its ruling in *Purdue Pharma*.

Given that the issue of the lawfulness of third-party releases remains the "great unsettled question," and that this Court's questions at oral argument raised at least the possibility of divergent views on the correct legal standard, there is no feasible way for the Third Circuit to proceed on its own until this Court announces its decision. Nor is there any way for BSA to argue that *Purdue Pharma* will not be controlling until this Court declares the applicable legal standard.

B. The Stay Application should be granted. The motions to dismiss before the Third Circuit seek to establish an unwarranted doctrine of statutory mootness that could prevent effective appellate reviews of plans of reorganization under Chapter 11 of the Bankruptcy Code.

In this case, BSA argues that appellate review of an unlawful provision in a plan of reorganization may be subject to statutory mootness if the unlawful provision is somehow tethered to a plan ("integral"). Under this theory the provisions of a

plan of reorganization under Chapter 11, including the third-party releases are immunized from appellate review by virtue of Code § 363(m). However, § 363(m) only pertains to *sales* under § 363(b). There is *no statutory mootness* provision which pertains to plans of reorganization. The motion to dismiss argues to the contrary. If granted it would create a roadmap for many future cases to defeat any ruling in *Purdue Pharma* by now claiming that the mootness provisions of § 363(m), which pertain to a sale, also render "moot" any plan provision if an underlying sales transaction is somehow "integral" to the plan. This would then work a wholesale expansion of mootness and would stand in sharp contrast to this Courts' rulings, which have pushed back on both equitable and statutory mootness.

Even if the statutory mootness section of §363(m) was found to pertain to a challenge to a plan, BSA has mischaracterized what this section means and has disregarded entirely the recent holding of this Court in *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288 (2023). BSA repeatedly insisted that the barrier to appellate review is an "absolute" barrier to review of any plan of reorganization that is premised on a sale of assets. *MOAC Mall* held exactly to the contrary and held that "section 363(m) plainly contemplates that appellate courts might reverse or modify" sale orders. *Id.* at 299. *MOAC Mall* left entirely in place the core principle that if effective relief is possible, then an appellate court is entitled and obligated to hear the appeal.

C. The Stay Application should be granted. The motions to dismiss are based on an expansive and improper theory of equitable mootness which is in sharp conflict with this Court's rulings in *Chafin v. Chafin*, as well as *MOAC Mall Holdings LLC v. Transform Holdco LLC.*

The motions to dismiss also argue that the D&V Appeal should be dismissed based on equitable mootness. This Court, and others, have repeatedly stated their opposition to, and concern over the doctrine of equitable mootness. Yet, the motions to dismiss seek an expansive and unwarranted extension of the doctrine of equitable mootness which would in effect, preclude appellate review of a plan of reorganization without any prior determination of the key issue of the availability of effective relief and where the parties have expressly agreed that a final resolution of all appeals is a condition to completion of the funding for the Plan.

As Chief Justice Roberts wrote for a unanimous Court in *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) "a case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.' . . . As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."[36]

The doctrine of equitable mootness violates a core principle that there is a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given

[36] "While a court may not be able to return the parties to the status quo ante—a court can fashion some form of meaningful relief in circumstances such as these." *Church of Scientology of California v. United States*, 506 U.S. 9, 12–13 (1992).

them." *Colo. River Water Construction Dist. v. United States*, 424 U.S. 800, 817 (1976). As summarized recently: "When equitable mootness is invoked, appellate courts often reach an extraordinary conclusion: even if the appellant has a meritorious case, the court will decline to hear the appeal. This leaves aggrieved appellants with no recourse for even profound errors made during the confirmation process."[37]

Judicial dissatisfaction with equitable mootness is evident. Then-Judge Alito's dissent in *In re Continental Airlines*, 91 F.3d 553, 567-83 (3d Cir. 1996) questioning the Third Circuit's wisdom in adopting the doctrine of equitable mootness "is widely viewed as the bedrock of equitable mootness skepticism among the circuit courts."[38] Justice Alito noted that equitable mootness unduly restricts appellate review and "places too much power in the hands of bankruptcy judges."[39] The harm is evident: an erroneous ruling by a non-article III court is then asserted to be immune from appellate review. Because substantial consummation is largely in the sole control of a debtor, an aggrieved party has no mechanism to preserve appellate review once a stay is denied. An egregious error by a bankruptcy court, coupled with a refusal to

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[37] Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L. J. 377, 381 (2019).

[38] George Kuney, *Understanding and Taming the Doctrine of Equitable Mootness*, NORTON ANNUAL SURVEY OF BANKRUPTCY LAW, 36 (2018).

[39] *See e.g., Nordhoff Investments v. Zenith Electronics*, 258 F.3d 180, 192 (3d Cir 2001) (Alito, J., concurring) (noting that "equitable mootness doctrines can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans."). *See also, In re Continental Airlines*, 91 F.3d 553, 567-83 (3d Cir. 1996) (Alito, J., dissenting).

stay the improper ruling, defeats the right to have an Article III court review a decision by a bankruptcy court.

Justice Alito's concerns have since been echoed by other judges. In 2015, in a concurring opinion Judge Cheryl Krause "pick[ed] up the mantle first assumed by then-Judge Alito … and sought to comprehensively dismantle the doctrine of equitable mootness—a doctrine adrift and in need of reconstruction by our court."[40]

Likewise, the academic community has expressed grave concerns over the doctrine. Professor Bruce Markell has documented the "pernicious effects" of the equitable mootness doctrine, including the "perversion and disruption of appellate jurisdiction;" "a dilution and impoverishment of the sources of interpretation of the Bankruptcy Code;" and the "perpetuation of a possibly unconstitutional deference by Article III courts to courts not possessed of the judicial power of the United States."[41]

Further, as Professor Adam Levitin has stated, equitable mootness causes Chapter 11 to suffer from "illusory appellate review."[42] "[T]he limited nature of appellate review in bankruptcy "reduces public oversight in Chapter 11 and intensifies the authority of bankruptcy courts."[43] Equitable mootness has, in turn,

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[40] *In re One2One Communications, LLC*, 805 F.3d 428, 447 (3d Cir. 2015).

[41] Markell, *supra* at n.37, p. 397-413.

[42] Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1121 (2022).

[43] Levitin, *Poison Pill* at 1122 (citing Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1733 (2018)).

permitted the increase in "bankruptcy hardball" in which distressed firms routinely engage in aggressive tactics that then elude appellate review.[44] Professor Levitin cites the numerous articles that focus on the "coercive restructuring techniques" and the related problems created by "the doctrine of equitable mootness [which] have been decried in scholarship."[45]

This case illustrates well why the debtors' equitable mootness arguments may have pernicious effects. The principal argument advanced by the debtors in support of their equitable mootness argument is that the sale of the insurance policies to the Settling Insurers is "complete" and cannot be undone and that the plan has been substantially consummated. By "complete" the debtor means mostly that the "insurers transferred $1.65 billion to the Settlement Trust or *into escrow*."[46] The debtors argue that "billions of dollars of cash and other assets were contributed to the Settlement Trust by BSA, Local Councils, Chartered Organizations and Settling

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[44] Levitin, *Poison Pill*, 1085.

[45] *Id*. at 1085 and n. 13 (citing Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L. J. 377, 397-98 (2019) (describing the pernicious effects of the current application of equitable mootness); Robert Miller, *Equitable Mootness: Ignorance is Bliss and Unconstitutional*, 107 KY. L. J. 269, 291-92 (2018) (stating that equitable mootness is unfair because it encourages "any party to invoke it no matter that chance of success"); Ryan M. Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather than Axe in Bankruptcy Appeals*, 19 NORTON J. BANKR. L.& PRAC. 1, 45-46 (2010) ("The current construction of equitable mootness is not without its faults.")).

[46] App. Mtn. Dis. 1.

Insurance Companies."[47] But in a footnote the debtor reveals that some of the transfers "were transferred into escrow rather than to the Settlement Trust."[48]

A more complete description is set forth in the Settling Insurers motion to dismiss, which acknowledge that the funds are only a contingent payment which may be returned. Both the Settling Insurers' Opposition to the Stay and the Motion to Dismiss acknowledge the following:

> Contemporaneously with the Effective Date, the Settling Insurers paid nearly $200 million directly to the Settlement Trust including $137 million by Hartford, $50 million by Century and $2.8 million by Clarendon, and paid the rest of their settlement amounts into escrow. Those additional amounts will be released to the Settlement Trust *if and when the bankruptcy court's* Confirmation Order becomes final and no longer subject to appeal.[49]

Thus, the majority of the $1.656 billion is still in escrow and its distribution is contingent on the completion of all appeals. The Settling Insurers have so far paid only $189.8 million of their total, or approximately 11% of the total.[50] Respondents

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[47] App. Mtn. Dis. 10.

[48] App. Mtn. Dis.10, n. 6. *See also*, "Another $1.46 billion, a majority of which is being held in escrow, will be released to the Settlement Trust upon the resolution of these appeals." Appellee's BSA's Consolidated Answering Brief, Case 23-1666, ECF Dkt. 115, p.1. The Plan, however, says upon completion of all appeals including if certiorari is granted.

[49] Set. Ins. Stay Opp. p. 11, n.4, emphasis added. The exact same language appears in the Set. Ins. Mtn., p. 13 n. 6.

[50] Set. Ins. Mtn. p.13, n. 6.

repeatedly argued that the Plan cannot be "unwound" because it is what they call a "single integrated transaction."[51] This assertion however is directly contradicted by the terms of the Plan which expressly provided that the major monetary contributions by the Settling Insurers must be refunded if there is no final order approving the Plan *after all appeals were completed.* Restated, the parties expressly bargained for a plan that might be unwound and money would be returned based on the appellate outcome. The parties cannot argue that an appeal is moot where they have already agreed that the Plan would remain contingent *until* the appeals were heard and resolved.

CONCLUSION

We respectfully submit that the Application is well grounded, and request that this Court grant the request and enter a stay of the implementation of the Plan and the D&V Appeal.

Respectfully submitted,

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[51] *See e.g.*, Declaration of Brian Whitman in Support of Appellee's Motion to Dismiss Appeals as Moot p. 3-4, ECF Dkt. 122, Case No. 23-1666.