No. 23A87

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

PURDUE PHARMA L.P., ET AL.

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

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The Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants (the "Ad Hoc Committee") respectfully submits this response in opposition to the application of the Solicitor General, on behalf of William K. Harrington, United States Trustee for Region 2 (the "UST"), seeking a stay of the mandate of the United States Court of Appeals for the Second Circuit associated with its May 30, 2023, judgment in which it affirmed the approval of the chapter 11 plan of reorganization of Purdue Pharma L.P. and its debtor affiliates ("Purdue" or the "Debtors").

INTRODUCTION

A stay of the mandate would further delay payments to Purdue's creditors—the governmental, private entity, and individual victims of one of the worst public health crises in this Nation's history. Those creditors are in desperate need of the billions of dollars that will be deployed for opioid abatement and victim compensation under the terms of Purdue's chapter 11 plan – a plan that has been carefully crafted over four years and has overwhelming creditor support. Continuing to delay implementation of this plan has no legal basis and would undermine the public interest.

Purdue and its owners, the Sackler family, helped create and prolong the nationwide opioid epidemic, causing massive harm to the American public and to the States, municipalities, and Tribes whose interests the Ad Hoc Committee represents. When Purdue's opioid liabilities forced it into bankruptcy, its creditors negotiated a plan of reorganization designed primarily to remediate part of that harm. The plan contains a release of third-party claims against the Sacklers, granted in exchange for their contribution of between $5.5-6.0 billion. Of the funds to be deployed for abatement and victim compensation under the plan, some $1.339 billion is expected to be made available to creditors immediately upon the effective date of the plan.

The plan enjoys overwhelming creditor support. As of its initial confirmation by the Bankruptcy Court, each of the governmental and personal injury claimant classes had voted in favor of the plan by margins exceeding 95%. A subsequent settlement with a small group of hold-out States (referred to as the "Nine") resolved the only outstanding objections from any non-federal domestic governmental units. No domestic State, Territory, municipality, or Tribe continues to oppose the plan in court. Indeed, aside from the UST—which holds no economic interest in the outcome of this litigation—there is no material opposition to the plan.

The Ad Hoc Committee, whose membership comprises ten States, the court-appointed Plaintiffs' Executive Committee in the multi-district litigation captioned *In re National Prescription Opiate Litigation*, Case No. 17-md-02804 (N.D. Ohio), six municipalities, and one federally recognized American Indian Tribe, was an early supporter of the plan and—together with a number of other organized creditor groups—was integrally involved in its creation. Creditors insisted on the plan's inclusion of a third-party release for the Sacklers. Without it, hold-outs could sue the Sacklers and deplete or exhaust future funds pledged to creditors under the plan.

Despite the near-universal creditor support for the plan, the UST continues to oppose it. Its efforts have already proved costly, as the plan, first confirmed in September 2021, has yet to go effective. Those efforts are also misguided. As the Bankruptcy Court found after a lengthy evidentiary hearing, "there is now no other reasonably conceivable means to achieve the result that would be accomplished by the Chapter 11 plan in addressing the problems presented by the Debtors' Chapter 11 cases." See In re Purdue Pharma L.P., 633 B.R. 53, 59 (Bankr. S.D.N.Y. 2021). Because there are no other viable alternatives, and because even the UST (at 29) appears to concede that Purdue's plan is good for its creditors (as it assuredly is), there is no good reason why *this* should be the plan that this Court allows the UST to use as a vehicle for its campaign against third-party releases. Other opportunities to challenge such releases will arise, and in the meantime, the Second Circuit's decision—which affirmed existing precedent—has not materially altered the legal landscape. In fact, the decision narrows and limits the circumstances in which third-party releases can be appropriately incorporated into a plan.

In view of this background, the Second Circuit rightly refused to stay its mandate, which issued on July 31. This Court should not recall it.

First, there is no "reasonable probability" that four Justices will vote to grant certiorari. This Court has repeatedly declined to review third-party releases, and there is no reason to expect a different outcome now, when the Second Circuit merely reaffirmed existing Circuit law. Beyond this history, the government's previewed petition presents no true circuit split on the central legal issue: whether section 1123(b)(6) supplies a statutory basis for a third-party release. The circuits that have considered that issue agree that it does. The cases on which the government relies do not address, let alone reject, the Second Circuit's analysis.

Second, there is not a "fair prospect" that five Justices will vote to reverse the Second Circuit's judgment. As the Panel majority persuasively explained, that judgment is firmly grounded in the Bankruptcy Code and existing precedent, including United States v. Energy Resources Co., 495 U.S. 545 (1990). Judge Wesley's concurrence does not tip the balance enough to make reversal by this Court likely, and relies on grounds different from those accepted by other courts of appeals.

Third, there is no likelihood that irreparable harm will result from denial of a stay. The principal "harm" that the government alleges is the hypothetical risk that, should certiorari be granted, it might be called on to defend its appeal against assertions that it has become equitably moot. But equitable mootness is far from certain; this Court has never blessed the doctrine, and the Debtors have indicated they cannot emerge from bankruptcy until January 2024 at the earliest. Moreover, the risk that the government might be forced to overcome legal arguments adverse to its position is not an irreparable harm—it is a natural outgrowth of an adversarial legal system.

Fourth, and most important, the public interest weighs decisively against a stay of the mandate. Purdue's abatement-focused plan enjoys unprecedented and overwhelming creditor support and promises wide-ranging societal benefits to public and private claimants alike. The ongoing opioid crisis claims new victims every day, and it is no exaggeration to say that each moment that distributions under Purdue's plan are delayed, the health and well-being of American citizens is put at risk. The Department of Justice is well aware of the importance of the timely deployment of funds for abatement. Notwithstanding its current position in opposition to Purdue's plan, the DOJ itself was integrally involved in that plan's creation, and advocated for its abatement-related provisions.

After four years in bankruptcy, a lengthy confirmation hearing, and two levels of appeals, the time has come for Purdue's plan to go effective. Purdue's creditors, who are in urgent need of the lifesaving funds and relief the plan will provide, should no longer be forced to bear the costs of the UST's misguided crusade. Thus, the Court should deny the government's request to recall and stay the mandate. Further, since the Solicitor General has asked the Court to treat its stay application as a certiorari petition, the Court should accept that invitation and deny the petition.

STATEMENT

The Ad Hoc Committee adopts the Debtors' statement of the case.

ARGUMENT

To recall and stay the mandate, the government must show: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay." Indiana State Police Pension Trust v. Chrysler LLC, 556 U.S. 960, 960 (2009) (citation omitted). The Court will also consider, where appropriate, "the interests of the public at large." Id. (citation omitted). The government's application fails every prong of this test.

I. There Is No Reasonable Probability the Court Will Grant the Government's Petition for Certiorari

On at least four occasions in the past twenty years, this Court has been asked to review chapter 11 plans containing third-party releases and/or exculpations. Each time—including twice in the last three years—it has declined the invitation. See Blixseth v. Credit Suisse, 961 F.3d 1074 (9th Cir. 2020), cert. denied, 141 S. Ct. 1394 (2021); In re Millennium Lab Holdings II, LLC, 945 F.3d 126 (3d Cir. 2019), cert. denied, 140 S. Ct. 2805 (2020); SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070 (11th Cir. 2015), cert. denied, 577 U.S. 823 (2015); Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648 (6th Cir. 2002), cert. denied, 537 U.S. 816 (2002).

The government's petition is unlikely to buck this trend. The primary criterion that allows a confident prediction of a grant of certiorari is a conflict in the circuits. On the central legal issue presented here, there is none.

In approving Purdue's plan, the court of appeals concluded that "two sections of the Bankruptcy Code, 11 U.S.C. §§ 105(a), 1123(b)(6), jointly provide the statutory basis for the bankruptcy court's authority to approve a plan that includes nonconsensual releases of third-party claims against non-debtors." Appl. App. 15a. No circuit decision conflicts with this construction of these statutory provisions—indeed, all to have considered them in this context have agreed with the Second Circuit. See, e.g., Dow Corning, 280 F.3d at 656-57 (holding a third-party release is "not inconsistent with the Code, and is authorized by section 1123(b)(6)") (quotations omitted); In re Airadigm Commc'ns, Inc., 519 F.3d 640, 657 (7th Cir. 2008) (finding support for third-party release in sections 105(a) and 1123(b)(6) of the Code).

In averring a circuit conflict, the government instead relies on cases addressing the import of section 524(e) of the Bankruptcy Code. See Stay Application at 14-15 (citing decisions from the Fifth, Ninth, and Tenth Circuits). But none of those cases considered, let alone rejected, the proposition that section 1123(b)(6) might provide a statutory basis for inclusion of a third-party release in a reorganization plan. See generally In re Pacific Lumber Co., 584 F.3d 229 (5th Cir. 2009) (no mention of 1123(b)(6)); In re Lowenschuss, 67 F.3d 1394 (9th Cir. 1995) (same); In re Western Real Estate Fund, Inc., 922 F.2d 592 (10th Cir. 1990) (per curiam) (same).

The statutory grounding for the Second Circuit's opinion—left unaddressed in the government's allegedly conflicting case law—is more than a trivial detail. This Court has long stressed the value of "percolation" of legal issues in the lower courts. See, e.g., Calvert v. Texas, 141 S. Ct. 1605, 1606 (2021) (Sotomayor, J.) (certiorari denied where the "legal question . . . is complex and would benefit from further percolation in the lower courts"); Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782 (2019) ("We follow our ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals."). Thus, unless and until a circuit split develops on the meaning and scope of section 1123(b)(6), the Court is unlikely to (and should not) grant certiorari.

To be sure, the Second Circuit *also* addressed section 524(e), and rejected the argument accepted by some other circuits, that the limited "effect of a discharge" under that subsection somehow limits the powers of a court approving a plan of reorganization. Despite its acceptance by the Fifth and perhaps the Ninth and Tenth Circuits (but see Blixseth, 961 F.3d at 1082-83), that argument is weak—so weak that Judge Wesley's concurrence in the judgment does not even mention that statutory provision. The real issue here is whether, as Judge Wesley put it, sections 105(a) and 1123(b)(6) are "up to the task." Appl. App. 87a. On *that* issue, no circuit conflict has yet developed, and it is entirely possible that one will never develop. The Court is thus highly unlikely to take the issue up at this time.

II. There Is Not a Fair Prospect That a Majority of the Court Will Conclude That the Decision Below Was Erroneous

The plain text of the Bankruptcy Code—beyond reasonable dispute—authorizes third-party releases in plans of reorganization as long as they are "appropriate" and "not inconsistent with the applicable provisions of this title." The authorizing section, 11 USC 1123(b)(6), states with unmistakable breadth that a plan may "include *any* other appropriate provision not inconsistent with the applicable provisions of this title" (emphasis added). And "any" means any. Ali v. Bureau of Prisons, 552 U.S. 214, 219-20 (2008); see also Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (Scalia, J., for a unanimous Court) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (cleaned up).

It is an uncontroversial proposition in this Court that statutory interpretation *always* starts with the text. Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (Thomas, J., for a unanimous Court). And the court of appeals relied centrally on Section 1123(b)(6), noting in particular that—by its plain text—it authorizes "appropriate" provisions in plans of reorganization as long as they are not forbidden elsewhere in the Code. Appl. App. 54a-56a

So what does the government have to say about *the* provision that unmistakably authorizes "appropriate" plan provisions not inconsistent with the Code? It never grapples with the text. Instead, the government mischaracterizes the Second Circuit's opinion as holding "that courts sitting in bankruptcy may take virtually any action not expressly forbidden by the text of the Bankruptcy Code." Stay Application at 4. But the court of appeals did not authorize "any action," but only "appropriate" provisions and only those that appear in a plan—which is the subject covered by Section 1123. The government's remaining complaint—that, in that context, the court of appeals authorized actions "not forbidden elsewhere in the Code"—is merely an accusation that the court of appeals <u>followed the text of Section 1123(b)(6)</u>, which within its domain authorizes *any* appropriate provision "not inconsistent with the applicable provisions of this title."

The government goes so far as to argue that this Court "has repeatedly rejected" that "premise at the heart of the court of appeals' reasoning." Stay Application at 4. The argument, which ignores the Second Circuit's words and the text of the Bankruptcy Code, is unsustainable. What this Court *has* rejected is the premise that *Section 105(a)* of the Code has that effect. But it has *never* said that with respect to Section 1123(b)(6).[1] Why? Because the express terms of Section 105(a) say nothing resembling Section 1123(b)(6)'s key phrase "not inconsistent with the applicable provisions of this title." Instead, Section 105(a)—one of the Code's *general* provisions applicable across all Chapters—authorizes "any process or judgment *necessary to carry out the provisions of this title*" (emphasis added).

Because the government refuses to grapple with the fact that Section 1123(b)(6) applies only to plans of reorganization under Chapter 11, it is able (p. 22) to lump that Section in with Section 105(a) as a "generic" provision of the Code, which it is not, and (p. 23) as a "general provision[] preserving bankruptcy courts' general residual authority." Because the government refuses to accept the fact that *Congress* trusted lower courts confirming plans of reorganization to differentiate "appropriate" from inappropriate provisions in plans, it attributes an absurd parade of horribles (p. 22) to the court of appeals and complains (ibid.) that the word Congress chose—"appropriate"—is not a sufficient constraint on the sound discretion of lower courts.[2]

[1] Indeed, the only time this Court has construed Section 1123(b)(6), it has—by an 8-1 vote—construed that section as a *broad* authorization, rejecting a prior Solicitor General's argument to the contrary. Energy Res., 495 U.S. at 549.

[2] The Solicitor General criticizes the court of appeals for giving content to the word "appropriate" through a seven-factor test, denigrating the fleshing-out of "appropriate" as "entirely unmoored from the Code's text" and "freewheeling." Stay Application at 23-24. But it is no more "unmoored" than the many detailed tests in antitrust law that stem from interpretation of "contracts, combinations, and conspiracies in restraint of trade" in the Sherman Act, 15 U.S.C. § 1, or the many doctrines stemming from the phrase "public interest" in statutes governing communications and transportation, see, e.g., 47 U.S.C. §§ 303, 307, 309 and 49 U.S.C. § 11324.

Instead of grappling with the text, the Solicitor General makes purposivist arguments based on the underlying theory she attributes to the Code (the bankruptcy *quid pro quo*) and structural arguments that rely on inapplicable Code sections. *No court of appeals has ever accepted any such arguments*. Instead, the three courts that the Solicitor General (inaccurately) claims to be in conflict with the decision below all rely exclusively on Section 524(e) of the Code, which states the effect of a discharge. But those courts have never grappled with Section 1123(b)(6), and they have constrained a judge's *powers* when confirming a plan of reorganization—the subject of Section 1123—by invoking an inapplicable provision that merely states what effect a *discharge* has. The Seventh Circuit cogently explained the distinction in Airadigm, 519 F.3d at 656, and the Second Circuit in this case block-quoted the relevant reasoning from that case, Appl. App. 57a.

The government chooses to stay nearly silent about the text of the statutory provision on which the court of appeals principally relied, and yet it implies that it is *Congress* that has been "silent." Stay Application at 23 (citing Czyzewki v. Jevic Holding Corp., 580 U.S. 451, 465 (2017), for the proposition that "more than simple statutory silence" is required to justify a "major departure" from a fundamental principle of bankruptcy, which the government claims is the case here despite the fact the great majority of circuits disagree). But the words "any other appropriate provision" are in no way, shape, or form congressional silence. They are a broad grant of authority. Energy Res., 495 U.S. at 549. The UST and his counsel may not like the results that follow naturally from a broad grant of authority, but it is struthious to pretend that Congress has been "silent."

For the government to obtain certiorari, it must persuade four Justices to address an alleged circuit split even though the Solicitor General does not endorse the reasoning of the alleged minority circuits and instead advances an argument that *no* court of appeals has ever accepted. For the government to prevail on the merits, it must convince five Justices that there is some reason *not to follow the plain text of Section 1123(b)(6)*. Perhaps the Solicitor General has some argument for why the text of Section 1123(b)(6) should not be followed, but she has not favored this Court with any such argument in her stay application. Given those defects, the government has not shown that a grant and reversal have the requisite likelihood to support a stay.

III. There Is No Likelihood of Irreparable Harm If a Stay Is Denied

A stay "is not a matter of right, even if irreparable injury might otherwise result," Chrysler, 556 U.S. at 961 (citation omitted), and here the government has not even shown a likelihood of irreparable harm.

The principal harm that the government identifies is the potential risk of equitable mootness. See, e.g., Stay Application at 26. That prospect is far from imminent. Equitable mootness could be relevant, if at all, only if certiorari is granted and only if Purdue's plan goes effective in the interim; neither is certain, or even likely. The government asserts there is "no dispute that, absent a stay, the plan is likely to be substantially consummated before this Court would have an opportunity to issue a merits decision in this case." Stay Application at 6. But the Debtors have stated that the earliest they could emerge from bankruptcy is January 2024. Therefore, the Court will have the opportunity to revisit the propriety of a stay at a later date should it decide to grant certiorari—a decision that is sure to come well before the Debtors would be in a position to emerge.

Moreover, the government does not concede that its petition for certiorari *will* be equitably moot if a stay is denied. It asserts only that this Court might be required "to address questions about the validity and applicability of" the equitable mootness doctrine. Id. at 26. The possibility that the government might be forced to confront and overcome legal arguments adverse to its position is hardly a cognizable form of harm. Any claim of irreparable injury is speculative in the extreme. See Chrysler, 556 U.S. at 960 (considering whether there is "a likelihood that irreparable harm *will* result from the denial of a stay") (emphasis added).

In any event, as the Second Circuit panel observed, the UST has *no financial interest* in overturning the third-party release at the heart of this case. Appl. App. 76a. The parties that *do* have such interests helped craft and overwhelmingly favor (or do not object to) the plan of reorganization, including the third-party release. The mere litigation interests of the government present at best an ephemeral injury, whereas the *grant* of a stay would inflict true and drastic irreparable injury on thousands of States, municipalities, Tribes, private entities, and individual victims.

Perhaps cognizant of its own tenuous claims of harm, the government also seeks to invoke the interests of Purdue's creditors. See Stay Application at 5 ("A stay would, at a minimum, avoid potentially wasteful implementation steps that would siphon resources from the estate in the event that this Court ultimately upholds the district court's order vacating the plan."); see also id. at 6 (referencing benefits of "legal certainty"). But those creditors can and do speak for themselves, and they have resoundingly voiced their support for the plan and their opposition to a stay. As the Debtors explain, permitting preliminary steps towards plan implementation now will save precious time later by enabling expeditious emergence if and when proceedings before this Court are resolved. The UST, which has no economic stake in this case, should not preempt the unanimous views of the economic stakeholders regarding the benefits or costs of preparing to emerge—particularly when the relatively de minimis costs associated with preparing for emergence are dwarfed by the enormous costs that would be imposed by a stay (as discussed below) And a desire for "legal certainty" provides no basis for a stay; if it did, then every plan should be stayed if its confirmation rested on an asserted error of law.

IV. The Public Interest Weighs Strongly Against A Stay

Finally, the public interest weighs strongly against a stay of the mandate. Purdue filed for bankruptcy in September 2019—nearly four years ago—yet its creditors have yet to receive any recoveries on their claims. The federal government, for its part, insisted on a pre-plan, $225 million payout from the Sacklers as a part of a civil settlement. C.A. JA-4895. The continued delay in plan distributions deprives States, municipalities, and Tribes of desperately needed funds for abatement of the opioid crisis and threatens the health and survival of thousands of individual victims and their families. As just one measure of the daily toll of the opioid crisis, government statistics show there were more than 80,000 opioid-related deaths in

2021 (the latest year for which final statistics are available).[3] For every day that Purdue's plan is delayed, human lives are put at continued risk.

Allowing Purdue's plan to go effective would help mitigate these effects. Among its many benefits, the plan will establish and fund a series of public and private creditor trusts dedicated, respectively, to abatement of the opioid crisis and the compensation of individual victims. The plan also establishes a document repository that will provide public access to over a hundred million documents (including thousands of privileged documents) detailing Purdue's and the Sacklers' role in the opioid crisis, and transfers the Debtors' business to a "Newco" for the benefit of the abatement trusts, while subjecting Newco to a detailed operating injunction, governance covenants, and the oversight of an independent monitor.

Ironically, the beneficial features of Purdue's plan are at least partly attributable to the efforts of the Department of Justice, which was involved in the plan's creation. As the Ad Hoc Committee's witness testified below, the federal government helped to craft, and ultimately signed off on, the abatement strategies in the plan. C.A. JA-6409. And as the Second Circuit recognized, Purdue's criminal plea agreement "stipulated that the DOJ would agree to release $1.775 billion of its $2 billion claim so long as a future distribution plan met certain requirements, specifically that an abatement trust for the public benefit would be established and a

[3] The National Institute on Drug Abuse reports that: "Opioid-involved overdose deaths rose from 21,089 in 2010 to 47,600 in 2017 and remained steady through 2019. This was followed by a significant increase in 2020 with 68,630 reported deaths and again in 2021 with 80,411 reported overdose deaths." See https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates.

document repository created." Appl. App. 21a; see also C.A. JA-465-66 (DOJ attorney explaining that "the government believes that these funds would be better used if put towards the abatement objectives of federal, state and tribal governments…").

While the benefits of Purdue's plan are clear, the Court need not speculate as to where the public interest lies, as the public itself has spoken. Purdue's creditors comprise, among others, nearly all of the Nation's States, Territories, municipalities, and Tribes, and thousands of individual victims. Those creditors—the entities with a concrete stake in the outcome of this litigation—overwhelmingly support the plan, with each of the governmental and personal injury claimant classes having voted in favor of the plan by margins exceeding 95% (even before accounting for subsequent settlements). See C.A. JA-6258. Thus, as the Second Circuit cogently observed: "with the Nine [initially objecting States] no longer pursuing their objection, the main challenge to this appeal is not by creditors, but by the [UST]—a government entity without a financial stake in the litigation." Appl. App. 76a.

The government acknowledges the plan's benefits, see Stay Application at 29, yet downplays the disruptive effect of a stay on the public while greatly overstating the stakes of this litigation for the government. Each of its arguments fails.

First, in an effort to "put the cost of delay in context," the government argues that "only $300 million" is due upon the effective date of the plan. Stay Application at 30. This is flatly incorrect (as the government should know, since its error was pointed out in the stay briefing before the Second Circuit). The plan as confirmed by the Bankruptcy Court required an effective date Sackler contribution of $300 million, see C.A. JA-3490, but that amount has since been increased to $500 million by virtue of the settlement with the Nine, see C.A. JA-1570. The government's $300 million figure also ignores the assets that *Purdue itself* (not the Sacklers) will distribute to creditors on the effective date. Since Purdue's cash exceeds $1.4 billion, see Monthly Operating Report [Bankr. Dk. No. 5785], *the Debtors project that approximately $1.339 billion will be distributed to creditors on the effective date*, assuming an effective date of December 31, 2023. Purdue C.A. Opp'n to Stay Mot. Exh. A, ¶18 (declaration of Jesse DelConte). These funds—as well as ensuing distributions—will be delayed by a stay. See id. ¶¶ 21-22 (explaining cascading effects of delay, under which a stay of three months would delay not just the initial $1.339 billion due on the effective date, but also subsequent distributions of approximately $1.603 billion).

Second, the government glibly suggests that the harms of delay could be mitigated by the Sacklers' "agreeing to an accelerated payment schedule." Stay Application at 30. But it is the Sacklers that benefit most from delay; they will not gratuitously agree to accelerated payments, especially because their settlement agreement already addresses the prospect of appellate delay. See C.A. JA-3501-02 (section titled "Payments Pending Appeals" addressing appellate scenarios).

Third, the government suggests that the costs of delay are justified by the stakes—in this and future cases. Stay Application at 30 at 20 (referencing "serious harm to the public interest, nonconsenting claimants in this case, and future mass tort victims of forgoing review"). The government is wrong on both counts.

As to this case, there is no reasonable prospect that reversal of the plan will lead to a better outcome for any claimant. The Bankruptcy Court found, on the basis of substantial evidence (none of it countered by the UST), that the most likely alternative to the current plan is a liquidation, and that in a liquidation, unsecured creditors would likely recover *nothing*. See C.A. SPA-283; see also id. at 232 (finding that in "the most realistic scenarios," there "would literally be no recovery by unsecured creditors from the estates in a Chapter 7 liquidation").

The government's allusion to alternative plan constructs not involving a third-party release reflects its persistent and fundamental misunderstanding of the release. Far from the sweeping Sackler overreach that the government portrays, see Stay Application at 2, 29, the tailored release is a feature insisted upon by the *creditors*, who overwhelmingly support it. The plan is structured so that non-federal governmental claimants will receive distributions from the Sacklers over the course of 16 years. The Ad Hoc Committee would not have agreed to deferred payments if it was possible that hold-out creditors could sue the Sacklers in the interim and deplete their assets, thereby impairing the negotiated stream of payments and disrupting the heavily negotiated allocation among States. See C.A. JA-6415 (testimony from Ad Hoc Committee witness that "[t]he Sackler settlement is predicated on the understanding that no state will retain its claims against the Sacklers, an outcome that could cause all other states to revisit allocation and settlement").

As to future cases, the Second Circuit decision neither provides a "roadmap" for "gamesmanship," nor does it threaten reduced recoveries in future bankruptcies.

Stay Application at 3, 28. Third-party releases have been permitted in the Second Circuit for decades, so this latest decision from the court of appeals is unlikely to result in the sort of forum-shopping the government has posited. If anything, the Second Circuit has erected a *heightened* standard for approval of third-party releases, with its 7-factor test—which looks, among other things, to whether there is "overwhelming" approval by creditors (as there is here)—and its requirement of District Court approval. Moreover, the government's assertion that the availability of third-party releases will *reduce* the amounts that are likely to be paid by non-debtor tortfeasors, Stay Application at 28, is belied by the evidence in this case. As the Ad Hoc Committee's witness testified, the Sacklers paid a "settlement premium" to obtain the release. See Purdue Pharma, 633 B.R. at 79.

Finally, the choice between using this case to resolve an "important and recurring question" of bankruptcy law, Stay Application at 29, and serving the public good is a false one. That the issues presented by the government's petition may be important does not mean that they must be resolved by the Court *in this case*—a case in which all parties agree that the plan stands to accomplish so much good. The UST can challenge third-party releases in other cases where doing so will not risk the public health. See, e.g., Stay Application at 29 (referencing ongoing litigation in In re Voyager Digital Holdings, Inc., 649 B.R. 111 (Bankr. S.D.N.Y. 2023)).

CONCLUSION

This Court should deny the stay application and should not recall the Second Circuit's mandate. Should the Court accept the government's invitation to consider its application a petition for certiorari, it should deny that petition as well.

Respectfully submitted.

August 4, 2023

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