No. 23A87

In the
Supreme Court of the United States

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

Applicant,

v.

PURDUE PHARMA L.P., ET AL.,

Respondents.

MOTION TO DIRECT THE CLERK TO FILE DEBTORS' SUR-REPLY 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

MARSHALL S. HUEBNER
BENJAMIN S. KAMINETZKY
MARC J. TOBAK
GARRETT L. CARDILLO
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017

GREGORY G. GARRE
Counsel of Record
CHARLES S. DAMERON
ERIC J. KONOPKA
LATHAM & WATKINS LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for the Debtors

August 9, 2023

RULE 29.6 STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

The Debtors respectfully request that the Court direct the Clerk to file a short sur-reply brief responding to a new argument raised for the first time in the Trustee's reply brief. In support, the Debtors state as follows:

1. The Trustee filed an application to stay the Second Circuit's mandate on July 28, 2023. Justice Sotomayor requested responses to that application, due by noon on August 4, 2023.

2. The Debtors and multiple creditor groups, including the Official Committee of Unsecured Creditors appointed by the Trustee himself, filed oppositions to the Trustee's stay application on August 4, 2023, shortly before the noon response deadline.

3. Shortly before that deadline, a small group of Canadian creditors—the Cities of Brantford, Grande Prairie, Lethbridge, and Wetaskiwin, the Peter Ballantyne Cree Nation, and the Lac La Ronge Indian Band (collectively, the "Canadian Creditors")—filed a lengthy "response" to the stay application. But unlike all the other responses, the Canadian Creditors' response *supported* the Trustee's stay application. It was, in effect, an amicus brief in support of the Trustee's stay application. The Debtors did not receive advance notice of this filing, which would be required in analogous circumstances. *See* Sup. Ct. R. 37.2.

4. The Canadian Creditors' response indicated that they would support the Trustee's petition for certiorari or possibly file their own petition for certiorari—an assertion that was introduced for the first time in this case—and raised additional arguments in support of the Trustee's application. The Debtors had no opportunity

to respond to these points given that the Canadian Creditors filed their response at the same time as all other responses were due.

5. On August 7, 2023, the Trustee filed a 28-page reply in support of his stay application. The Trustee's reply was not expressly authorized by this Court's rules, *see generally* Sup. Ct. R. 22, this Court's July 28, 2023 scheduling order, or any other order entered in this case. In his reply (at 5), the Trustee specifically relied on the Canadian Creditors' response and their "continued participation in this case" to argue that the Court has "no need to address" significant questions raised by the Debtors (at 32-37) about the Trustee's statutory and Article III standing to independently pursue relief in this Court.

6. The Trustee did not previously make this argument. Indeed, his stay application in this Court—and his stay papers in the Second Circuit—did not mention the Canadian Creditors (except in the caption or "Parties to the Proceeding" section).

7. Both the Canadian Creditors' response and the Trustee's reply relying on that response omit key facts that bear on the Canadian Creditors' role in this case and their ostensible interest in the plan at issue. For example:

- The Canadian Creditors failed to raise in the bankruptcy court any categorical objection to authority under the Bankruptcy Code to approve the third-party releases at issue and, instead, simply argued that the releases should not be approved under the Second Circuit's test authorizing third-party releases in appropriate circumstances.
- The Canadian Creditors have no apparent stake in the plan at issue.

Purdue Canada—which is separately owned by the Sacklers and is not one of the Debtors—manufactured, sold, and distributed products in Canada; the Debtors did not (and do not). And under the plan, any claims the Canadian Creditors may have against Purdue Canada, or against the Sacklers that relate to Purdue Canada and do not rest on the Debtors' conduct, are expressly carved out of the releases. As a result, the Canadian Creditors, unlike U.S. creditors, have an alternative source of recovery for any injury they may have suffered.

- It is also highly unlikely that the Canadian Creditors have any claim that would be subject to the releases at issue. Indeed, their most recent attempt to plead claims that would be subject to the releases rests on a highly attenuated public nuisance theory that alleges that conduct directed to the United States inflicted injuries across the border—a theory that would face significant legal obstacles.

In light of these facts (and others), the Canadian Creditors would present a highly flawed and untenable vehicle to raise the question presented by the Trustee, and would only further complicate the serious standing questions raised by the Trustee's stay application and petition for certiorari.

8. The information in the Debtors' proposed sur-reply would be of material assistance to Justice Sotomayor (or the Court) in acting on the Trustee's stay application, because the Trustee—for the first time in his reply brief—has specifically relied on the Canadian Creditors' response in seeking to deflect the glaring vehicle

defect raised by the Trustee's own lack of standing to press his petition for certiorari.

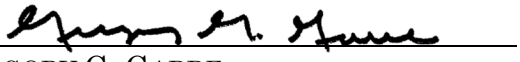
9. On August 8, 2023, within a day of the Trustee's filing of his reply, the Debtors submitted a sur-reply tailored to respond only to the new points raised by the Trustee and the Canadian Creditors. The Debtors' sur-reply explained the vehicle problems associated with the Trustee's reliance on the Canadian Creditors' supposed standing and the need for a sur-reply to correct an incomplete portrayal of this issue. The Debtors also requested leave in that brief to file the sur-reply. The Clerk of the Court did not accept the Debtors' sur-reply for filing.

* * *

For the reasons discussed above, the Debtors respectfully submit that their proposed sur-reply would assist the Court in acting on the Trustee's application and is warranted to respond to the Trustee's new attempt to seek relief in this Court based on the supposed standing of the Canadian Creditors. The Debtors respectfully request that the Court direct the Clerk to file their proposed sur-reply, appended hereto, as a sur-reply in opposition to the Trustee's stay application.

August 9, 2023

Respectfully submitted,



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555 Eleventh Street, N.W.
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APPENDIX
Proposed Sur-Reply

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DEBTORS' SUR-REPLY

The Debtors seek leave to file this sur-reply to respond to a new argument raised for the first time in the Trustee's reply brief. In their opposition to the Trustee's stay application, the Debtors (at 32-37) pointed out thorny questions about the Trustee's statutory and Article III standing to independently seek relief in this Court. For the first time in his reply, the Trustee (at 5) encourages the Court to look past these questions by relying on a brief filed by four Canadian municipalities and two Canadian First Nations (the "Canadian Creditors") in support of the Trustee's stay application, to which the Debtors never had an opportunity to respond.[1] But the Trustee's attempt to piggyback on the supposed standing of six foreign creditors with legally dubious claims exacerbates, rather than alleviates, the glaring vehicle defects with the Trustee's stay application and petition for certiorari.

1. A limited sur-reply to respond to a new argument raised by the Trustee in his reply brief based on the Canadian Creditors' brief in support of his stay application is appropriate. The Trustee's stay application in this Court—and his stay papers in the Second Circuit—did not even mention the Canadian Creditors (except

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[1] The Canadian Creditors refer to themselves (at 1) as "representative plaintiff[s]" for class action lawsuits. But that is purely aspirational. As the Canadian Creditors concede (at 6), no class of Canadian municipalities or Canadian First Nations and Metis Peoples has been certified by any court—in the United States or Canada. Certainly no such class was certified in the proceedings below. The bankruptcy court itself observed that it had "never granted . . . approval" of such a class under Federal Rule of Bankruptcy Procedure 7023. Tr. (Aug. 9, 2021) 41:6-7, Bankr. Dkt. No. 3572. The Canadian Creditors thus consist of four relatively small Canadian municipalities (the Cities of Brantford, Grande Prairie, Lethbridge, and Wetaskiwin) and two Canadian First Nations (the Peter Ballantyne Cree Nation and Lac La Ronge Indian Band)—the actual plaintiffs named in the litigation.

in the caption or "Parties to the Proceeding" section), much less attempt to rely on the Canadian Creditors' ostensible standing to bootstrap his own. And the Debtors did not have an opportunity to respond to the Canadian Creditors' brief in support of the Trustee's stay application because—while their response was akin to an amicus curiae brief in support of the Trustee, which ordinarily would be filed early enough to allow other parties to respond to the filing, *see, e.g.*, Sup. Ct. R. 37.2-4—the Canadian Creditors did not file and serve their response until shortly before the response deadline set by this Court for the Debtors' opposition to a stay. Now that the Trustee has specifically relied on the Canadian Creditors' response, the Debtors feel it incumbent on them to respond to the Trustee's new argument. We do not otherwise respond to the many mischaracterizations in the Trustee's reply.

2. The Trustee's position is a contradiction in terms. He first claims (at 5) that there is "no need" for the Court "to address the U.S. Trustee's standing" because of "the Canadian creditors' continued participation in this case." At the same time, the Trustee summarily dismisses (at 5 n.2) the argument "that the Canadian creditors 'have waived' their objections" because "waiver . . . would go only to the merits of the Canadian creditors' claims and have no bearing on their standing." The Trustee evidently wants to piggyback on the Canadian Creditors' ostensible standing, but pursue this case free of any of the vehicle issues that would haunt a petition for

certiorari from the Canadian Creditors themselves. That cannot be. If the Trustee wants to stand in the Canadian Creditors' shoes, he has to carry their baggage.[2]

3. That baggage is real. There are, in fact, several issues that would render any petition for certiorari by the Canadian Creditors an exceedingly poor vehicle for this Court's review in its own right.

a. First, the Canadian Creditors failed to object below to the third-party releases on the basis the Trustee now pursues. While the Trustee selectively quotes (at 5 n.2) from a heading in the Canadian Creditors' objection to plan confirmation to obscure the point, the Canadian Creditors did not argue that third-party releases categorically are not authorized by the Bankruptcy Code. Instead, they *embraced* the Second Circuit's longstanding test for approving third-party releases, recognizing that the "hurdles" to approval of such releases "may not be insurmountable for a Debtor," and argued only that the releases were not authorized under the particular circumstances here. Objection of Certain Canadian Municipality Creditors and Canadian First Nation Creditors at 9-10 (July 19, 2021), Bankr. Dkt. No. 3275 ("Canadian Creditors' Objection") (relying on *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 725-26 (Bankr. S.D.N.Y. 2019)).

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[2] This requires an examination of what the case would look like if the Canadian Creditors were the sole petitioners. Without standing of his own, the Trustee could support the Canadian Creditors as amicus curiae but not seek relief independently. The decision whether to grant certiorari would turn on, among other things, whether there are vehicle issues with *the Canadian Creditors' petition—i.e.*, whether *they* preserved the question presented for this Court's review at every stage of the judicial process, not whether an amicus without standing did so.

Moreover, rather than broadly argue that the third-party releases were unauthorized (as the Trustee now does), the Canadian Creditors' true objection was that "[t]he imposition by a bankruptcy court of non-consensual third-party releases against *foreign sovereigns* . . . raises a number of obvious questions." *Id.* at 10 (emphasis added). That is a far cry from the position that the Trustee now misattributes to the Canadian Creditors. And this argument—like the Canadian Creditors' other arguments—was properly rejected by the courts below, is not reprised by the Trustee or the Canadian Creditors here, and does not implicate a conflict of authority. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689, 1696 (2023) ("[T]he Bankruptcy Code unequivocally abrogates the sovereign immunity of any and every government that possesses the power to assert such immunity."); *see also, e.g.*, App. 81a-85a.

b. The Canadian Creditors may well have no actual stake in the outcome of the plan at issue. The Debtors do not distribute or sell any medications in Canada (and, in fact, have never done so). Purdue Canada, which is separately owned by the Sacklers and is not one of the Debtors, was responsible for the manufacture, distribution, and sale of products in Canada. The only claims released under the plan are opioid claims held by creditors *of the Debtors* that relate *to the Debtors'* conduct. Debtors' Response 14. By contrast, any claims the Canadian Creditors may have against Purdue Canada, or against the Sacklers that relate to Purdue Canada and do not rest on the Debtors' conduct, are expressly carved out of the releases. Debtor App. 175a n.2, 181a n.3. The preservation of these claims gives

the Canadian Creditors—unlike U.S. creditors—"another source of recovery" for whatever harm they allegedly suffered. App. 84a. Indeed, the fact that these claims are preserved by the plan led every single Canadian province to stipulate that it does not object to the plan. *See* Debtor App. 338a-42a. And the fact that this handful of Canadian Creditors has nothing to lose perhaps explains why they stand alone among all creditors in support of the Trustee's crusade against the plan.

In addition, not one of the proofs of claim that the Canadian Creditors mentioned in their objection to plan confirmation suggests that they have claims that would be subject to the releases.[3] As the bankruptcy court found: The Canadian Creditors' proofs of claim did "not distinguish between the conduct of the Debtors and the non-Debtors," so "it is far from clear that the claims really are against the Debtors." *Id.* at 175a n.2. To the extent that these claims relate to conduct of Purdue Canada or other non-Debtors, and not to the conduct of the Debtors, such claims are fully preserved under the plan. *Id.* at 175 n.2, 181a n.3.

c. It is also extremely unlikely that the Canadian Creditors could manufacture a valid claim subject to the releases—*i.e.*, one that is against the Debtors or related to their conduct. It was not until December 2022—more than three years after these Chapter 11 cases were filed and more than a year after the plan was confirmed—that the Canadian Creditors first asserted *any* claims against the

[3] In their objection to plan confirmation, the Canadian Creditors listed seven proofs of claim, numbered 145592, 144535, 144455, 144366, 144514, 144475, and 144465. Canadian Creditors' Objection at 4. Copies of these proofs of claim are available at https://restructuring.ra.kroll.com/purduepharma/.

Sacklers. *See* Complaint, *Lac La Ronge Indian Band v. Sackler*, No. 160667-2022 (N.Y. Sup. Ct. Dec. 14, 2022), ECF No. 1. Those claims rest entirely on the alleged conduct of the Debtors in the United States (and of the Sacklers in allegedly directing the Debtors' conduct), directed to the United States, that purportedly contributed to injuries the Canadian Creditors claim to have sustained in Canada as a result of an alleged public nuisance that crossed the border. These claims are both extraordinarily attenuated and likely run afoul of the longstanding common-law rule barring civil actions by foreign governments to enforce foreign penal laws or to recover penalties in U.S. courts. *See, e.g.*, *Pasquantino v. United States*, 544 U.S. 349, 361 (2005) ("[T]he Courts of no country execute the penal laws of another." (citation omitted)); *Texas v. Donoghue*, 302 U.S. 284, 288 (1937) (bankruptcy court could not enforce statute requiring forfeiture of oil as a penalty). In this respect, it is especially remarkable that the Trustee would embrace the Canadian Creditors' claims. Indeed, throwing open the gates of public nuisance doctrine to cover alleged extraterritorial effects of purely domestic conduct would both be inherently contrary to our national interests and create even more vehicle problems for this already baggage-laden petition.

4. Finally, the Canadian Creditors' claims (at 3, 16) regarding the purported risk of equitable mootness do not give rise to irreparable harm that would warrant a stay and, in any event, misapprehend the procedural steps that would be necessary before anything resembling substantial consummation could occur. Pursuant to the plea agreement with the Department of Justice, the timing of Purdue

Pharma L.P.'s sentencing hearing is tied to, and in fact precedes, emergence from Chapter 11. The Department of Justice is obviously integral to the scheduling of that sentencing hearing. Therefore, the Canadian Creditors' statement (at 3)—that the Debtors could take steps toward plan implementation that "would unnecessarily complicate the Court's resolution of the case"—is untethered to reality.

* * *

For these reasons, the Canadian Creditors provide no solid ground for the Trustee to stand on in this Court. On the contrary, piggybacking on the Canadian Creditors' flimsy case would invite *more* questions about whether this case is a suitable vehicle for this Court's review. It is not. The Court should deny the Trustee's stay application, consider that application as a petition for certiorari, and deny it too.

August 9, 2023

Respectfully submitted,

MARSHALL S. HUEBNER
BENJAMIN S. KAMINETZKY
MARC J. TOBAK
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