No. 23A____

In the Supreme Court of the United States

LUJAN CLAIMANTS and DUMAS & VAUGHN CLAIMANTS,
Applicants,

v.

BOY SCOUTS OF AMERICA, et al.,
Respondents.

On Application for a Stay of the Bankruptcy Plan Presently Being Implemented in the United States Bankruptcy Court for the District of Delaware (No. 22-1237)

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

To the Hon. Samuel A. Alito Circuit Justice, United States Court of Appeals for the Third Circuit

Delia Lujan Wolff
LUJAN & WOLFF LLP
238 Archbishop Flores St.
Suite 300, DNA Building
Hagatna, Guam 96910
671-477-8064
dslwolff@lawguam.com
Counsel for Applicants Lujan Claimants

Gilion C. Dumas
DUMAS & VAUGHN, LLC
3835 NE Hancock Street, Suite GLB
3835 Portland, OR 97212
503-616-5007

John M. Reeves
Counsel of Record
REEVES LAW LLC
7733 Forsyth Blvd., Suite 1100--1192
St. Louis, MO 63105
(314) 775-6985
reeves@appealsfirm.com
Counsel for Applicants Lujan Claimants and Dumas & Vaughn Claimants

gilion@dumasandvaughn.com
Counsel for Applicants Dumas & Vaughn Claimants

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PARTIES TO THE PROCEEDINGS

The parties below are National Union Fire Insurance Company of Pittsburgh, Pa., Lexington Insurance Company, Landmark Insurance Company, and The Insurance Company of the State of Pennsylvania (the "AIG Companies"); Allianz Global Risks US Insurance Company, National Surety Corporation and Interstate Fire & Casualty Company, Arch Insurance Company, Argonaut Insurance Company and Colony Insurance Company, Continental Insurance Company and Columbia Casualty Company, Gemini Insurance Company, General Star Indemnity Company, Great American Assurance Company, f/k/a Agricultural Insurance Company; Great American E&S Insurance Company, f/k/a Agricultural Excess and Surplus Insurance Company; and Great American E&S Insurance Company, Indian Harbor Insurance Company, on behalf of itself and as successor in interest to Catlin Specialty Insurance Company, Liberty Mutual Insurance Company, The Ohio Casualty Insurance Company, Liberty Insurance Underwriters, Inc. and Liberty Surplus Insurance Corporation, Traders and Pacific Insurance Company, Endurance American Specialty Insurance Company, and Endurance American Insurance Company, Old Republic Insurance Company, Travelers Casualty and Surety Company, Inc. (f/k/a Aetna Casualty & Surety Company), St. Paul Surplus Lines Insurance Company and Gulf Insurance Company, Lujan Claimants, and Dumas & Vaughn Claimants.

The parties below are also Boy Scouts of America, Delaware BSA, LLC,

Ad Hoc Committee of Local Councils of the Boy Scouts of America, Coalition of Abused Scouts for Justice, Future Claimants' Representative, The Zalkin Law Firm, P.C. and Pfau Cochran Vertetis Amala PLLC, Hartford Accident and Indemnity Company, First State Insurance Company, Twin City Fire Insurance Company, and Navigators Specialty Insurance Company, Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America and Indemnity Insurance Company of North America, Federal Insurance Company and Westchester Fire Insurance Company, American Zurich Insurance Company, American Guarantee Insurance Company, and Steadfast Insurance Company, Clarendon National Insurance Company, as successor in interest by merger to Clarendon America Insurance Company; River Thames Insurance Company Limited (as successor in interest to Unionamerica Insurance Company Limited, on its own behalf and in turn as successor to St. Katherine Insurance Company Limited); and Zurich American Insurance Company, as successor to Maryland Casualty Company, Zurich Insurance Company, and Maryland General Insurance Company.

Finally, the parties also include The Hon. Barbara J. Houser (Ret.) as Trustee of the BSA Settlement Trust.

Related Proceedings

United States Court of Appeals for the Third Circuit:

In re Boy Scouts of America, et al., No. 23-1664 (Dec. 14, 2023)
(denying motion to stay appeal and bankruptcy plan)
(reprinted at Apx.4a).

United States District Court for the District of Delaware:

In re Boy Scouts of America, et al., No. 22-1237 (March 28, 2023)
(affirming bankruptcy plan) (reprinted at Apx.51a),
available at 650 B.R. 87 (D. Del. 2023).

United States Bankruptcy Court for the District of Delaware:

In re Boy Scouts of America, et al., No. 20-10343 (Sept. 8, 2022)
(order confirming and approving bankruptcy plan),
available at 2022 WL 20541782 (Bankr. D. Del. Sept. 8, 2022).

In re Boy Scouts of America, et al., No. 20-10343 (July 29, 2022)
(order outlining general nature of bankruptcy plan but declining to approve it at that point), *available at* 642 B.R. 504 (Bankr. D. Del. 2022)

INTRODUCTION

TO THE HONORABLE SAMUEL A. ALITO, CIRCUIT JUSTICE OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT:

In accordance with this Court's Rule 23 and the All Writs Act, 28 U.S.C. § 1651, Lujan Claimants and Dumas & Vaughn Claimants (collectively "Abuse Claimants") respectfully apply for a stay of the bankruptcy plan currently being implemented in the United States Bankruptcy Court for the District of Delaware pending the disposition of Abuse Claimants' appeal challenging that plan in the United States Court of Appeals for the Third Circuit and, if the Third Circuit affirms that plan, pending the timely filing and disposition of a petition for a writ of certiorari and any additional proceedings in this Court. Abuse Claimants also respectfully apply for a temporary administrative stay of the bankruptcy plan pending resolution of this application.

This Chapter 11 bankruptcy case—one that is "extraordinary by any measure," (Apx.56a), involving over 82,209 claims for sexual abuse against the Boy Scouts of America (BSA) as well as third parties including approximately 250 Local Councils and over 100,000 Chartered Organizations, *In re Boy Scouts of Am.*, 642 B.R. 504, 547, 608 (Bankr. D. Del. 2022), with a settlement fund intended to exceed $2.46 billion (Apx.66a)—presents the exact same question that this Court is currently resolving in *Harrington v. Purdue Pharma L.P.*, No. 23-124: Does the Bankruptcy Code authorize the judicial approval of non-consensual, non-debtor third-party

releases? It is anticipated that this Court will answer this question by the end of its current term—likely with a "no"—in late May or early June. Nevertheless, the Third Circuit below has refused to stay the bankruptcy plan's implementation pending this Court's answer (Apx.9a—denial order), and has given strong indication that oral argument will take place the week of April 8. (Apx.3a—order inquiring about parties' availability for oral argument that week).

Applicants Abuse Claimants are individuals who have suffered childhood sexual abuse caused by various non-debtor, third-party entities that the bankruptcy plan releases from liability. They have objected to these non-consensual releases for the same reasons as the petitioners in *Purdue Pharma*—that the Bankruptcy Code does not authorize the federal courts to approve such releases. Smelling an opportunity to sweep this matter under the rug before this Court issues its ruling in *Purdue Pharma*—and thus rob Abuse Claimants of their ability to seek vindication against the entities who turned a blind eye to their pain and suffering as a result of sexual abuse—several of the parties, including BSA, have asked the Third Circuit to dismiss the appeal under the equitable mootness doctrine, a "curious doctrine" that "permit[s] federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief." *In re Continental Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (en banc) (Alito, J., dissenting).

For now, the Third Circuit has declined to grant dismissal, instead referring the matter to the merits panel. (Apx.6a). But the danger to Abuse Claimants remains, as the bankruptcy plan continues to be implemented in the bankruptcy court. Given the complexity of this bankruptcy appeal, a genuine chance exists that over a year could pass before the Third Circuit issues a decision on the merits. *Compare with In re Purdue Pharma*, 69 F.4th 45 (2d Cir. 2023) (argued on April 20, 2022, but not decided until May 30, 2023), *cert. granted*, *Harrington v. Purdue Pharma L.P.*, 144 S.Ct. 44 (2023). Given that various parties have already sought dismissal under the equitable mootness doctrine, it is inevitable that they will continue to push for this relief as the bankruptcy plan's implementation proceeds further given their strong interest in ensuring *Purdue Pharma* does not apply to this case. Indeed, BSA itself has filed an amicus brief in *Purdue Pharma* practically begging this Court to hold that any ruling it may issue invalidating non-consensual, non-debtor third-party releases is inapplicable to the bankruptcy plan Abuse Claimants are challenging here. Brief of Amicus Curiae Boy Scouts of America (BSA Amicus Brief), *Purdue Pharma*, No. 23-124 at 23-29 (Oct. 27, 2023). Absent a stay, it is likely that BSA and other parties will do everything they can to put the bankruptcy plan's implementation within the equitable mootness doctrine, creating a genuine likelihood that the Third Circuit will dismiss the appeal.[1]

[1] Abuse Claimants do not concede that equitable mootness applies and continue to contest the viability and applicability of the doctrine.

There is no question that the Abuse Claimants have a certiorari-worthy question on which they are likely to prevail. Indeed, the Government's own stay application in *Purdue Pharma* explicitly referenced this case's district court order approving the bankruptcy plan in support of the argument that this is a recurring issue of national importance justifying this Court's review. *See* Stay Application, *Purdue Pharma*, No. 23A87 at 16 (July 28, 2023) (citing *In re Boy Scouts of Am.*, 650 B.R. 87, 135-43, 185 (D. Del. 2023)). BSA's amicus brief in *Purdue Pharma* likewise recognizes the similarities between that case and this one. BSA Amicus Brief at 4. The equities favor a stay as settlement distributions under the bankruptcy plan have barely begun, and any money already placed in the Settlement Trust can be held in that trust pending resolution of these proceedings and returned to its original owners in the event *Purdue Pharma* invalidates the plan. By contrast, a genuine possibility exists that Abuse Claimants will lose their ability to pursue their claims outside of bankruptcy proceedings absent a stay, a blatant violation of their due process rights given they have a property interest in those claims and cannot be deprived of them without their consent. A stay is warranted.

Further, absent a temporary administrative stay from this Court pending resolution of this application, Abuse Claimants and other child sexual abuse creditors will be required to make an election for treatment of their claims and pay a nonrefundable initial fee of $10,000 by February 16, 2024, (and later another

$10,000 nonrefundable fee) if they wish to have their claims determined under the Independent Review Option. This makes a temporary administrative stay likewise appropriate.

STATEMENT

A. Factual background.

1. The essential facts are undisputed. The Boy Scouts of America (BSA)—the Chapter 11 Debtor—has existed since 1916. Its "mission is to prepare young people for life by instilling in them the values of the Scout Oath and Law and encouraging them to be trustworthy, kind, friendly and helpful." (Apx.58a). BSA works alongside independent Local Councils and Chartered Organizations. Such Chartered Organizations include "churches, schools, and civil associations." (Apx.59a). Since about 1976, BSA has also "purchase[d] general liability insurance that is shared among BSA, Local Councils, and Chartered Organizations." (Apx.59a).

BSA can justly take pride in its many accomplishments for this country's youth. But over the past several decades, it has had to come to grips with its history of turning a blind eye to sexual abuse. Up until BSA filed for bankruptcy in February 2020, victims of child sexual abuse filed countless civil lawsuits against BSA and other entities, including independent Local Councils, and Chartered Organizations. (Apx.61a-62a). Many sexual abuse victims also asserted direct action claims against the Insurers of BSA, the Local Councils, and the Chartered Organizations. This led to BSA filing for Chapter 11 bankruptcy relief on February 18, 2020. (Apx.62a). But

critically, none of the Local Councils, Chartered Organizations, or Insurers are debtors alongside BSA.

In September 2022, the bankruptcy court confirmed a bankruptcy plan which uses channeling injunctions and releases to funnel into a Settlement Trust all sexual abuse claims not only against BSA but also against all third-party, non-debtor Local Councils, Chartered Organizations, and Insurers, known collectively under the plan as "Protected Parties." (Apx.69a, 70a-72a). Sexual abuse claims are not the only claims funneled into the Settlement Trust—claims for non-abuse matters such as wrongful death and personal injury are likewise funneled into the trust. *See In re Boy Scouts*, 642 B.R. at 535-38. Both BSA and the Local Councils must contribute—in the form of cash and property—hundreds of millions of dollars to the Settlement Trust. (Apx.66a-67a). The Insurers must likewise make contributions—again, in the form of cash and property—exceeding $1.6 billion. (Apx.67a). In contrast, over one hundred thousand released Chartered Organizations are paying no cash contribution to the settlement. (Apx.66a-667a). The district court estimated that the Settlement Trust will exceed $2.46 billion in cash and property.[2] (Apx.66a). According to the district court, the Settlement Trust

[2] In its amicus brief filed in *Purdue Pharma* on October 27, 2023, BSA claimed that the Settlement Trust "has already been vested with $2.46 billion in cash and other property, plus $4 billion." BSA Amicus Brief at 12 (citing *In re Boy Scouts*, 650 B.R. at 104, 110-111 (reprinted in Abuse Claimants' Appendix at 55a, 66a)). If by "vest" BSA means that the trust has become legally entitled to the referenced cash and property, then—subject to Abuse Claimants' argument that the plan never became effective in the first place due to the failure of a condition precedent—this is

will be "what is apparently the largest sexual abuse compensation fund in the history of the United States." (Apx.55a). The non-consensual, non-debtor third-party releases and channeling injunctions are, according to the district court and bankruptcy court, essential to making the plan work. (Apx.12a, 69a). Both lower courts also found that, for purposes of confirmation, BSA had demonstrated that all victims with sexual abuse claims would likely receive full payment, (Apx.12a-13a), a finding that Abuse Claimants are strongly contesting in the Third Circuit below.

Under the bankruptcy plan, there are several different procedural mechanisms sexual abuse victims may elect to pursue in seeking resolution of their claims, one of which is the Independent Review Option (IRO). *In re Boy Scouts*, 642 B.R. at 541-42. The IRO is meant to enable abuse claimants "with higher value claims to potentially receive a higher award and directly trigger excess insurance coverage." *Id*. at 544. Pursuing the IRO option requires the claimant to pay an initial "administrative fee" of $10,000, with another $10,000 "administrative fee" to be paid subsequently, immediately prior to a court-approved neutral reviewing the claim. *Id*. at 659. The current deadline for submitting all IRO claims—including the initial $10,000 fee—is February 16, 2024, *see* Scouting Settlement Trust Website, *available*

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accurate. But if by "vest" BSA means that such an amount of monies and property have actually been placed in the Settlement Trust, this is not so. The cited portion of the district court's opinion only discusses the money and property that will *eventually* be placed in the trust. And as discussed further in this application, the actual amount of money currently within the trust is nowhere near the billions eventually intended for it.

at bit.ly/3SRk49D, and the Trustee has indicated it will not be seeking an extension on that deadline. (Bankr. D. Del. No. 20-10343, Doc.11751). The deadline for submitting all non-IRO "Matrix" claims, by contrast, is May 31, 2024. *See* Scouting Settlement Trust Website, *available at* bit.ly/3SRk49D.

2. Applicants Lujan Claimants are 75 individuals who suffered scouting-related childhood sexual abuse in Guam from approximately 1955 to 1981. (Third Cir. No. 23-1664, Doc.66:1). Applicants Dumas & Vaughn Claimants are 69 individuals who also suffered scouting-related childhood sexual abuse across the country. [3] (Third Cir. No. 23-1666, Doc.61:3). In addition to their sexual abuse claims against BSA, they each have prepetition claims against third-party non-debtors, including Local Councils and Chartered Organizations. (Third Cir. No. 23-1664, Doc.66:1; No. 23-1666, Doc. 61:3). They object to the bankruptcy plan on multiple grounds. While the district court concluded that the bankruptcy plan became effective on April 19, 2023 (Apx.14a), Abuse Claimants argue that the plan never became effective at all, and may instead be null and void due to failure to timely satisfy a condition precedent to occurrence of the effective date. (Third Cir. No. 23-1664, Doc.154:3-9). They also strongly contest the district court's conclusion that they are likely to be paid in full on their claims under the plan. (Third Cir. No. 23-1664, Doc.61:70-78; Doc.66:47-49).

[3] Throughout this litigation the Lujan Claimants have been represented by the Guam-based law firm of Lujan &Wolff LLP, and Dumas & Vaughn Claimants have been represented by the Oregon-based law firm of Dumas & Vaughn.

Critical to this stay application, Abuse Claimants also object to the plan's validity on the ground that the bankruptcy court lacks statutory authority to approve non-consensual, non-debtor third-party releases under the Bankruptcy Code. (No. 23-1664, Doc.66:28-29; No. 23-1666, Doc. 61:33-48). While maintaining their objections to the bankruptcy plan, certain Abuse Claimants also intend to preserve their ability to pursue the IRO process should their appeal fail. Thus, by February 16, 2024, they must each pay a "non-refundable fee" of $10,000 for the IRO process, with a subsequent non-refundable fee of $10,000 to be paid prior to the court-appointed neutral reviewing the plan.

B. Procedural History

1. On appeal from the bankruptcy court, the district court rejected Abuse Claimants' argument that no statutory authority exists for judicial approval of non-consensual, non-debtor third-party releases, relying on Third Circuit precedent. (Apx.108a). *See*, *e.g.*, *In re Continental Airlines*, 210 F.3d at 214-15. The district court explicitly "reject[ed] . . . Abuse Claimants' reliance on *In re Purdue Pharma*, 635 B.R. 26 (S.D.N.Y. 2021), for the proposition that the Bankruptcy Court lacked statutory authority to approve the [c]hanneling injunction and [r]eleases." (Apx.110a). The district court issued its order and opinion confirming the bankruptcy plan on March 28, 2023. (Apx.50a-205a). It concluded that the non-consensual, non-debtor third-party releases and channeling injunction were a cornerstone of the plan. (Apx.55a).

On April 11, 2023—that is, before this Court granted certiorari in *Purdue Pharma* on August 10, 2023—the district court issued a memorandum order denying Abuse Claimants' motions to stay the bankruptcy plan's implementation pending their appeal to the Third Circuit. (Apx.34a-49a). The Third Circuit likewise denied Abuse Claimants' motions to stay the plan on April 19, 2023. (Apx.31a-33a). The bankruptcy plan purportedly became effective on April 19, 2023. (Apx.14a).

2. After this Court granted certiorari and stayed the implementation of the bankruptcy plan in *Purdue Pharma*, Abuse Claimants filed a renewed motion to stay the bankruptcy plan with the Third Circuit in light of this Court agreeing to take up the non-consensual, non-debtor third-party release question, but that court denied the motion without prejudice on the ground that Abuse Claimants first needed to seek a stay in the district court on that basis, (Apx.29a-30a), which they did. But the district court denied Abuse Claimants' renewed motions for a stay on October 3, 2023. (Apx.10a-28a). While agreeing that Abuse Claimants had demonstrated they were likely to succeed on the merits of their appeal in light of *Purdue Pharma*, (Apx.22a-24a), the district court nevertheless concluded both that Abuse Claimants had failed to demonstrate the risk of irreparable harm and that the balance of the equities favored the bankruptcy plan's continued implementation.

The district court based its conclusion that Abuse Claimants would not suffer any irreparable harm on its related conclusion that they would be fully compensated under the bankruptcy plan, and that, from the court's perspective, no

evidence existed that they would receive greater compensation if they pursued their claims outside of the plan. (Apx.24a-25a). The district court did not examine whether Abuse Claimants were being deprived without their consent of their rights to litigate their abuse claims as they best saw fit, regardless of how much compensation they may eventually win in the end. At no time did the district court consider that depriving Abuse Claimants of their right to pursue their claims outside of the bankruptcy process without their consent is itself a violation of due process. "Nonconsensual nondebtor releases are inconsistent with . . . due process requirements. Creditors who have direct claims against nondebtors have property interests; their direct claims are 'choses in action.' Like other types of property interests, these choses in action are protected under the Due Process Clause." Adam J. Levitin, *The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 91 Fordham L. Rev. 429, 440 (2022) (footnote omitted). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause.").[4] Obviously, Abuse Claimants strongly disagree with the district court's conclusion that they will be fully compensated for their sexual abuse under the bankruptcy plan, but even

[4] While *Logan* involved a challenge to a state law that deprived a litigant of his property interest in his cause of action, *see Logan*, 455 U.S. at 424-432, instead of a federal court order like in this case, this is a distinction without a difference since "the Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without 'due process of law.'" *Dusenbery v. U.S.*, 534 U.S. 161, 167 (2002).

assuming for the sake of argument that they will be fully compensated, the district court's observation misses the point. The fact of the matter remains that Abuse Claimants have a property interest in their claims, meaning that they can pursue them in any manner they see fit, even if this means rejecting a non-consensual settlement and instead taking a risk on gaining either more (or less) monetary award through their own lawsuits. But rather than undertaking the above due process analysis, the district court limited itself to concluding that Abuse Claimants would not suffer any irreparable harm because they had failed to demonstrate that they would receive more compensation for pursuing claims outside of the plan rather than within the plan. (Apx.24a).

By contrast, the district court held that the public interest and the other non-objecting parties would suffer from a stay because the Settlement Trust was "fully operational and engaged in investing and managing hundreds of millions of dollars of cash and other assets to which it gained title on the Effective Date." (Apx.18a). Why this amounted to irreparable harm the district court never said. Notably, it never explained what, if anything, would prevent the Settlement Trust from returning the monies it was holding to the original owners in the event of a reversal under *Purdue Pharma*. The district court did point out that by the time of its ruling the Local Councils had already contributed a total of $439 million in assets to the trust, along with "the settling insurance companies' contributions of $189.9 million, plus $716 million held in escrow." (Apx.18a-19a). Local Councils had also, by that

point, sold eleven real estate properties, resulting in a contribution of an additional $4 million to the Settlement Trust (Apx.19a). The district court noted that Abuse Claimant had failed "to describe what would happen to these assets . . . if the Plan were stayed." (Apx.20a). At no time did the district court consider that in the event of a stay the assets would remain within the Settlement Trust, undisturbed, until further notice.

After the district court denied the renewed motion for a stay on October 3, 2023, Abuse Claimants filed renewed motions to stay with the Third Circuit in light of *Purdue Pharma* on October 13, 2023. (Apx.8a). The Third Circuit denied those motions on November 2, 2023, without providing any explanation. (Apx.9a).

3. On October 27, 2023—that is, before the Third Circuit ruled on the renewed motions to stay—both BSA and several insurers who were part of the non-consensual, non-debtor third-party releases filed motions to dismiss Abuse Claimants' appeals under the equitable mootness doctrine, arguing that by that point the bankruptcy plan had been substantially consummated. (Third Cir. No. 23-1664, Docs.123, 124-1). While they made much of how millions of dollars in assets and cash had already been contributed to the Settlement Trust, BSA nevertheless conceded that as of October 27, 2023, the trust had only paid" $747,825 to 295 survivors under the Plan." (No. 23-1664, Doc.124-1:20). In opposing dismissal, Abuse Claimants pointed out, among other things, that "[m]ost of the $2.484 billion in cash and property . . . has not been transferred to [the] Trust," and that "[o]nly

$189,871,000 of the Settling Insurance Companies' contributions [have] been transferred to [the] Trust." (No. 23-1664, Doc.154:12). More than $1.4 billion of the settling insurance contributions remain in escrow and not part of the trust. (No. 23-1664, Doc.154:12).

On December 14, 2023—before full briefing was completed on the merits—the Third Circuit issued an order declaring it was "unpersuaded at this preliminary stage that equitable or statutory mootness apply in the particular circumstances of this case," and referring the matter to the merits panel. (Apx.6a). Meanwhile, the court-appointed trustee for the Settlement Trust held an online townhall on January 10, 2024. At that townhall, the Trustee declared that approximately 1,850 expedited sexual abuse claims had been paid out of the Settlement Trust, totaling $4.5 million. Declaration of Judge Barbara Houser (Ret.) at Scouting Settlement Townhall of January 10, 2024 (Houser Declaration), at 2, *available at* sforce.co/42xIKaf. The Trustee also observed that "while some assets were transferred to the trust when the plan went effective on April 19, 2023, a substantial amount of money will only be transferred to the trust once the confirmation order becomes final and is no longer on appeal." *Id*. At 3.

Full appellate briefing has now been completed in the Third Circuit, and on February 2, 2024, that court issued an order directing counsel for the parties to inform the court if they are unavailable for oral argument the week of April 8, 2024. (Apx.3a).

ARGUMENT

An applicant seeking a stay pending certiorari must demonstrate "(i) a reasonable probability that this Court would eventually grant review and a fair prospect that the Court would reverse, and (ii) that the applicant would likely suffer irreparable harm absent the stay." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). This Court also takes into account the public interest and the equities. *Id*.

I. Should the Third Circuit uphold the third-party releases, this Court is likely to grant certiorari and either summarily reverse or order a GVR in light of *Purdue Pharma*.

A. This case presents the exact same issue as *Purdue Pharma*—does statutory authorization exist to give judicial approval to non-consensual, non-debtor third-party released in bankruptcy? This Court has not only granted certiorari in *Purdue Pharma* to address that very issue, it has also recalled and stayed the Second Circuit's mandate in that case so that the bankruptcy plan cannot be implemented until this Court issues its ruling. *See Purdue Pharma*, 144 S. Ct. at 44. What's more, the petitioner in *Purdue Pharma*—the United States Trustee—explicitly cited to this very case in its stay application in support of its argument that the issue was of nationwide importance and one on which it was likely to prevail. *See* Stay Application, *Purdue Pharma*, No. 23A87 at 16 (citing *In re Boy Scouts*, 650 B.R. at 135-43). Recognizing that resolution of *Purdue Pharma* could impact the bankruptcy plan and free Abuse Claimants to pursue their claims as they best see

fit, BSA has implored this Court in its amicus brief in *Purdue Pharma* not to allow any ruling it may issue in that case to invalidate the plan. BSA Amicus Brief at 23-29. There cannot be any serious issue that Abuse Claimants have a certiorari-worthy issue.

B. Along similar lines, Abuse Claimants are likely to win on this issue, given this Court's earlier grant of stay in *Purdue Pharma* on this issue and the strong indications from this Court during oral argument in *Purdue Pharma* that it is skeptical of non-consensual, non-debtor third-party releases. In its amicus brief filed in *Purdue Pharma*, BSA attempts to distinguish that case from this one, arguing that even if this Court were to invalidate the Purdue bankruptcy plan, it should not invalidate the BSA bankruptcy plan for two reasons: (1) unlike the Purdue plan, the BSA plan is already effective; and (2) all abuse victims with prepetition claims will be fully compensated under the plan. BSA Amicus Brief at 8-14, 16. This fails for several reasons. First, contrary to BSA's argument, it is not established that the BSA bankruptcy plan is, in fact, effective. Indeed, Abuse Claimants are currently challenging that very matter in the Third Circuit below, arguing that a condition precedent to the effective date failed to occur. (Third Cir. No. 23-1664, Doc.154:3-9). Even if the BSA bankruptcy plan went effective, BSA's argument to exclude the BSA appeal from the benefits of this Court's upcoming decision in *Purdue Pharma* would essentially have this Court endorse and even lower the bar for proving equitable mootness, as all anyone would have to do to

restrict application of the Bankruptcy Code and this Court's interpretation of the Code to live appeals is to show that the plan went effective.[5] Plainly, the Bankruptcy Code still applies to creditors after a plan has gone effective.

Second—contrary to BSA's claims, the BSA plan does not guarantee that sexual abuse victims will be paid in full, (Bankr. No. 20-0343, Doc.644:29), and Abuse Victims are presently appealing this issue before the Third Circuit. In any event, should this Court invalidate non-consensual, non-debtor third-party releases as a matter of law in *Purdue Pharma*, it would make the payment in full issue irrelevant, as the payment in full factor is only utilized to determine whether such non-consensual releases are appropriate in particular circumstances based on the assumption that courts actually have statutory authority to approve such releases. *See*, *e.g.*, *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 935, 938 (Bankr. W.D. Mo. 1994).

To be clear—in arguing the above, Abuse Claimants are not in any way suggesting that this Court should use this stay application to resolve the merits dispute between BSA and Abuse Claimants. That is properly before the Third Circuit at this moment. Rather, Abuse Claimants are simply pointing out that, even taking into account BSA's arguments raised in its amicus brief in *Purdue Pharma*,

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[5] This Court has never determined the viability of the equitable mootness doctrine. In the Third Circuit, the doctrine applies not just where the plan went effective, but where the plan has been substantially consummated, along with other factors that must be present. *Semcrude*, 728 F.3d at 320.

Abuse Claimants still have a strong likelihood of success before this Court were it to grant certiorari, as there is no practical difference between the non-consensual third-party releases in the *Purdue Pharma* bankruptcy plan and the BSA bankruptcy plan. This Court need not dive into the weeds of the specific arguments between BSA, Abuse Claimants, and other parties in the Third Circuit to arrive at this conclusion.

C. In short, there is no question that Abuse Claimants have a certiorari-worthy issue on which they are likely to win. Should this Court issue its holding in *Purdue Pharma* at the end of its current term—that is, in late May or early June—and conclude that non-consensual, non-debtor releases are invalid, it would presumably mean that the Third Circuit will follow this ruling and invalidate the bankruptcy plan here, thereby allowing Abuse Claimants to pursue their claims as they wish. Should the Third Circuit rule otherwise, or if it were to issue its holding on the merits before this Court resolves *Purdue Pharma,* that would make this case a textbook candidate either for summary reversal or for an order granting certiorari, vacating the judgment, and remanding (GVR) for further consideration. *See Shoop v. Cassano*, 142 S. Ct. 2051, 2057 (2022) (Thomas, J. dissenting) (noting that summary reversal is appropriate when a court of appeals decision is "obviously wrong and squarely foreclosed by [this Court's] precedent."); *Flowers v. Mississippi*, 136 S. Ct. 2157, 2157 (2016) (Alito, J., dissenting) (observing that GVR is appropriate "when we believe the lower court should give further thought to its

decision in light of an opinion . . . that . . . came after the decision under review.”). Abuse Claimants have satisfied the first part of the test outlined in *Merrill*.

II. The irreparable harm that Abuse Claimants would suffer absent a stay of the bankruptcy plan—the loss of their ability to pursue their sexual abuse claims against third parties due to the equitable mootness doctrine—far outweighs any other harm the parties may suffer.

By granting certiorari and issuing a stay in *Purdue Pharma* this Court recognized that any harm that may result from staying the bankruptcy plan’s implementation is outweighed by the risk that claimants such as the opioid victims in that case and the sexual abuse victims in this case will lose their right to pursue their claims independently of the bankruptcy settlement trust. And contrary to what the district court held below (Apx.24a-25a), Abuse Claimants will suffer irreparable harm from being unable to pursue their claims outside of bankruptcy regardless of whether they will, in fact, be fully compensated under the bankruptcy plan. Abuse Claimants have a vested property right in their civil actions against the non-debtor, third-party entities that turned a blind eye to their sexual abuse. *See* Levitin, *supra*, at 440; *Logan*, 455 U.S. at 429. Regardless of whether they would, in fact, be fully compensated for their claims under the bankruptcy plan, they have a right to pursue those actions as they best see fit. This includes taking a risk and pursuing those claims outside of bankruptcy before a jury, where they may receive more, less, or the same amount of compensation as they would under the bankruptcy plan. The amount of compensation—or even the fact of compensation—is beside the point. What matters is that depriving sexual victims of their right to

pursue those causes of action without their consent violates due process, which is exactly what the bankruptcy plan does here. This is irreparable harm that only a stay can prevent.

By contrast, neither BSA, the Trustee, or any other party to the bankruptcy proceedings can demonstrate irreparable harm resulting from a stay. This Court's decision in *Purdue Pharma* to grant a stay already forecloses such a possibility. While it is true that in *Purdue Pharma* the bankruptcy plan's implementation had not begun at the time this Court entered the stay, whereas here the plan's implementation began in April 2023, this is a distinction without a difference. Despite being set up to become a multi-billion dollar settlement trust, the Trust does not have nearly that amount of funding in it yet. (Apx.18a-19a). Moreover, only $4.5 million has been paid out thus far on abuse claims. Houser Declaration at 2. Relatively speaking, this is a small portion of the billions of dollars that the plan intends to someday utilize. Given how the bankruptcy plan is still in its early stages of implementation, no harm would result from this Court putting it on hold. In any event, imposing a stay would mean that all funds currently in the Settlement Trust or escrow would remain there pending further order by this Court. Should the bankruptcy plan be invalidated under *Purdue Pharma*, the monies held in trust and escrow would be returned to their original owners. No irreparable harm could result from this.

The equities thus favor staying the bankruptcy plan from further implementation. Such a stay would prevent BSA, the Trustee, and the other parties from attempting to fast-track the bankruptcy plan's implementation in the hopes of it coming within the Third Circuit's requirements for dismissal under the equitable mootness doctrine. Given how relatively few abuse claims have been paid thus far, and given how relatively little of the hoped-for billions of dollars in funding has thus far been placed in the Settlement Trust, it is highly unlikely that, under the Third Circuit's precedents, the bankruptcy plan has, at this point, "progressed to the point that turning back may be imprudent," thus justifying dismissal under the equitable mootness doctrine as that court has defined it. *See In re Semcrude, LP*, 728 F.3d 314, 321 (3d Cir. 2013). A stay right now would limit the parties seeking dismissal under the equitable mootness doctrine from further implementing the plan beyond what has already happened. While it is true that the Trustee has indicated in the townhall that substantial payments will not begin to be made until after the appeals in this case are completed, *see* Houser Declaration at 3, nothing can or would prevent the Trustee from changing her mind and seeking to expedite the bankruptcy plan's fulfillment, especially if this Court invalidated non-consensual, non-debtor third-party releases in *Purdue Pharma*. As noted above, this is a highly complex appeal, and it may well take the Third Circuit over a year from the time of oral argument—that is, until April or May 2025—to issue its ruling. Given this length of time, and the amount of resources the Trustee, BSA, and other parties

have invested in the plan's completion in the event of an adverse ruling in *Purdue Pharma*, it is easily foreseeable that they will attempt to fast-track the plan's completion as a last-ditch effort to try to obtain dismissal of the appeal under the equitable mootness doctrine. For example, they could try to argue that once the IRO option deadline of February 16, 2024, has passed, this would amount to substantial consummation given that that is the deadline to submit excess-coverage claims. They could also try to argue that substantial consummation will have taken place once the May 31, 2024, deadline to submit all non-IRO claims passes. A stay will prevent this from happening.

At least one other court facing litigation relevant to the BSA bankruptcy plan has already stayed proceedings pending the outcome of *Purdue Pharma*. The Trustee is currently litigating insurance coverage issues against 91 non-settling insurers related to the plan in *The Hon. Barbara J. Houser (Ret.) v. Allianz Global Risk Ins. Co.* in the Northern District of Texas. (N.D. Tex. No. 23-cv-1592, Doc.1). On December 12, 2023, the district court in that case stayed all proceedings pending this Court's ruling in *Purdue Pharma*, thus recognizing the importance of waiting for this Court to resolve the matter. (N.D. Tex. No. 23-cv-1592, Doc.339). Not surprisingly, the Trustee filed a motion to reconsider that stay on January 31, 2024. (N.D. Tex. No. 23-cv-1592, Doc.365). This makes it all the more appropriate for this Court to stay further implementation of the bankruptcy plan so that Trustee, BSA,

and the other parties cannot use the equitable mootness doctrine as a means of avoiding the consequences of *Purdue Pharma*.

IV. A temporary administrative stay of the bankruptcy plan pending resolution of this application is likewise appropriate.

As noted above in the factual background, the deadline for Abuse Claimants to submit an IRO claim—including the initial "nonrefundable" $10,000 filing fee—is February 16, 2024. Given this approaching February 16 deadline, and the possibility that BSA and other parties may use its passing to argue that the plan has been substantially consummated under the equitable mootness doctrine, it is proper for this Court to enter a temporary administrative stay of the bankruptcy plan pending full resolution of this stay application. This is to say nothing of how a temporary administrative stay will help Abuse Claimants avoid having to pay what may turn out to be an unlawful filing fee of $10,000 in the event this Court invalidates the bankruptcy plan under *Purdue Pharma*.

CONCLUSION

This Court stayed the bankruptcy plan in *Purdue Pharma* to enable victims of the opioid crisis to challenge the non-consensual, non-debtor third-party releases invalidating their claims without the risk of the equitable mootness doctrine taking away that right. Sexual abuse victims deserve just as much an opportunity to litigate their claims as do opioid victims. This Court should stay the bankruptcy plan from being further implemented in the bankruptcy court pending the completion of proceedings in the Third Circuit and, if necessary, this Court. It

should also grant a temporary administrative stay of the bankruptcy plan pending resolution of this application.

John M. Reeves
Counsel of Record
REEVES LAW LLC
7733 Forsyth Blvd., Suite 1100--1192
St. Louis, MO 63105
(314) 775-6985
reeves@appealsfirm.com
Counsel for Applicants Lujan Claimants and Dumas & Vaughn Claimants

Delia Lujan Wolff
LUJAN & WOLFF LLP
238 Archbishop Flores St.
Suite 300, DNA Building
Hagatna, Guam 96910
671-477-8064
dslwolff@lawguam.com
Counsel for Applicants Lujan Claimants

Gilion C. Dumas
DUMAS & VAUGHN, LLC
3835 NE Hancock Street, Suite GLB
3835 Portland, OR 97212
503-616-5007
gilion@dumasandvaughn.com
Counsel for Applicants Dumas & Vaughn Claimants