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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
PURDUE PHARMA, L.P., *et al.*,[1]	Case No. 19-23649 (RDD)
Debtors.	(Jointly Administered)
PURDUE PHARMA, L.P., *et al.*,	Adv. Pro. No. 19-08289 (RDD)
Plaintiffs,	
v.	
COMMONWEALTH OF MASSACHUSETTS, *et al.*,	
Defendants.	

THE STATES' COORDINATED OPPOSITION TO THE DEBTORS' MOTION FOR PRELIMINARY INJUNCTION OF STATES' LAW ENFORCEMENT ACTIONS AGAINST THE SACKLERS

[1] The Debtors in these chapter 11 cases, along with the last four digits of each of their federal tax identification number, as applicable, are Purdue Pharma Manufacturing L.P. (3821), Purdue Pharma Inc. (7486), Purdue Transdermal Technologies K.P. (1868), Purdue Pharma Manufacturing L.P. (3821), Purdue Pharmaceuticals L.P. (0034), Imbrium Therapeutics L.P. (8810), Adlon Therapeutics L.P. (6745), Greenfield BioVentures L.P. (6150), Seven Seas Hill Corp. (4591), Ophir Green Corp. (4594), Purdue Pharma of Puerto Rico (3925), Avrio Health L.P. (4140), Purdue Pharmaceutical Products L.P. (3902), Purdue Neuroscience Company (4712), Nayatt Cove Lifescience Inc. (7805), Button Land L.P. (6166), Rhodes Associates L.P. (N/A), Paul Land Inc. (7425), Quidnick Land L.P. (7584), Rhodes Pharmaceuticals L.P. (6166), Rhodes Technologies (7143). UDF LP (0495), SVC Pharma LP (5717) and SVC Pharma Inc. (4014). The Debtors' principal offices are located at One Stamford Forum, 201 Tresser Boulevard, Stamford, CT 06901.

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Twenty-four States and the District of Columbia (the "States")[2] respectfully submit this Opposition to the Motion for Preliminary Injunction, ECF No. 2, filed by Purdue Pharma Inc. and its affiliated debtors and debtors in possession (collectively, "Purdue" or "Debtors").

The States filed two coordinated Oppositions today:

- The first brief opposes the request to enjoin the States' suits against Purdue.
- This second brief opposes the request to enjoin the States' suits against ***non***-debtors, most notably members of the Sackler family.[3]

In support of their Opposition, the States respectfully represent as follows:

I. INTRODUCTION

The people of the United States are suffering from a crisis of opioid addiction, overdose, and death: a crisis so severe that life expectancy in America has declined.[4] The Attorneys General of many States have filed suits alleging that eight people in a single family made the choices that caused much of this crisis. Members of the Sackler family used their power as owners and directors of their privately-held drug company—Purdue Pharma—to lead a decades-

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[2] California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin.

[3] In addition to the Sacklers, the arguments made in this Opposition apply to the other non-debtors, not employed at Purdue, who have been sued by Colorado, Connecticut, and/or Massachusetts for individual misconduct (former CEOs Mark Timney and John Stewart; former Vice Presidents Russell Gasdia and David Haddox; and former Board members Paulo Costa, Judith Lewent, and Ralph Snyderman).

To streamline the issues facing the Court, the States agree that their claims against current Purdue employees or directors should be treated like the States' claims against Purdue.

[4] *See* Lenny Bernstein, *U.S. Life Expectancy Declines Again, A Dismal Trend Not Seen Since World War I*, Wash. Post. (Nov. 28, 2018), https://www.washingtonpost.com/national/health-science/us-life-expectancy-declines-again-a-dismal-trend-not-seen-since-world-war-i/2018/11/28/ae58bc8c-f28c-11e8-bc79-68604ed88993_story.html.

long campaign of deceptive marketing for addictive drugs. The Sacklers used the profits from their illegal scheme to become one of the richest families in the world—far wealthier than the company they ran. Now, the Sacklers seek to leverage Purdue's corporate bankruptcy to avoid their own individual accountability. This Court should not lend its authority to that maneuver.

Purdue's motion for a preliminary injunction halting suits against the non-debtor Sacklers should be denied because it fails the test under 11 U.S.C. § 105. Enjoining law enforcement actions against the Sacklers would make a successful reorganization less likely by delaying state court decisions that will inform a resolution. The States' actions do not threaten irreparable harm to Purdue, because it can continue its reorganization effort while suits against the non-debtor Sacklers proceed. The public has a compelling interest in the law enforcement actions going forward to advance interests established in the Bankruptcy Code itself; to enforce the States' laws against dangerous fraud; and to pursue accountability for thousands of injuries and deaths. Accordingly, the States' actions to prove our allegations against the Sacklers, enforce our laws, and secure relief for our citizens should continue.

II. BACKGROUND

Purdue seeks an injunction to shut down law enforcement actions that accuse the Sacklers of deadly, illegal misconduct. The key points of the Sacklers' misconduct and of the States' law enforcement actions help to show why the injunction should be denied.

A. The Sackers' Illegal Conduct[5]

Purdue is owned by the descendants of Raymond and Mortimer Sackler. Until the States exposed their misconduct, members of the Sackler family controlled the company and held a

[5] This summary is based on the complaints filed by the States, and it sets forth the basis of the States' claims against the Sacklers and the core facts that the States expect to prove at trial. The complaints can be found at https://www.mass.gov/lists/state-lawsuits-against-sackler-family.

majority of seats on its board. Eight Sackler former board members (Richard, Mortimer, Jonathan, Kathe, Ilene, Beverly, Theresa, and David – collectively, "the Sacklers") were leading players in America's opioid crisis and are defendants in the States' law enforcement actions.

Purdue launched OxyContin in 1996. It became one of the deadliest drugs of all time.[6] The FDA scientist who evaluated OxyContin wrote in his original review: "Care should be taken to limit competitive promotion."[7] The Sacklers did the opposite. From the beginning, the Sacklers viewed limits on opioids as an obstacle to greater wealth. To make more money, the Sacklers considered whether they could sell OxyContin in some countries as an uncontrolled drug. Staff reported to Richard Sackler that selling OxyContin as "non-narcotic," without the safeguards that protect patients from addictive drugs, would provide "a vast increase of the market potential."[8] The inventor of OxyContin, Robert Kaiko, wrote to Richard to oppose this dangerous idea. Kaiko predicted: "If OxyContin is uncontrolled, … it is highly likely that it will eventually be abused." Richard responded: "How substantially would it improve your sales?"[9]

From the beginning, the Sacklers drove Purdue's decision to deceive doctors and patients. In 1997, Richard Sackler, Kathe Sackler, and other Purdue executives determined that doctors had the dangerous misconception that OxyContin was weaker than morphine, which led them to prescribe OxyContin more often, even as a substitute for Tylenol.[10] Richard directed Purdue staff not to tell doctors the truth, because the truth would reduce sales.[11]

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[6] CT Compl. ¶ 16; MA. Compl. ¶ 174; NY Compl. ¶ 268.

[7] CO Compl. ¶ 425; MA Compl. ¶ 174.

[8] MA Compl. ¶ 174.

[9] CO Compl. ¶ 222; MA Compl. ¶ 174.

[10] CO Compl. ¶ 428; CT Compl. ¶ 70; MA. Compl. ¶ 176; NY Compl. ¶ 297.

[11] CO Compl. ¶ 429; MA. Compl. ¶ 176.

In 1999, Richard Sackler became the CEO of Purdue.[12] Jonathan, Kathe, and Mortimer Sackler were Vice Presidents.[13] The company hired hundreds of sales representatives and trained them to make false claims to sell opioids.[14] On the crucial issue of addiction, Purdue instructed sales representatives to falsely tell doctors that the risk of addiction was "less than one percent."[15] A sales representative told a reporter: "We were directed to lie. Why mince words about it? Greed took hold and overruled everything. They saw that potential for billions of dollars and just went after it."[16]

As Purdue kept pushing opioids and people kept dying, the company was investigated by state Attorneys General, the U.S. Drug Enforcement Agency, and the U.S. Department of Justice. In 2003, Richard Sackler left his position as CEO of Purdue, but remained on the Board. Later, Jonathan, Kathe, and Mortimer Sackler resigned from their positions as Vice Presidents, but stayed on the Board as well. The Sacklers kept control of the company. Their family owned Purdue. They controlled the Board. And they continued to direct Purdue's deceptive marketing campaign.[17]

By 2006, prosecutors found damning evidence that Purdue had intentionally deceived doctors and patients. The Sacklers voted that their first drug company, the Purdue Frederick Company, should plead guilty to a felony.[18] They admitted, in an Agreed Statement Of Facts,

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[12] CO Compl. ¶ 423; CT Compl. ¶ 111; MA Compl. ¶ 179.

[13] CO Compl. ¶423; MA Compl. ¶ 179.

[14] CO Compl. ¶¶ 10-11; CT Compl. ¶¶ 27-28; NY Compl. ¶ 157; MA Compl. ¶ 179.

[15] MA Compl. ¶ 179; NY Compl. ¶ 312.

[16] MA Compl. ¶ 179.

[17] MA Compl. ¶ 187.

[18] CO Compl. ¶ 462; CT Compl. ¶ 116; MA Compl. ¶ 188.

that for more than five years, supervisors and employees had *intentionally* deceived doctors about OxyContin: "Purdue supervisors and employees, with the intent to defraud or mislead, marketed and promoted OxyContin as less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications."[19] The Sacklers agreed to enter into a plea agreement that stated: "Purdue is pleading guilty as described above because Purdue is in fact guilty."[20] In 2007, prosecutors announced: "The conviction of Purdue and its executives will end the misbranding and fraudulent marketing of OxyContin, deter other companies from committing like crimes, and provide desperately needed resources to fight addiction and abuse that threatens' the health of millions."[21]

If the Sacklers had followed the law from then on, thousands of lives could have been saved. Instead, the Sacklers led a continuing illegal marketing campaign that put more patients at risk. They knew that their wealth depended on selling more opioids.[22] So they directed Purdue to downplay the risk of addiction, target vulnerable patients, push prescriptions by the most prolific doctors, and use deceptive tactics to get patients on higher doses for longer periods of time.[23]

The Sacklers directed this deception even though they knew that improper prescribing of opioids, diversion, and addiction were deadly. They knew about a rising volume of calls to

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[19] CO Compl. ¶ 464; CT Compl. ¶ 116; MA Compl. ¶ 190.

[20] CO Compl. ¶ 463; MA Compl. ¶ 191.

[21] U.S. Dept. of Justice, Statement of U.S. Attorney John Brownlee on the Guilty Plea of the Purdue Frederick Company and Its Executives for Illegally Misbranding OxyContin (May 10, 2007) at 7, https://www.ctnewsjunkie.com/upload/2016/02/usdoj-purdue-guilty-plea-5-10-2007.pdf.

[22] CO Compl. ¶ 299; MA Compl. ¶ 404.

[23] CO Compl. ¶ 283; CT Compl. ¶¶ 28-29; MA Compl. ¶ 528.

Purdue's compliance hotline, including hundreds of reports of concern about abuse and diversion of OxyContin that the company did not report to authorities.[24] They knew about a secret list of doctors suspected of diversion and abuse, along with the number of prescriptions and dollars of revenue each doctor provided.[25]

The Sacklers knew and intended that Purdue sales representatives would spread deceptive representations about opioids to doctors and patients across the country, and that doctors and patients would rely on those deceptive representations to prescribe and take dangerous drugs.[26]

The scheme worked. The Sacklers received reports that their marketing techniques caused some doctors to prescribe twice as much OxyContin as before. OxyContin became the best-selling painkiller in America.[27]

The Sacklers knew that the profits were not safe inside Purdue. Richard Sackler warned, in a confidential memo, that the company posed a "dangerous concentration of risk." Purdue's CFO stated that a single lawsuit by a state Attorney General could "jeopardize Purdue's long-term viability."[28] So the Sacklers pulled the money out of the company and took it for themselves. The Sacklers have directed Purdue to pay their family as much as $13 billion.[29]

Meanwhile, patients became addicted, overdosed, and died. In Massachusetts, the

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[24] CO Compl. ¶ 238; MA Compl. ¶ 202.

[25] CO Compl. ¶¶ 575-580; CT Compl. ¶¶ 81, 83; MA Compl. ¶¶ 310-313.

[26] CO Compl. ¶¶ 247-248; MA Compl. ¶ 204.

[27] MA Compl. ¶ 340; NY Compl. ¶ 370.

[28] CO Compl. ¶ 552; CT Compl. ¶ 145; MA Compl. ¶ 237; NY Compl. ¶ 415.

[29] Last week, a Purdue witness testified that Purdue had paid the Sacklers $12 or $13 billion. *See* Jesse DelConte Dep. at 245 ("Q. What is your understanding of the amount of transfers that have been made ultimately to the Sacklers from any of the debtors? A. I believe from that initial MDL [multi-district litigation] deck it was 12 or $13 billion.") (Troop Decl. Ex. A).

doctors Purdue selected as its top marketing targets were at least ten times more likely than comparable doctors to prescribe Purdue opioids to patients who overdosed and died.[30] The Purdue patients who died of overdoses included firefighters, homemakers, carpenters, truck drivers, nurses, hairdressers, fishermen, waitresses, students, mechanics, cooks, electricians, ironworkers, social workers, accountants, artists, lab technicians, and bartenders. In Massachusetts, the youngest known victim started taking Purdue's opioids at 16 and died when he was 18 years old.[31]

B. The States' Law Enforcement Actions

In 2015, the States began a collaborative multi-state investigation of opioid companies suspected of illegal conduct. The States issued civil investigative demands, reviewed thousands of internal company documents, analyzed death certificates and prescription records, and took sworn testimony from the companies' current and former employees. The Attorneys General collaborated with state health departments, district attorneys, boards of registration in medicine, and the DEA. For many Attorneys General, the investigation was one of the highest priorities in state law enforcement.

Beginning in the summer of 2018, the States revealed the results of their investigation in complaints alleging that members of the Sackler family personally violated state laws. Twenty-four of the objecting Attorneys General have sued one or more of the Sacklers.[32] As one court recognized, the States' complaints are "notable" for their "level of detail, including … citation to

[30] MA Compl. ¶ 116.

[31] MA Compl. ¶ 22-23.

[32] Virginia has filed a motion to amend its complaint against Purdue to add claims against four of the Sacklers, and that motion is currently pending. Washington has not sued the Sacklers; it has a case ready for trial against Purdue.

and quotations from Purdue's own internal communications."[33]

In response to the States' actions, the Sacklers filed motions to dismiss based on a wide range of legal defenses testing the boundaries of states' jurisdiction and substantive law. The Attorneys General assigned teams of experienced prosecutors to brief those important issues. The state courts dedicated significant judicial attention to the States' actions. And the public has taken an intense interest in the litigation, filling courtrooms to capacity and standing outside courthouses to emphasize the importance of the case.

So far, two tribunals have issued decisions in State cases against the Sacklers: a Rhode Island court and a Utah administrative agency each denied motions to dismiss.[34] Three more state courts may issue decisions in October or November. In Massachusetts, the Sacklers' motions were heard on August 2, and the Court stated in September that a decision is expected in the next few weeks. In Maryland and New York, motions are fully briefed and are being heard this month. In the other 20 State actions, the parties are serving and responding to complaints and briefing motions to dismiss. Decisions on those motions will provide the States, the Sacklers, and the public with important answers to questions of law about the Sacklers' liability.

Other important answers will come from discovery. The Attorneys General seek to establish the truth of the Sacklers' role in the opioid crisis, including by discovery of the Sacklers' documents and testimony. The evidence uncovered thus far has already changed the

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[33] *Commonwealth of Massachusetts v. Purdue Pharma*, No. 1884-cv-01808 (BLS2) (Mass. Super. Ct. Sept. 16, 2019), Mem. of Decision and Order on the Def. Purdue's Mot. to Dismiss, at 1, available at https://www.mass.gov/files/documents/2019/09/30/Massachusetts.pdf.

[34] *State of Rhode Island* v. *Purdue Pharma L.P., et al.*, C.A. No. PC-2018-4555, 2019 WL 3991963 (Providence Super. Ct. Aug. 16, 2019) (ruling regarding Richard Sackler); *In the Matter of Purdue Pharma*, DCP Legal File No. CP-2019-005, DCP Case No. 107102 (Utah Dep't of Comm. July 15, 2019) Order On Motion To Dismiss Of The Sackler Respondents (ruling regarding Richard and Kathe Sackler).

public understanding of the epidemic (for example, Richard Sackler's directions to promote higher doses of opioids and to blame patients for their addiction). And more remains to be learned. Of the eight Sackler defendants, only Richard and Kathe have been deposed. Only some documents from some Sacklers have been produced. In the next stages of litigation, under the supervision of state courts, the States would use the traditional tools of discovery to learn what the Sacklers knew, what they did, and whether they are, in fact, liable for breaking the law.

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In the summer of 2019, the Sacklers tried to negotiate an end to the States' law enforcement actions. *See* Debtors' Informational Br. at 44, ECF No. 17. Purdue describes the Sacklers' offer as including: (1) the Sacklers giving up ownership of Purdue; (2) the Sacklers selling their foreign drug companies; and (3) the Sacklers paying $3 billion over seven years, with the possibility of more. *Id.* In exchange, Purdue and the Sacklers would be released from all liability in all the States' civil actions for all their misconduct in illegally marketing opioids throughout the United States.

The offer that Purdue describes does not include any admission of wrongdoing; it does not require public disclosure of all the evidence; and does not enjoin the Sacklers from future misconduct. The offer does not require the Sacklers to pay back any of the money they pocketed from their illegal conduct. The offer does not shut down Purdue; instead it would keep Purdue in business under a new name, so that settlement money could be collected from future OxyContin sales. If the States accepted the offer, there would never be a trial to determine the Sacklers' liability for one of the greatest public health crises of our time.

The 25 Attorneys General signing and joining this brief determined that the right way to meet their responsibilities at the present time was to reject the offer and continue their actions to enforce the law.

III. ARGUMENT

The Court Should Not Enjoin The States' Law Enforcement Actions Against The Sacklers.

The Court is familiar with the standards for an injunction under 11 U.S.C. § 105 and has applied them in many prior cases. What is uncommon about Purdue's motion—perhaps unprecedented—is that it asks the Court to use a preliminary injunction to stop all civil law enforcement actions against individual defendants who are far from bankrupt and are not employees, officers, or directors of any of the Debtors. The States are not aware of any decision in which any court has ever done that. Moreover, Purdue asks the Court to take this unprecedented step in a case where the individuals at issue are accused by the chief law enforcement officers of dozens of states of illegal conduct that contributed to thousands of deaths.

The standards governing section 105 ask the Court to consider:

(1) the likelihood of success;

(2) imminent irreparable harm to the estate in the absence of an injunction;

(3) the balance of harms; and

(4) the public interest.

See Nev. Power Co. v. Calpine Corp. (*In re Calpine Corp.*), 365 B.R. 401, 409 (S.D.N.Y. 2007); *Lyondell Chem. Co. v. CenterPoint Energy Gas Servs. Inc.* (*In re Lyondell Chemical Co.*), 402 B.R. 571, 588 (Bankr. S.D.N.Y. 2009). Application of those standards shows why the preliminary injunction should be denied.[35]

[35] In a footnote, Purdue describes an alternative test for section 105 injunctions that, according to Purdue's summary, does not consider traditional factors such as the public interest at all. *See* Purdue Mem. at 18 n.20. Purdue does not ask the Court to apply that alternative test (*see* Purdue

A. The Injunction Would Make Successful Reorganization Less Likely.

There are many reasons why the reorganization structure that Purdue has suggested will not succeed.[36] However, to rule on the issue of whether to enjoin State law enforcement actions against the Sacklers, the Court need not reach conclusions about a yet-to-be-filed plan. Instead, the Court should deny Purdue's motion because enjoining State law enforcement actions against the Sacklers would make successful reorganization ***less*** likely. Enjoining the States' actions against the non-debtor Sacklers would: (1) deprive the parties of information that is needed for a successful reorganization; (2) provoke doubt about the justice of this proceeding that will undermine reorganization; and (3) delay progress on reorganization while States wait out the 270-day injunction, oppose Purdue's attempts to shield the Sacklers, and then re-start their law enforcement actions after 270 days have been lost.

Mem. at 17-31 and 32-38, addressing "the traditional requirements for a preliminary injunction" and "the familiar four-part test"), and the Court should not do so. *See Solidus Networks, Inc. v. Excel Innovations, Inc.* (*In re Excel Innovations, Inc.*), 502 F.3d 1086, 1089 (9th Cir. 2007) ("[W]hen a debtor applies for a 11 U.S.C. § 105(a) preliminary injunction to stay a proceeding in which the debtor is not a party, the bankruptcy court must balance the debtor's likelihood of success in reorganization against the relative hardship of the parties, as well as consider the public interest if warranted."). Even the alternative examples cited by Purdue considered traditional factors. *See Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec., LLC*, 460 B.R. 106, 121 (Bankr. S.D.N.Y. 2011) (considering "strong U.S. public policies" reflected in Securities Investor Protection Act); *Johns-Manville Corp. v. Colo. Ins. Guar. Assoc.* (*In re Johns-Manville Corp.*), 91 B.R. 225, 228-230 (Bankr. S.D.N.Y. 1988) (considering irreparable harm).

[36] The significant problems with Purdue's proposal include: (1) it seeks to use Purdue's bankruptcy as a tactic to extinguish claims against the Sacklers in circumstances where the Sacklers are accused of individual illegal conduct, thousands of people died, many claims will not be paid, and many claimants will not consent; (2) it would let the Sacklers keep the money they took out of Purdue through their past illegal conduct, sending a terrible message that it is permissible to profit by breaking the law; and (3) it offers no commitment to disclose the evidence of Purdue's and the Sacklers' conduct, to provide sworn testimony from the Sacklers, or to make Purdue's and the Sacklers' documents public.

Information

First, the injunction would deprive the parties of information that is necessary to consider the global resolution that Purdue has proposed. Purdue proposes that the resolution of this corporate bankruptcy should include settlement of the States' claims that individual Sacklers broke the law.[37] The Attorneys General submitting and joining this brief are the chief law enforcement officers of their States, and they are responsible for exercising diligence before settling States' claims against lawbreakers — even more so when thousands of people were injured and died. The State law enforcement actions that are now underway would answer important questions to guide any appropriate resolution:

- Do the state courts have jurisdiction over the Sacklers?
- Do the State complaints against the Sacklers state claims to relief as a matter of law?
- What evidence do the Sacklers have in their personal possession, custody, and control?
- What do the Sacklers say when they are questioned about their conduct under oath?

Regardless of whether the answers support the States' position or the Sacklers' position, knowing the answers will give the parties more certainty about the strength of their positions and what kind of resolution is appropriate. An injunction would deprive everyone of answers to those questions.[38] Without answers, it will be more difficult to resolve this case.

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[37] *See* Purdue Mem. at 19 ("global resolution"); Jamie O'Connell Dep. at 253:22-25 ("they would want to get a release") (Troop Decl. Ex. B); *id.* at 314:17-20 ("offered by the family in exchange for the releases").

[38] Scholars analyzing past bankruptcies have noted the concern that injunctions halting suits against non-debtors can stop important evidence from coming to light. *See* Richard B. Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* 64 (1991).

Bankruptcy courts recognize that state court litigation can "greatly assist" with reorganizations. *In re Project Orange Assocs.*, 432 B.R. 89, 107 (Bankr. S.D.N.Y. 2010). Even when state court litigation involves the debtor itself and does not involve law enforcement, bankruptcy courts have lifted the automatic stay to allow state courts to address questions "best resolved by a state court." *Id.*[39] Even when granting injunctions under section 105, bankruptcy courts have allowed parties to resolve motions to dismiss in actions against non-debtors, because the legal issues presented by those motions are resolved by lawyers and courts and the burden on the bankruptcy is "minimal." *Rickel Home Ctrs. v. Baffa* (*In re Rickel Home Ctrs.*), 199 B.R. 498, 500 (Bankr. D. Del. 1996).

Twenty-three state courts are poised to deliver decisions about whether the Sacklers are subject to their jurisdiction and whether the States' law enforcement actions against the Sacklers state claims for relief as a matter of law.[40] Allowing the state courts to issue those decisions will give the parties and the public information that is important to a fair resolution, and the parallel process of deciding motions to dismiss brought by the Sacklers will not harm this bankruptcy.

Justice

When assessing whether to delay other litigation during a bankruptcy, courts have observed that "there are certain circumstances where postponement itself is an injustice." *Chicago Title Ins. Co. v. Lerner*, 435 B.R. 732, 736 (S.D. Fla. 2010). In this case, many

[39] *See also Peterson v. 610 W. 142 Owners Corp.* (*In re 610 W. 142 Owners Corp.*), No. 94 B 44488(JGH), 1999 WL 294995, at *2 (S.D.N.Y. May 11, 1999) (lifting automatic stay and dismissing adversary proceeding, pursuant to 28 U.S.C. § 1334(c)(1), where claims under state law presented issues "more appropriate for resolution in the state courts").

[40] California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, and Wisconsin. As noted above, the court in Rhode Island denied the motion to dismiss.

Attorneys General allege that the Sacklers collected billions of dollars from illegal conduct that injured thousands of people, and the Sacklers are now attempting to use a fraction of their wealth to cut off law enforcement against them. If the States' cases against the Sacklers are to be resolved in a reorganization, that should occur only after the merits and worth of the cases have been made obvious through state court proceedings and decisions. If the States' actions are stopped now, the public cannot be assured that a reorganization has justly settled their claims. By allowing the States' law enforcement actions to continue in parallel with this bankruptcy, this Court's and the state courts' combined efforts can provide the strongest assurance that justice is served.

The importance of avoiding injustice is a compelling reason why an injunction of 25 States' law enforcement actions against the Sacklers would be far different from the injunction against two States' actions in the Takata bankruptcy—the only section 105 injunction against a State Attorney General that Purdue has identified. *See In re TK Holdings*, No. 17-11375 (BLS) (Bankr. D. Del. Aug. 16, 2017) Hr'g Tr. at 6 (actions by Hawaii, New Mexico, and U.S. Virgin Islands) (Purdue Mem. at 30, ECF No. 3).[41] As the court in *TK Holdings* observed, allegations against Takata had already been resolved in a guilty plea. Hr'g Tr. at 8. The plea agreement, executed eight months before the injunction hearing, had already established a public record of the illegal behavior in an Agreed Statement of Facts.[42] Takata had already agreed to disclose the complete record of its misconduct, including by producing documents and providing sworn

[41] The hearing transcript is Ex. D to the Decl. of Benjamin S. Kaminetzky in Supp. of Mot. for Prelim. Inj., ECF No. 4.

[42] *U.S. v. Takata Corp.*, Case No. 16-20810 (E.D. Mich. Jan. 13, 2017), https://www.justice.gov/opa/press-release/file/926051/download ("Plea Agreement").

testimony from present and former employees, officers, and directors.[43] No State had sued any individual for personal misconduct.[44] And Takata had already executed an agreement to pay $1 billion in a case in which approximately 250 people were injured and 16 people died.[45] The court had strong reasons to believe that its injunction would not delay full accountability and restitution. In contrast, in this case, Purdue and the Sacklers have refused to admit responsibility; Purdue seeks an injunction to protect the Sacklers against having to testify or make relevant documents public;[46] and Purdue and the Sacklers have not offered restitution that comes close to addressing the tens of thousands of injuries and deaths.

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[43] *Id.* at 18-19.

[44] *See TK Holdings, Inc. v. State of Hawaii* (*In re TK Holdings, Inc.*), No. 17-11375-BLS (Bankr. D. Del. July 13, 2017) Verified Compl. For Injunctive Relief at ¶ 1 (seeking to enjoin only suits against corporations); *State of New Mexico v. Takata Corp.*, No. D-101-cv-2017-00176 (N.M. Dist. Ct. Jan. 20, 2017) Compl. (suing only corporations); *State of Hawaii v. Takata Corp.*, No. 16-1-0922-05-JHC (Haw. Cir. Ct. May 13, 2016) Compl. (suing corporations and "Doe defendants," who were never identified and were not the subject of any of the subsequent proceedings).

[45] Plea Agreement at 9-10 ($1 billion payment); *Takata Recall Spotlight*, Nat'l Highway Traffic Safety Admin., https://www.nhtsa.gov/equipment/takata-recall-spotlight (last visited Oct. 2, 2019) (official count of injuries and deaths).

Enjoining suits against automakers in Takata is also strikingly different from enjoining suits against the Sacklers because Takata's Plea Agreement stated that the automakers were the *victims* of Takata's misconduct; in contrast, the States' allege that the Sacklers were the chief architects of the illegal conduct at Purdue. *Compare* Rule 11 Plea Agreement, *U.S. vs. Takata Corp.*, No. 16-20810 (E.D. Mich. Jan. 13, 2017) pgs. 10-11, Paragraph 3(E)(1) and (3) (automakers were "victims") *with* MA Compl. ¶ 160 (Sacklers were "chief architects").

[46] In Rhode Island's law enforcement action, for example, Jonathan Sackler is on the eve of giving his first ever sworn testimony. Rhode Island noticed the deposition in April 2019. Jonathan refused to testify because he resides in neighboring Connecticut. On May 6, the Rhode Island court issued a commission for Jonathan to be deposed in Connecticut. He again refused to testify and filed suit for a Protective Order in Connecticut. Jonathan argued that preparing for the deposition would pose an undue burden and would cost $200,000. On August 27, the Connecticut court ordered Jonathan to testify. On September 4, he filed an appeal. Two weeks later, Purdue moved to halt State law enforcement actions against the Sacklers nationwide.

Delay

Third, an injunction would make successful reorganization less likely because delaying the States' actions will delay the resolution of this bankruptcy as well. The States are pursuing law enforcement actions against the Sacklers because their chief law enforcement officers determined those actions are necessary. Purdue has proposed a reorganization that requires "global resolution" of those State claims. Purdue Mem. at 19. Freezing the States' lawsuits would halt progress on those claims, pushing resolution further away. To increase the likelihood of successful reorganization, the bankruptcy process and the law enforcement process should move forward in parallel.

B. Denying The Injunction Will Not Cause Imminent Irreparable Harm To The Estate.

Allowing the States to continue their law enforcement actions against the Sacklers will not harm the estate. A single board and management team is overseeing the Debtors' operations, and the Sacklers are not part of it. *See* Debtors' Informational Br. at 11, 14. The Sacklers have separate counsel from Purdue, and the company is not paying the Sacklers' legal fees. *See* First Day Hearing Transcript at 116:16-21 (Troop Decl. Ex. C).

Purdue identifies four kinds of potential harm to the estate:

1) third-party discovery requests to Purdue could consume Purdue's time and resources;

2) legal or factual findings in law enforcement actions against the Sacklers could create an adverse record for Purdue;

3) judgments against the Sacklers could deplete the Sackler family fortune and diminish the resources available for Purdue; and

4) continued law enforcement actions against the Sacklers could discourage them from contributing money to a settlement.

None of these alleged harms provides a reason to issue the injunction that Purdue demands.

Third-party Discovery Requests to Purdue

The only example of a tangible drain on estate resources that may plausibly occur in the next few months is if the State law enforcement actions require Purdue to spend time and money answering third-party discovery. The appropriate way to address that possibility is to impose limits to protect Purdue from unfairly burdensome discovery requests while the bankruptcy proceeds. *See In re Rickel Home Ctrs.*, 199 B.R. at 502 (injunction under section 105 tailored to allow suit against non-debtors to go forward and "allow discovery by any party in the [non-bankruptcy] action on persons other than [the debtor] or any employee, manager, officer or director of [the debtor]"); *In re Johns-Manville Corp.*, 41. B.R. 926, 932 (S.D.N.Y. 1984) (reversing bar on discovery) ("I am not persuaded that permitting limited discovery in this or comparable cases would bring about so disruptive an effect upon Manville's reorganization efforts as to condone the imposition of an injustice upon others").[47] There is not cause for the Court to order a nationwide shut-down of State law enforcement actions against the Sacklers. A concern about discovery directed at Purdue does not provide a reason why state courts should not decide the Sacklers' motions to dismiss; why the Sacklers and their non-debtor controlled shell companies should not produce evidence in their own possession, custody, and control; or why the Sacklers should not answer questions under oath.

[47] Purdue has already produced millions of documents in the federal multi-district litigation, and many Purdue witnesses have been deposed. A suitably tailored order protecting Purdue and its current employees, officers, and directors from burdensome third-party discovery requests eliminates the concern identified by *Nev. Power Co. v. Calpine Corp.* (*In re Calpine Corp.*), 365 B.R. 401, 411 (S.D.N.Y. 2007) (debtor's current employee reviewing binders of evidence) (Purdue Mem. at 34); *Haw. Structural Ironworkers Pension Tr. Fund v. Calpine Corp.*, No. 06-CV-5358(PKC), 2006 WL 3755175, at *5 (S.D.N.Y. Dec. 20, 2006) (same bankruptcy: concern about burden of debtor "producing documents").

Legal and Factual Records Adverse to Purdue

Purdue's second concern is intangible: that law enforcement against the Sacklers could create an "adverse record" against Purdue. Purdue Mem. at 35. There is no risk of legal or factual findings that justifies the proposed injunction. The States do not need collateral estoppel to win cases against Purdue. A dozen courts have already resolved numerous issues of law against Purdue.[48] The States will not contend that a judgment in their law enforcement actions against the Sacklers is binding on Purdue. The States can prove their cases against Purdue directly. *See Barney's Inc. v. Isetan Co.* (*In re Barney's, Inc.*), 200 B.R. 527, 532 (Bankr. S.D.N.Y. 1996) (denying section 105 injunction where party opposing the injunction nullified the issue of collateral estoppel by agreeing not to assert it); *Solow v. PPI Enters., Inc.*, 150 B.R. 9, 11 (S.D.N.Y. 1992) (same, denying motion to extend a stay).[49]

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[48] Decisions denying Purdue's motions to dismiss are available at https://www.mass.gov/lists/decisions-denying-purdues-motions-to-dismiss.

Courts across the country will continue to resolve issues of law bearing on Purdue as they address litigation over the opioid epidemic. This month, a trial in the federal multi-district litigation will adjudicate claims for liability under the Racketeer Influenced and Corrupt Organizations Act directed at an "Opioid Marketing Enterprise" that includes Purdue. *See In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Sept. 25, 2019), Pls.' Trial Br., Doc. 2660 (identifying RICO claim for trial); Pls.' Consolidated Mem. in Opp'n to Defs.' Mot. for Summ. J. on Pls.' Civil Conspiracy, RICO and OCPA Claims, Doc. 2182 (evidence of Purdue participation in RICO enterprise). A civil RICO claim against co-defendants was precisely the situation in *Eastern Air Lines v. Rolleston* (*In re Ionosphere Clubs*), 111 B.R. 423, 435 (Bankr. S.D.N.Y. 1990), which Purdue cites as an example of litigation against non-debtors threatening a bankruptcy estate (Purdue Mem. at 27, 35), but Purdue is not seeking to halt the MDL.

[49] The solution adopted in *Barney's* and *Solow* eliminates the concern about an adverse record identified in *In re W.R. Grace & Co.*, 386 B.R. 17, 34-35 (Bankr. D. Del. 2008); *Union Tr. Phila., LLC v. Singer Equip. Co.* (*In re Union Tr. Phila., LLC*), 460 B.R. 644, 656 (E.D. Pa. 2011); and *Eastern Air Lines v. Rolleston* (*In re Ionosphere Clubs*), 111 B.R. 423, 435 (Bankr. S.D.N.Y. 1990). *See* Purdue Mem. at 35.

See also Queenie Ltd. v. Nygard Int'l, 321 F.3d 282, 288 (2d Cir. 2003) ("We have not located any decision applying the stay to a non-debtor solely because of an apprehended later use against

Purdue's concern about an adverse factual record also does not justify an injunction halting law enforcement actions against the Sacklers. The Sacklers are motivated and equipped to defend themselves. Finding the facts about individuals alleged to have caused much of the opioid epidemic is important, and shutting down law enforcement actions against those individuals to prevent discovery of the facts is not necessary to protect the bankruptcy estate.

Judgments against the Sacklers

Purdue's third concern is that a hypothetical money judgment against the Sacklers would wipe out funds that would otherwise flow through the estate. Once again, the immediate nationwide injunction that Purdue seeks is disproportionate to this risk. As described above, the State law enforcement actions are now exploring basic legal and factual questions about the Sacklers' liability. Twenty-three States have yet to receive decisions on motions to dismiss. No matter how those decisions come out, they will not be money judgments. Instead, they will provide important answers about the strength and boundaries of the States' claims. Similarly, a handful of States are beginning the process of obtaining evidence and testimony from the Sacklers. That factual record is of great public importance, and of great value for the parties assessing their positions in this proceeding; and it does not pose any risk of constituting a money judgment. The very case that Purdue cites on this issue recognized that there was "no need whatsoever" to enjoin litigation that was not on the eve of trial. In *Caesars Entertainment*,

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the debtor of offensive collateral estoppel or the precedential effect of an adverse decision. If such apprehension could support application of the stay, there would be vast and unwarranted interference with creditors' enforcement of their rights against non-debtor co-defendants."); *Lyondell Chem. Co. v. CenterPoint Energy Gas Servs. Inc.* (*In re Lyondell Chem. Co.*), 402 B.R. 571, 591 (Bankr. S.D.N.Y. 2009) (declining to find irreparable injury as a consequence of potential collateral estoppel); *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 564 B.R. 192, 195 (S.D.N.Y. 2016) (rejecting collateral estoppel as a basis to extend automatic stay).

(Purdue Mem. at 36), the court enjoined a single trial that was 17 days away. *Caesars Entm't Operating Co. v. BOKF, N.A.*, 561 B.R. 441, 447, 457 (Bankr. N.D. Ill. 2016) (Feb. 26 order enjoining Mar. 14 trial). The court explained in detail that an injunction against other litigation was not appropriate, and it refused to enjoin a case that was still in discovery:

> Unlike the [enjoined] action, no trial date has been set in [the other] action. Fact discovery has concluded, but expert discovery is continuing without a cut-off. Preliminary injunctions are meant to be emergency relief, granted where there is "an urgent need for speedy action to protect the movant's rights." If there is currently no need to enjoin [certain other] actions with a May trial date, there is no need whatever to enjoin the [other] action with no trial date.

561 B.R. at 456, quoting *Alert Holdings, Inc. v. Interstate Protective Servs., Inc.* (*In re Alert Holdings, Inc.*), 148 B.R. 194, 201 (Bankr. S.D.N.Y. 1992). Moreover, the court in *Caesars* refused to enjoin that other litigation even though it was purely commercial, the stakes were entirely financial, there were no law enforcement interests, and no allegations of conduct causing thousands of deaths.

Purdue also does not meet its burden as the movant to show that the Sackler fortune is small enough to be wiped out. Purdue does not even answer the question of how much money the Sacklers have.[50] Purdue's witness stated that Purdue paid the Sacklers as much as $13 billion, and Bloomberg estimates that the Sacklers have $13 billion outside of Purdue.[51] The cases that Purdue cites again illustrate the proof that Purdue lacks. The *Caesars* court found

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[50] *See* Decl. of Benjamin S. Kaminetzky in Supp. of Mot. for Prelim. Inj., ECF No. 4 (not stating the total of the Sacklers' wealth); Decl. of Jesse DelConte in Supp. of Mot. for Prelim. Inj., ECF No. 5 (same); Decl. of Jamie O'Connell in Supp. of Mot. for Prelim. Inj., ECF No. 6 (same).

[51] *See* DelConte Dep. 245:11-18 ("Q. What is your understanding of the amount of transfers that have been made ultimately to the Sacklers from any of the debtors? A. I believe from that initial MDL [multi-district litigation] deck it was 12 or $13 billion.") (Troop Decl. Ex. A); Tom Metcalf, *Even Without Purdue Pharma, Sackler Family is Worth Billions*, Bloomberg, (Mar. 5, 2019), https://www.bloomberg.com/news/articles/2019-03-05/even-without-purdue-pharma-sackler-family-is-worth-13-billion.

specifically that the company to be shielded by a temporary injunction had "an enterprise value of roughly $3 billion," and the trial that was 17 days away threatened a judgment for "$7.1 billion, more than twice the company's value." 561 B.R. at 451, 454. In *In re United Health Care Organization*, (Purdue Mem. at 36), the court enjoined litigation against two individuals to preserve their assets only after reviewing their individual tax returns and affidavits about their personal wealth. 210 B.R. 228, 233-34, 234 n.6 (S.D.N.Y. 1997), *appeal dismissed as moot*, 147 F.3d 179 (1998). In *In re Lazarus Burman Associates*, (Purdue Mem. at 36), the individuals seeking the benefit of an injunction appeared and testified that a specific state court action would prevent them from contributing funds. *Lazarus Burman Assocs. v. Nat'l Westminster Bank USA*, 161 B.R. 891, 899 (Bankr. E.D.N.Y. 1993). And *In re Third Eighty-Ninth Associates* (Purdue Mem. at 36-37) held that it was an abuse of discretion to enjoin a suit to protect funds that would allegedly be contributed to a bankruptcy because only one of the three individuals seeking to receive the benefit of the injunction had testified that the suit would impair his ability to pay. *Chase Manhattan Bank (N.A.) v. Third Eighty-Ninth Assocs.*, 138 B.R. 144, 149 (S.D.N.Y. 2008).

In this case, none of the Sacklers has testified. The Sacklers have not made their tax returns available. The Court does not know the size of their fortune. None of Purdue's declarants or their firms or Purdue's Special Committee has done any due diligence about the Sacklers' fortune.[52] The Sacklers are not 17 days or even 17 weeks from a trial that could wipe

[52] *See* DelConte Dep. 74:14-75:10 ("Q. Have you seen any work or heard about anybody doing for Davis Polk or Purdue any examination of where the beneficial owners have their assets? A. No. Q. Have you done or seen any work done on their ability to pay a judgment? A. No. … Q. And to your knowledge, no such work has been done, correct? A. To my knowledge, no.") (Troop Decl. Ex. A); *id.* at 291:24-292:3 ("Q. Do you have any understanding of the Sacklers' personal finances? A. Zero."); O'Connell Dep. 256:17-257:11 ("Q. Have you heard anything

their fortune out.[53]

Third Eighty-Ninth Associates identified another factor that made the injunction in that case an abuse of discretion: the individuals seeking the protection of the injunction "conditioned" their proposed payment on the release of claims against them. 138 B.R. at 149. Purdue avoids saying that the Sacklers' contribution to the Settlement Structure would be conditioned on a release; instead, Purdue refers to a "global resolution."[54] The reality is that everything the Sacklers offer is conditioned on a release.[55] Reversing the injunction in *Third Eighty-Ninth*, the District Court stated: "The conditional nature of the infusion casts serious doubt on whether any funds actually are available to the Debtor for use in the reorganization." 138 B.R. at 149.

There are circumstances where it makes sense to act early and preemptively, but an injunction to protect the Sacklers' fortune from the States' law enforcement actions is not one of them. To the contrary, there are compelling reasons for this Court not to enjoin State law enforcement actions against these individuals earlier than necessary, if at all. To enjoin a State

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about in the course of your engagement the families either net worth, available assets or liquidity? A. No, we have not done any analysis along those lines … Q. To your knowledge, did anybody working for the debtors make any inquiry into the family's net worth, available assets or liquidity? A. I don't know. Q. You've heard nothing on that subject one way or the other? A. I have not.") (Troop Decl. Ex. B); *id.* at 311:25-312:4 ("Q. Do you know what the Sackler family is able to pay? A. I do not.").

[53] Purdue argues for an injunction to shield the Sackler fortune both to fund "contributions contemplated by the Settlement Structure" (Purdue Mem. at 36) and to fund "fraudulent transfer or veil-piercing and alter ego claims" by the estate (Purdue Mem. at 37). Both arguments require Purdue to come forward with specific evidence of how much money the Sacklers have and what judgment in the next few weeks threatens to wipe it out. *See* Purdue Mem. at 37.

[54] Debtors' Informational Br. at 3.

[55] O'Connell Dep. 253:22-25 ("I believe they want to get -- I would imagine that they would want to get a release in total"); *id.* at 314:17-20 ("I believe that it is being offered by the family in exchange for the releases we talked about") (Troop Decl. Ex. B); *id.* at 314:23-315:10 ("Q. Was any effort made to explore with the Sacklers what they would pay to Purdue's claimants without obtaining a release of the primary claims against them held by those claimants and others? A. No I'm not aware of any efforts around that.").

from enforcing its laws against individuals alleged to have caused thousands of deaths would be a highly significant decision. The Court would benefit from more facts than are available at the stage of this preliminary injunction. To make the judicial determinations contemplated by section 105, the Court would benefit from knowing exactly what claims were proceeding to trial, against which individuals, based on what evidence, with what likely consequences, how much money those individuals have, and what they are contributing to the bankruptcy that is not conditioned on a release.

Keeping the Sacklers at the Table

Purdue appears to make one additional argument: that an injunction should issue because, even months before a trial in any State law enforcement action, subjecting the Sacklers to the "risk" of continuing law enforcement action may make them "unwilling" to participate in a settlement. Purdue Mem. at 36.[56] If this argument is about an imminent threat of a judgment that would wipe out the Sackler fortune, it is addressed above. If the argument is intended to be broader than that—to suggest that the Sacklers are entitled under the Code to a stay of State law enforcement actions as an incentive to keep them "willing" to negotiate in a bankruptcy—then the argument is not supported by the law.

Purdue's motion for an injunction to protect the non-debtor Sacklers should be denied under the cases that have found litigation against non-debtors does not threaten a bankruptcy.

[56] Purdue sends mixed signals on this issue. On the one hand, Purdue states that it does not "desire to benefit or protect ... any member of the Sackler Families," and that it will conduct a "searching investigation" of fraudulent transfer claims against the Sacklers, as if Purdue would bring claims against the Sacklers. Purdue Mem. at 31, 37. On the other hand, Purdue asks the Court to stop all State law enforcement actions against the Sacklers because making the Sacklers experience "risk" may make them "unwilling" to contribute money. *Id.* at 36. The Attorneys General have a responsibility to uncover the facts and enforce the law, regardless of whether that makes the Sacklers more or less willing to pay.

See, e.g., *Wolf Fin. Grp., Inc. v. Hughes Constr. Co.* (*In re Wolf Fin. Grp., Inc.*), No. 94B44009 (JLG), 1994 WL 913278, at *11 (Bankr. S.D.N.Y. Dec. 15, 1994), quoting *Jaytee-Penndel Co. v. Bloor* (*In re Inv'rs Funding Corp. of N.Y.*), 547 F.2d 13, 16 (2d Cir. 1976) ("Because debtors have failed to show that continued prosecution of the Actions, as against non-debtor defendants will 'embarrass, burden, delay or otherwise impede the reorganization proceedings,' they have not established a right to injunctive relief under § 105."); *see also CAE Indus. Ltd. v. Aerospace Holdings Co.*, 116 B.R. 31 (S.D.N.Y. 1990) (reaching same conclusion in denying extension of automatic stay).

C. The Public Interest Weighs Against An Injunction.

Even when a section 105 injunction would help a reorganization, the law requires the Court to consider the bigger picture: "the public interest factor of the analysis 'requires a balancing of the public interest in successful bankruptcy reorganizations with other competing societal interests.'" *In re Calpine Corp.*, 365 B.R. at 413, quoting 2 *Collier on Bankruptcy* ¶ 105.02[2] (15th ed. 2006). This is a case where the societal interests in law enforcement and justice are overwhelming.

The Public Interests Reflected in the Bankruptcy Code

Within the Bankruptcy Code, the provisions for stays and discharges reveal long-established public interests. At the start of a bankruptcy, the automatic stay applies only to lawsuits "against the debtor," rather than third parties, and does not stay the actions that are the subject of Purdue's motion -- law enforcement actions using the States' police power. *See* 11 U.S.C. § 362. Those rules reflect a public interest in limiting the benefits of bankruptcy to debtors who undertake the burdens of bankruptcy and, even then, allowing law enforcement actions to continue. At the end of a bankruptcy, the discharge given to the debtor "does not affect the liability of any other entity," and the discharge does not remove an individual's

liability for penalties owed to the government, when the individual is the debtor in bankruptcy. 11 U.S.C. §§ 524(e), 523(a)(7). Those rules reflect the same public interests: limiting the benefits to those who bear the burdens, and not shielding any individual from punishment for breaking the law.

In addition, the statute governing bankruptcy jurisdiction recognizes a public interest in comity between the federal bankruptcy courts and state courts, and the use of state courts, in appropriate cases, to advance "the interest of justice" and "respect for State law." 28 U.S.C. § 1334(c)(1) ("nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11"). The law prohibits the removal of police power actions from state court to federal bankruptcy court. 28 U.S.C. § 1452(a). This Court has denied a preliminary injunction under section 105 to protect "the principle of comity and avoidance of needless friction between Federal and State courts." *Go West Entm't, Inc. v. N.Y. State Liquor Auth.* (*In re Go West Entm't, Inc.*), 387 B.R. 435, 442 (Bankr. S.D.N.Y. 2008).

The Public Interest In Enforcement of Laws Against Deception, Fraud, and False Claims

The law of every State reflects public interests that favor denying the injunction in this case. Every State has adopted a statute prohibiting unfair and deceptive practices in business ("UDAP" laws). The States' highest courts have recognized that enforcing the UDAP laws is of great public interest. For example, "[a]s Massachusetts's chief law enforcement officer, the Attorney General has a manifest interest in enforcing G.L. c. 93A." *Exxon Mobil Corp. v. Attorney General*, 479 Mass. 312, 323 (2018), *cert. denied*, 139 S. Ct. 794 (2019). Twenty-one

States allege that the Sacklers violated the law against unfair and deceptive practices.[57]

The law of every State also prohibits fraud, and six States are pursuing law enforcement actions alleging that the Sacklers committed fraud.[58] Bankruptcy courts have recognized that the prevention of fraud is one of the goals to be served by injunctions under section 105. *See, e.g.*, *In re Spoor-Weston, Inc*., 139 B.R. 1009, 1015 (Bankr. N.D. Okla. 1992) ("The equitable powers of a bankruptcy court, whether codified in 11 U.S.C. § 105 or 'inherent,' may be relied on … to prevent fraud or injustice and safeguard the public interest."), *aff'd*, 13 F.3d 407 (10th Cir. 1993).

The law of every State also prohibits making false claims to the government, and six States are pursuing law enforcement actions alleging that the Sacklers violated False Claims Acts.[59] Cases brought by Attorneys General under the States' False Claims Acts seek to protect a public interest. *See United States ex rel. Durham v. Prospect Waterproofing, Inc.*, 818 F. Supp. 2d 64, 67 (D.D.C. 2011), quoting *United States ex rel. Littlewood v. King Pharm., Inc.*, 806 F. Supp. 2d 833, 840 (D. Md. 2011) ("Cases brought under the False Claims Act receive special consideration by the courts because they 'inherently implicate the public interest.'").

The Public Interest in Reorganizations and Settlements

Purdue contends that shutting down State law enforcement actions against the Sacklers would advance the public interest in reorganizations and settlements. *See* Purdue Mem. at 38. This argument is mistaken in two respects.

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[57] California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Vermont, Virginia, and Wisconsin. The complaints are at https://www.mass.gov/lists/state-lawsuits-against-sackler-family.

[58] Colorado, Hawaii, Minnesota, New Hampshire, New York, and Rhode Island.

[59] Minnesota, Nevada, New Hampshire, New Jersey, New York, and Rhode Island.

First, in this case, our system can accommodate both the continuation of the State's law enforcement actions against the non-debtor Sacklers and also work within the bankruptcy toward Purdue's reorganization and settlement. The public should not be forced to sacrifice one interest for the other — or to pursue only one at a time. In this very important case, Attorneys General should be permitted to pursue both in parallel.

Second, reorganizations and settlements serve the public when a fair process leads to a just result. In 2007, Purdue settled law enforcement actions in a manner that: (1) did not resolve the individual responsibility of the Sacklers who controlled the company; (2) did not expose for the public the evidence of misconduct; and (3) did not deter the executives of opioid companies from continuing to break the law. Since that settlement, more than 200,000 Americans have overdosed on opioids and died.[60] In this context, it is appropriate that the State Attorneys

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[60] *See Opioids Drive Continued Increase In Drug Overdose Deaths*, Ctrs. for Disease Control & Prevention (Feb. 20, 2013), *available at* https://www.cdc.gov/media/releases/2013/p0220_drug_overdose_deaths.html (15,597 opioid deaths in 2009 and 16,651 opioid deaths in 2010); Li-Hui Chen et al., *Rates of Deaths from Drug Poisoning and Drug Poisoning Involving Opioid Analgesics — United States, 1999–2013*, 64 Morbidity and Mortality Weekly Report 1, 32 (2015), *available at* https://www.cdc.gov/mmwr/pdf/wk/mm6401.pdf (16,235 opioid deaths in 2013); Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths — United States, 2010–2015*, 65 Morbidity and Mortality Weekly Report 1445, 1445 (2016), *available at* https://www.cdc.gov/mmwr/volumes/65/wr/pdfs/mm655051e1.pdf (28,647 opioid deaths in 2014 and 33,091 opioid deaths in 2015); Puja Seth et al., *Overdose Deaths Involving Opioids, Cocaine, and Psychostimulants —United States, 2015–2016*, 67 Morbidity and Mortality Weekly Report 349 (2018), *available at* https://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm6712a1-H.pdf (42,249 opioid deaths in 2016); Lawrence Scholl et al. *Drug and Opioid-Involved Overdose Deaths — United States, 2013–2017*, 67 Morbidity and Mortality Weekly Report 1419, 1419 (2019), *available at* https://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm675152e1-H.pdf (47,600 opioid deaths in 2017).

The cases Purdue cites regarding the public interest in reorganizations and settlements did not consider, much less endorse, court orders to shut down law enforcement actions against deadly, illegal conduct. *See* Purdue Mem. at 38; *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 437 (1999) (addressing a specific, unrelated issue of law: "[t]he issue in this Chapter 11 reorganization case is whether a debtor's prebankruptcy equity holders may, over

General who have filed suit against the Sacklers be allowed to proceed with their actions in accordance with state law and make their own determinations as law enforcement officers about when to consider settlement.

The Public Interest in Accountability for the Opioid Epidemic

Today, every branch of government has recognized the public interest in accountability for misconduct underlying the opioid crisis. The President of the United States declared the epidemic to be a public health emergency.[61] The U.S. House of Representatives Committee on Oversight and Reform demanded that Purdue turn over documents about the conduct of the Sacklers to shed light on the "greatest public health crisis in decades."[62] The Massachusetts Appeals Court stated about one of the lawsuits that Purdue seeks to enjoin: "it is difficult to imagine a dispute in which the public has a greater interest." *Commonwealth v. Purdue Pharma LP*, 2019-J-0050 (Mass. App. Ct. Jan. 31, 2019) (single Justice).[63]

When States act to enforce their laws, there is a strong public interest in allowing law enforcement actions to proceed. In *In re First Alliance Mortgage Company*, the district court reversed a preliminary injunction under section 105 against UDAP actions by three States.

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the objection of a senior class of impaired creditors, contribute new capital and receive ownership interests in the reorganized entity, when that opportunity is given exclusively to the old equity holders under a plan adopted without consideration of alternatives."); *Rickel Home Ctrs. v. Baffa* (*In re Rickel Home Ctrs.*), 199 B.R. 498 (Bankr. D. Del. 1996) (allowing suit against non-debtor to proceed).

[61] *President Donald J. Trump Is Taking Action on Drug Addiction and the Opioid Crisis*, The White House (Oct. 26, 2017), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-action-drug-addiction-opioid-crisis/.

[62] 03-21-2019 Letter from Representative Cummings and Representative DeSaulnier to Craig Landau, House of Representatives Committee on Oversight and Reform (Mar. 21, 2019), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-03-21.EEC%20DeSaulnier%20to%20Landau-Purdue.pdf.

[63] Available at http://ma-appellatecourts.org/search_number.php?dno=2019-J-0050.

F.T.C. v. First All. Mortg. Co. (*In re First All. Mortg. Co.*), 264 B.R. 634, 641 (C.D. Cal. 2001).

The court emphasized the public interest in accountability, punishment, and deterrence:

> [T]he hardship to the governmental units of not being allowed to proceed with their actions in their chosen forums includes harms different in character from the harms normally considered on motions for injunctions under § 105. Being able to have a claim determined by the bankruptcy court is qualitatively different from proceeding with a lawsuit in home forums. As Congress recognized when it created the regulatory and police powers exception, the goals of public policy, punishment, and deterrence may sometimes conflict with the goals of maximizing an individual estate's assets and efficiently processing claims. It is the former goals, which are difficult if not impossible to measure in dollars and cents, that are impaired when a governmental unit loses the ability to enforce its laws in its own forum.
>
> Considering deterrence in particular, the harm to the governmental units must be measured with a broader perspective in mind than these parties alone. The bankruptcy court and First Alliance are undoubtedly correct that there will be more money to distribute to borrowers in this case if the separate actions are not allowed to proceed. However, the governmental units are entitled to make the choice that, over time, similarly situated borrowers and consumers benefit more when companies do not violate the law in part because they know that bankruptcy will not provide a way out when their wrongs are discovered. In any given case, reasonable minds could disagree about the marginal costs and the marginal benefits of different approaches and which will maximize the wealth and happiness of the greatest number of people. The point is that it is the governmental units charged with enforcing consumer protection laws, governmental units that are responsive to the political will of the people, that should be the ones to make the choice, not the bankruptcy court.

264 B.R. at 659. The court went on to reverse a preliminary injunction of the States' suits against individual officers and directors too. *Id.* at 660.

The reasoning of *First Alliance* is persuasive, and the public interest in three States enforcing laws to address misleading mortgages in that case was significant. But the stakes are far higher today. The public interest in enforcement of the law against the Sacklers is extraordinary. The chief law enforcement officers of half the States in the nation allege that the Sacklers led illegal conduct that caused thousands of deaths. The public has a compelling

interest in allowing State law enforcement actions against the Sacklers to proceed.

D. The Balance Of Harms Weighs Against An Injunction.

Because (1) the injunction would not help the reorganization, (2) the States' law enforcement actions will not cause irreparable harm, and (3) there are compelling public interests against an injunction, the balance of harms weighs against an injunction.

IV. CONCLUSION

For the reasons stated above, the Court should not enjoin the States' law enforcement actions against the Sackers.

Respectfully submitted this 4th day of October 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 4, 2019, a true and correct copy of this document was served by electronic mail through the Court's CM/ECF system to all parties who are deemed to have consented to electronic service.

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