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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.*,	
Plaintiffs,	Adv. Pro No. 19-08289 (RDD)
- against –	
COMMONWEALTH OF MASSACHUSETTS *et al.*	
Defendant.	

LIMITED OBJECTION OF THE AD HOC COMMITTEE ON ACCOUNTABILITY TO DEBTORS' MOTION TO EXTEND THE PRELIMINARY INJUNCTION

To the Honorable Robert D. Drain, United States Bankruptcy Judge:

[1] The debtors in these chapter 11 cases ("Debtors" or "Purdue"), along with the last four digits of each Debtor's registration number in the applicable jurisdiction, are as follows: Purdue Pharma L.P. (7484), Purdue Pharma Inc. (7486), Purdue Transdermal Technologies L.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. (7502), 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) (collectively, the "Bankruptcy Cases").

Introduction

The Ad Hoc Committee on Accountability, by and through its undersigned counsel, hereby submits this limited objection to the motion of Purdue Pharma, L.P., et al., to extend the preliminary injunction to protect non-debtors, such as members of the Sackler family, because the injunction harms the public interest by preventing accountability that the public deserves.

Argument

Because the Court has considered certain arguments regarding the injunction before, the Committee on Accountability respectfully refers to its prior briefs and oral argument and incorporates them by reference.[2] Today, the Committee on Accountability focuses on the "standards to evaluate if a settlement is fair and equitable" set forth in *Motorola, Inc. v. Official Committee on Unsecured Creditors* (*In re Iridium Operating LLC*), 478 F.3d 452 (2d Cir. 2007).

The Committee is mindful that the pending motion does not seek approval of a settlement under Rule 9019 or in the form of a plan.[3] However, the pending motion and Purdue's prior motions supporting the injunction are based on the premise of a settlement with the Sacklers.[4] That settlement will not be a consensual matter, done by a contract or a handshake. Instead, Purdue seeks a non-consensual settlement to be imposed on hundreds of thousands of people (including parties in the bankruptcy and even people who are not parties in the bankruptcy) by an Order of

[2] ECF No. 232 (opposition filed March 19, 2021); ECF No. 203 (opposition filed Sep. 25, 2020); Mar. 24, 2021 hearing at 62-75; Sep. 30, 2020 hearing at 60-65.

[3] *Compare* ECF No. 246 (pending motion) *with* ECF No. 1828, Motion of Debtors Pursuant to 11 U.S.C. § 105 and Fed R. Bankr. P 9019 Authorizing and Approving Settlements Between the Debtors and the United States. The Committee on Accountability reserves its rights regarding any motion to approve a settlement or plan including whether the plan should be rejected for reasons apart from the *Iridium* factors.

[4] *See, e.g.*, ECF No. 2 at 4 (Sep. 19, 2019) (suits against Sacklers "threaten the billions of dollars of Related Party contributions that are a keystone of the Settlement Structure."); ECF No. 198 at 15 (Sep. 16, 2020)(injunction to "permit the Debtors, parties in interest, and members of the Sackler Families to effectively negotiate the amount and contours of the Sackler contribution to the Debtors' estates"); Docket No 235 at 6 (Mar. 23, 2021)(injunction to protect the plan that "embodies . . . resolution of claims against the Sacklers in exchange for a guaranteed contribution of $4.275 billion"); ECF No. 246 at 1 (Apr. 7, 2021) (injunction to protect "intense negotiations concerning a potential resolution of claims by the estates and other parties against members of the Sackler Families").

the Court.[5] Everyone will have their claims against the Sacklers settled, whether they "like the settlement or not."[6] Since the last hearing, the Committee has reflected on the standards set forth in the *Iridium* decision. Considering how those factors apply to the Sacklers' settlement is helpful for assessing Purdue's request to extend the injunction now.

An examination of the seven interrelated *Iridium* factors shows again why the injunction protecting the Sacklers is unjustified. Some *Iridium* factors pose helpful questions that expose the injustice of the injunction. Other *Iridium* factors reveal how powerful bad actors manipulate the justice system by taking facts that should not be defenses and transforming them into reasons for extraordinary protections. The more people you hurt, the more money you made, the more of that money you hide overseas, the more lawyers you hire, which Court you select – should not be considered factors to favor the approval of a settlement.

Iridium Factor #1: The Balance Between the Litigation's Possibility of Success and the Settlement's Future Benefits

The first *Iridium* factor asks a good question: when the Court decides between allowing litigation and imposing a settlement, what are the likely consequences of the Court's decision.

In this case, a forced bankruptcy settlement to protect the very-not-bankrupt Sacklers would establish a precedent that billionaires can buy their way out of trouble. If the Sacklers can purchase immunity in this case, with so many people hurt so badly as the world watches, then every future powerful perpetrator and predator will know immunity is for sale. The lesson for malefactors will be: make sure you pocket enough money to get rich enough so the rules don't

[5] *See* ECF No. 2488, Disclosure Statement, at 15 ("the Plan provides for the Channeling Injunction to … forever stay, restrain, and enjoin all Persons that have held or asserted, or that hold or assert, any Channeled Claims arising out of or related thereto from taking any action to directly or indirectly collect, recover, or receive payment, satisfaction, or recovery from any such Released Party"); id. at 182 ("The Channeling Injunction, which, among other things, bars all persons that have held or asserted, or that hold or assert Channeled Claims or any Released Claims arising out of or related thereto against the Released Parties, is a necessary element of the Plan."); ECF No. 2488-1, Plan, at 17 ("'Person' means an individual, corporation, partnership, . . ." etc.).

[6] *See* Purdue's counsel at the March 24, 2021 hearing at pg. 80 ("you can like the settlement or not").

apply. Wealth is your best defense. The lesson for anyone trying to investigate, expose, protest, or stop the wealthy and the powerful will be: don't bother. In contrast, allowing parties to make their own decisions about litigation and settlement would be appropriate and fair.

***Iridium* Factor #2: The Likelihood of Complex and Protracted Litigation, with its Attendant Expense, Inconvenience, and Delay, Including the Difficulty in Collecting on the Judgement.**

In the circumstances of this case, the second *Iridium* factor is improper and unjust. It directs the Court to favor settlement if a case requires "complex or protracted litigation," or the wrongdoers have protected their money in an overseas trust so there is "difficulty in collecting."

If the Court were to invoke this factor in favor of the Sacklers, it would be a roadmap for how to get away with deadly misconduct. It would mean that special defendants who kill thousands of people should not be put on trial, because such a big case would be "complex," but a regular defendant who slightly injured one person in an accident could be put on trial because the case would be simple. It would mean that special defendants with billions of dollars and hundreds of lawyers could avoid trials because they make litigation "protracted;" but a regular defendant who cannot protract everything could be put on trial.

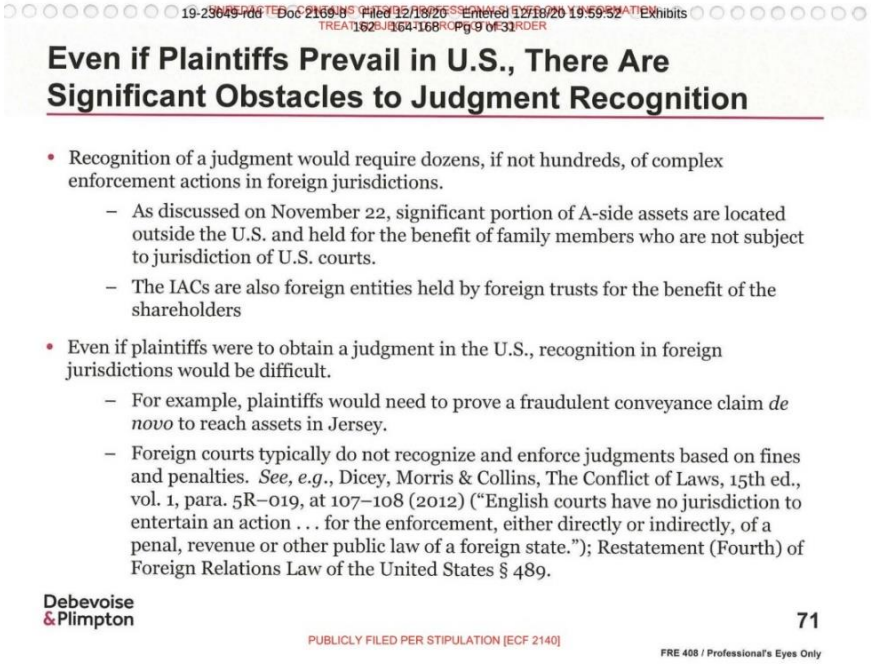
It would also mean that special defendants who devise their illegal schemes years in advance and hide their money in trusts in the Jersey Islands should get Court protection against trials because of the "difficulty in collecting." It would mean that regular defendants can be put on trial, because they don't have Purdue Pharma board member Peter Boer coaching them to stash their money in "overseas assets with limited transparency and jurisdictional shielding from U.S. Judgements."[7]

As noted by the UCC in a November filing, Peter Boer left his deposition forty-five minutes

[7] Jonathan Randles, Sara Randazzo and Andrew Scurria, Sackler Family Debated Lawsuit Risk While Taking Billions From Purdue, Wall St. J., Dec. 22, 2020, *available at* https://www.wsj.com/articles/sackler-family-debated-lawsuit-risk-while-taking-billions-from-purdue-11608680865.

into it and has refused to complete it.[8] Despite his apparent role in creating this "difficulty in collecting," Boer remains a Purdue director and has collected over a million dollars during this case.[9]

The Sacklers did not only have help from Peter Boer, but they also received advice from Debevoise, who has been representing Purdue since 2006.[10] Debevoise knew that "even if plaintiffs were to obtain a judgment in the U.S., recognition in foreign jurisdictions would be difficult."



This case began in dozens of state courts as a case about who caused the opioid crisis. It began as a case about who is responsible for thousands of injuries and deaths and millions of lives pushed into an abyss of misery. It will end as a case not only about that, but also about the tactics the powerful use to escape justice: about secrecy for facts that should not be secret, about

[8] ECF No. 2014. (UCC Reply in Support of Its Motion to Compel Productions of Purportedly Privileged Documents, Or For In Camera review, Based on Good Cause, Crime Fraud, and at Issue Exceptions To Claims of Privilege).
[9] ECF No. 2539 (February 2021 – Purdue Monthly Operating Report).
[10] Patrick Radden Keefe, *Empire of Pain*, 247-48.

bankruptcy protection for people who are not bankrupt and about schemes that the wealthy use to create so much "expense, inconvenience, and delay," that their money – and even the billionaires themselves – are outside our system of justice.

For these reasons, the Court should hold the second *Iridium* factor should not be considered in this case. That would be a step forward in the law.

***Iridium* Factor #3: The Paramount Interests of the Creditors, Including Each Affected Class's Relative Benefits and the Degree to Which Creditors Either do not Object to or Affirmatively Support the Proposed Settlement**

The third *Iridium* factor considers the interest of people affected by a settlement, sometimes phrased more emphatically as their "paramount interests." Factor three acknowledges that different people have different interests—a reality it addresses through the bankruptcy concept of sorting creditors into classes. Admitting that people have different interests and assessing how they are affected by the Court's decision makes sense. In this case, taking seriously the variety of interests leads to the conclusion that no one should be forced to settle with the Sacklers and everyone should be allowed a free choice about whether to settle or not. A look at just two groups of people illustrates this point.

Group One: Purdue – Very Interested In Settlement

First, some people really want to settle with the Sacklers. Purdue is at the top of this list. The Committee on Accountability is convinced that Purdue executives and attorneys sincerely wish to keep the peace with the Sacklers. Purdue should be allowed to settle with the Sacklers. To be honest, the notion of Purdue ever suing the Sacklers always seemed far-fetched.

Group Two: People Who Will Get Nothing – A Forced Settlement Cannot Possibly Be In Their Interest

Second, there are people who deserve compensation but will not get anything from the proposed settlement at all. This group merits attention because there are many thousands of people in it, and because there is a logical certainty that the settlement cannot be in their interest. Their "paramount interests" are not advanced by the settlement and are only harmed by it.

For example, the Committee on Accountability is concerned that the settlement will pay no money to thousands of Americans who were hurt or killed by the Sacklers' deceptive promotion but who don't have a Purdue opioid prescription – even though the settlement will still give the Sacklers' immunity from those people's claims.[11] The Disclosure Statement says these families get nothing: "[c]laimants who used only opioids manufactured by companies other than the Debtors will not be eligible or qualified to receive a settlement payment."[12] To recover anything, people who were hurt must "show that they or their injured family member(s) were prescribed and used a Purdue opioid."[13]

That edict is particularly unjust because Purdue and the Sacklers' deception and crimes always extended beyond Purdue's brand of opioids generally. That's how they caused the opioid crisis.

This injustice was the topic of the Committee on Accountability's first filing in this case. Before Purdue admitted it, before the Justice Department acknowledged it, back when Purdue went by the alias of "Pharma Co. X," the Committee on Accountability alerted the Court to the problem that Purdue and the electronic health records company Practice Fusion had engaged in a criminal

[11] *See* ECF No. 2488, Disclosure Statement, at 15 ("the Plan provides for the Channeling Injunction to … forever stay, restrain, and enjoin all Persons that have held or asserted, or that hold or assesrt, any Channeled Claims…).
[12] Disclosure Statement, ECF No. 2488, pg. 59.
[13] Disclosure Statement, ECF No. 2488, pg. 59

conspiracy to illegally prompt doctors to put patients on extended-release opioids.[14] The Committee pleaded with the Court to notify these victims of Purdue's crime.

As camouflage for the crime, Purdue's criminal scheme intentionally went beyond promoting OxyContin to promote extended-release opioids as a class. Our counsel said at the hearing in June 2020:

> This company pled guilty to receiving illegal kickbacks from a drug manufacturer, which many have identified at Purdue Pharma, and I don't believe there can be any doubt that the party named is Purdue Pharma. Several of the exhibits used even have Purdue Pharma's name on them. The illegality was the creation of a scheme to target patients in – by creating a medical [records company] that influenced doctors to prescribe extended-release opioids. Accordingly, the victims of this scheme that was perpetrated by the Debtor here were those patients that were targeted. And they're the victims, whether or not they received OxyContin or another Purdue Pharma drug or a third party's drug.[15]

That was true. Purdue's documents said that the objective of the scheme was to "Grow ERO prescriptions" and "Grow the ERO market." "ERO" stood for "extended-release opioids" – a category in which Purdue made some, but not all, of the drugs.[16]

According to the Justice Department, Purdue estimated that its illegal "alerts" in patients' medical records "would cause 22,500 patients to switch to EROs."[17] The Justice Department found that the crime in fact affected tens of thousands of patients:

> The Pain CDS alert was live on the Practice Fusion platform from early July 2016 to the spring of 2019. **The Pain CDS alerted more than 230,000,000 times during this period. Physicians wrote hundreds of thousands of ERO prescriptions after one of the Pain CDS alerts had been triggered.** Healthcare providers who received the Pain CDS alerts had been triggered. Healthcare providers who received the PAIN CDS alerts prescribed EROs at a higher rate than those that did not. Based on the higher rate of opioid prescriptions among providers who received the Pain CDS, **the alerts resulted in tens of thousands of additional prescriptions for EROs**.[18]

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[14] ECF No. 1187.
[15] June 3, 2020 hearing at 57-58.
[16] *United States v. Practice Fusion, Inc.,* Information ¶ 1, 40, & 64, filed in the bankruptcy at ECF No. 1189-2.
[17] *United States v. Practice Fusion, Inc.,* Information ¶ 1, 68.
[18] *United States v. Practice Fusion, Inc.,* Information ¶ 1, 114-16. (emphasis added).

Purdue admitted to this crime,[19] but its settlement would extinguish the rights of patients who were wrongly prescribed other brands of EROs and pay those patients nothing.

Purdue's conspiracy with Practice Fusion to pump up the category of extended-release opioids continued a strategy the Sacklers followed for decades. The Tennessee Attorney General explained that Purdue's illegal marketing "included both branded materials- those that referred to one of Purdue's opioid products by name – and unbranded materials – those that referred to opioids generally or a class of opioids, such as extended-release opioids for which Purdue was the branded market leader."[20] Deception about whole categories of opioids was a ploy "to make claims about the safety or risks of opioids in general that would generate less scrutiny from the FDA than if made about a specific branded product.[21] To see it with your own eyes, watch this Purdue advertisement, which never says the word "OxyContin" and instead promotes "the opioids."

Purdue's false advertising said: "[t]here's no question that our best, strongest pain medicines are the opioids, but these are the same drugs that have a reputation for causing addiction and other

[19] *See* Plea Agreement, Schedule A, Count Three, filed in the bankruptcy at ECF No. 1828-2.
[20] TN Compl. ¶ 39, *at* https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/purdue/purduecomplaint-5-15-2018.pdf.
[21] TN Compl. ¶ 40.

terrible things. Now, in fact, the rate of addiction amongst pain patients who are treated by doctors is much less than 1%."[22] Some may say that false statements in the 1990s are ancient history. However, those statements had real consequences for people, including members of the Committee on Accountability whose children died in the first wave of the crisis.

Purdue's sweeping lies about opioids generally had sweeping consequences. Experts say: "the introduction and marketing of OxyContin explains a substantial share of overdose deaths over the last two decades."[23] Now Purdue wants to impose a court-ordered settlement that gives no consideration to victims who don't have a Purdue prescription.

Another class of people who will get nothing from the settlement, but still have their claims against the Sacklers extinguished, are those who overdose and die after Purdue filed for bankruptcy in September 2019. As far as the Committee on Accountability can discern, the Disclosure Statement makes no provision for the people that Purdue killed in October 2019, or November 2019, or in all of 2020, or this week or this coming summer. Purdue's consultants at McKinsey used to forecast how many Purdue patients would overdose; they predicted 8,306 "OxyContin events" within just seven insurance companies in 2019.[24] But the Disclosure Statement does not contain a forecast for the deaths and injuries expected this year — or next year when OxyContin will be owned or sort of owned by the government. The monthly deaths and injuries also don't appear in the Monthly Operating Reports.

Whatever authority the Bankruptcy Court has to rule that people will not recover from the Debtors in bankruptcy (for example, by disallowing their claims against the Debtors), the Court

[22] 1998 Purdue Pharma LLP Commercial, https://wp.wwu.edu/hled151/tag/oxycontin/.
[23] Abby E. Alpert, William N. Evans, et al., Origins of the Opioid Crisis and Its Enduring Impacts, National Bureau of Economic Research, Nov. 2019, *available at* https://www.nber.org/papers/w26500.
[24] Walt Bogdanich and Michael Forsthe, McKinsey Proposed Paying Pharmacy Companies Rebates for OxyContin Overdoses, N.Y. Times, Nov. 27, 2020, *available at* https://www.nytimes.com/2020/11/27/business/mckinsey-purdue-oxycontin-opioids.html.

has no basis to reach out and force thousands of people to "settle" claims against the non-debtor Sacklers in exchange for ***nothing at all***. That's not a settlement. It's a confiscation of thousands of people's rights, to be packaged up and extinguished as a perquisite that can be sold to billionaires in exchange for money that is then paid to other people.

What To Do

The Debtors may not have thought through what will happen if their Plan is approved. There will be thousands of people throughout the nation who recognize this case as an injustice; who personally receive nothing from the bankruptcy; and whose claims against the non-debtor Sacklers will allegedly have been released in exchange for no consideration. Morally, practically, politically, legally – that is a recipe for years of conflict. As discussed further below, it is not a stable foundation on which to resolve an important case. It would be fair and prudent for Purdue to revise its plan so that every claimant who suffered an injury from opioids (not only Purdue opioids) receives some compensation.

The way to advance the diverse interests of the people affected by this case is to let people make their own decisions about whether to settle with the Sacklers. Purdue should be allowed to settle with the Sacklers. After all, they have common interests. They plot defense strategies together. They have selected board members together, and even worked together to strategize to fend off Congress and to polish their public image.[25]

Other people who want to settle with the Sacklers should be allowed to negotiate

[25] May 4, 2018 Email from Theresa Sackler to Jonathan White re: Davis Polk Candidate Recommendations - Board of Directors of Purdue Pharma Inc., filed at ECF No. 2442-3, Exhibit A, at 26 (Theresa Sackler emails about Davis Polk's recommendations for who should be on the Purdue Pharma Inc. Board); Jan 23, 2019 Email from Mortimer Sackler to Marshall Huebner, Maura Monaghan, Mary Jo White, Jonathan Sackler, et al., Fwd: Thoughts for the Day, filed at ECF No. 2442-2, Exhibit A at 73; Feb. 10, 2019 Email from Nick Hope to Theresa Sackler, Mortimer Sackler, Anthony Roncalli, et al., re: Nan Goldin Coverage, filed at ECF No. 2442-2, Exhibit A at 80; Aug. 26, 2019 Email from David Goldin to Marshall Huebner, Patrick Fitzgerald, Jerry Uzzi, Mary Jo White, Anthony Roncalli, et al., re: Privileged – op ed drafts, filed at ECF No. 2442-2, at Exhibit A at 320.

settlements, in exchange for actual consideration, to which they consent. And people who don't want to settle with the Sacklers should not be forced to settle at all.

The Sacklers are not bankrupt. The sole reason the Court is considering forcing anyone to settle with them is because the *Sacklers want global peace*. That is a recipe for corruption. If the American judiciary is available to compel settlements to give billionaires peace because they want it, then billionaires will of course demand it. That's how the powerful get more powerful. If the Court makes the correct decision that its authority is not available for that purpose, then the Sacklers will have to settle their liabilities on consensual terms like anyone else.

If the Court finds that it must compel a non-consensual settlement, then the Court should flip the script. Compel a settlement in which the Sacklers pay $10 billion tomorrow. Davis Polk could make the edits and propose that plan tonight. The Sacklers might complain that the settlement does not serve their paramount interests and they won't consent. But the Sacklers are only six people – even though they likely have more wealth than all 90,000 people who died of overdoses last year.[26] And the Sacklers would get consideration: immunity. That would be far more fair than a settlement that strips the legal rights of thousands of people without their consent for no consideration at all. Everyone assumes that the Court cannot impose a settlement on the Sacklers, but it somehow can impose a settlement on parents whose children the Sacklers killed. That's not right.

The Committee on Accountability opposes a court-imposed settlement, even as a shortcut to seize the Sacklers' ill-gotten gains. The right way to treat people and their paramount interests

[26] *Compare* Angel Au-Yeung, Despite Years of Litigation, The Sackler Family Behind OxyContin Is Still Worth Billions, Forbes Dec. 17, 2020 ($10.8 billion) *with* The Commonwealth Fund, The Spike in Drug Overdose Deaths During the COVID-19 Pandemic and Policy Options to Move Forward ("The final 2020 total in the United States could exceed 90,000 overdose deaths."), *at* https://www.commonwealthfund.org/blog/2021/spike-drug-overdose-deaths-during-covid-19-pandemic-and-policy-options-move-forward *and* Federal Reserve Bulletin, Sep. 2020 Vol. 106, No. 5, at 10 (median family net worth $121,700), *at* https://www.federareserve.gov/publications/files/scf20.pdf.

in a fair system of justice is to allow people to make decisions about settlements for themselves. As discussed further below, allowing parties to opt-in or opt-out of a settlement with non-debtors is also consistent with and likely required by the Constitution of the United States.

***Iridium* Factor #4: Whether Other Parties in Interest Support the Settlement**

The Fourth *Iridium* factor asks each party to consider whether other parties support the settlement. Factor Four is a poor fit for the personal injuries in this case. When you are physically hurt by a dangerous drug, day after day for years of your life – or lost a family member killed by it – the injury is personal. When you have been blamed and stigmatized as part of the Sacklers' strategy to "hammer on the abusers in every way possible," the injury is personal. When you watched the Sacklers boast about their innocence year after year, and then hide in Purdue's bankruptcy and admit that it was committing crimes the entire time, the injury is personal. When you've seen the Sacklers keep everything secret for decades, even when the secrets are about how your family was hurt, the injury is personal.

When your injury is personal, it does not help much to know that so-and-so-many municipalities, or ad hoc committees, or insurance companies support a settlement of some dollar amount. The interests of a committee, corporation, or political party are not the same as justice for a person. Even among the families whose children's deaths are tallied into government statistics, each person's interest in justice is distinct. The families that supported each other through dark nights and a lifetime of grief always understood that each individual loss has a significance that cannot be counted or outweighed by someone else.

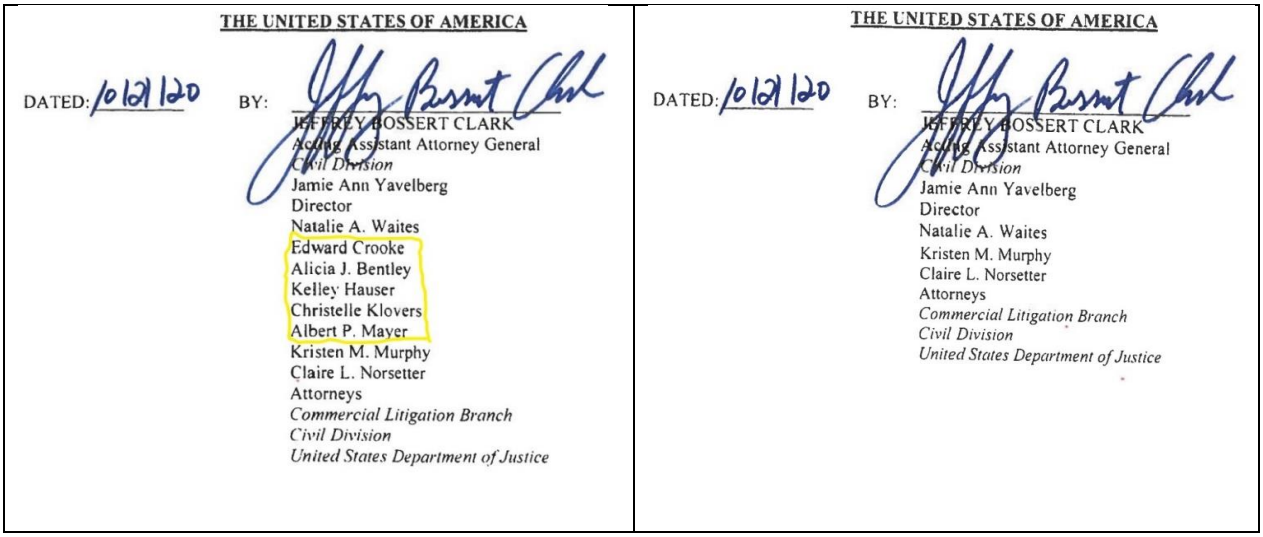
Despite this reservation, the Committee on Accountability has reviewed the work of other parties in interest. For example, the Court has previously considered settlements involving the federal government. The last presidential administration concluded a settlement with the Sacklers

before the election and said the Sacklers' payment of 2% of their fortune was "a very steep price."[27]

A book published this week revealed that:

> Inside the DOJ, the line prosecutors who assembled both the civil and criminal cases started to experience tremendous pressure from the political leadership to wrap up their investigations of Purdue and the Sacklers prior to the 2020 presidential election in November. A decision had been made at high levels of the Trump administration that this matter would be resolved quickly and with a soft touch. Some of the career attorneys at Justice were deeply unhappy with this move, so much so that they wrote confidential memos registering their objections to preserve a record of what they believed to be a miscarriage of justice.[28]

One document that emerged from the controversy within DOJ was an early version of the Sackler settlement agreement. The first version posted online on October 21, 2020, included the names of career prosecutors Edward Crooke, Alicia J. Bentley, Kelley Hauser, Christelle Klovers, and Albert P. Mayer.[29] Later that night, DOJ switched it out for a new signature page without those names.[30]



THE UNITED STATES OF AMERICA

DATED: 10/21/20 BY: _____

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[27] Deputy AG Rosen remarks, Oct. 21, 2020, video at 31:11, at https://www.justice.gov/opa/video/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid.
[28] Patrick Radden Keefe, *Empire of Pain*, at 420.
[29] final_sackler_settlement_agreement_for_execution_combined_0, cached on the Internet Archive Wayback Machine on Oct. 21, 2020 at 3:22 PM.
[30] final_sackler_settlement_agreement_for_execution_combined_0, cached on the Internet Archive Wayback Machine on Oct. 21, 2020 at 8:51 PM.

Now members of Congress are urging a new administration "to charge the Sackler family and hold them criminally responsible."[31] Within the last few weeks, individual prosecutions have begun in the Practice Fusion-Purdue conspiracy.[32]

While Factor Four may inform courts' review of settlements in other cases, the question of whether *some* parties support a settlement with the Sacklers should not justify the Court imposing a settlement on *other* parties who do not want it. In this case, the egregious misconduct that has been alleged by individuals who are not debtors, and the personal injuries that have been suffered, require that each party be allowed to decide about settlement for herself.

For these reasons, the Court should hold that the fourth *Iridium* factor should not be considered in this case. That would be a step forward in the law.

Iridium Factor #5: **The Competency and Experience of Counsel Supporting, and the Experience and Knowledge of The Bankruptcy Court Judge Reviewing the Settlement**

Factor Five is improper and unjust. It includes two sub-parts, pertaining to counsel and to the Bankruptcy Court Judge. The Court should disregard each of these sub-parts because they improperly take into account factors that should not count in a system of justice.

Factor Five Regarding Counsel

First, Factor Five suggests that, if the lawyers supporting a settlement of the Sacklers' liability have a lot of "competency and experience," then the settlement should be approved, and if the lawyers had less competency and experience, then the very same settlement could be

[31] Rep. Raja Krishnamoorthi, From One 'Big House' To Another: DOJ Must Hold The Leaders Of Purdue Pharma Accountable, The Hill, Mar. 31, 2021, *at* https://thehill.com/blogs/congress-blog/politics/545858-from-one-big-house-to-another-doj-must-hold-the-leaders-of.

[32] Press Release, Former Practice Fusion Sales Executive Pleads Guilty to Obstructing Government Investigations Into Purdue Pharma and Practice Fusion, March 8, 2021, *available at https://www.justice.gov/usao-vt/pr/former-practice-fusion-sales-executive-pleads-guilty-obstructing-government* (James A. Dawson, Special Agent in Charge of the FBI Washington Field Office Criminal Division, concluded "this is yet another example of the dedication of the FBI and Department of Justice to hold accountable individuals and businesses who perpetrated and aided in the kickback scheme involving Purdue Pharma and Practice Fusion.").

rejected. That's not an appropriate legal standard; it's a gift to the country's top-paid lawyers. It invites wealthy bad actors like Purdue and the Sacklers to purchase favorable review of their settlements by procuring the most competent and experienced attorneys so those attorneys can cite their own competence and experience as a reason to rule for their clients. This case will be the poster child of what wealthy people gain by spending their money on lawyers.

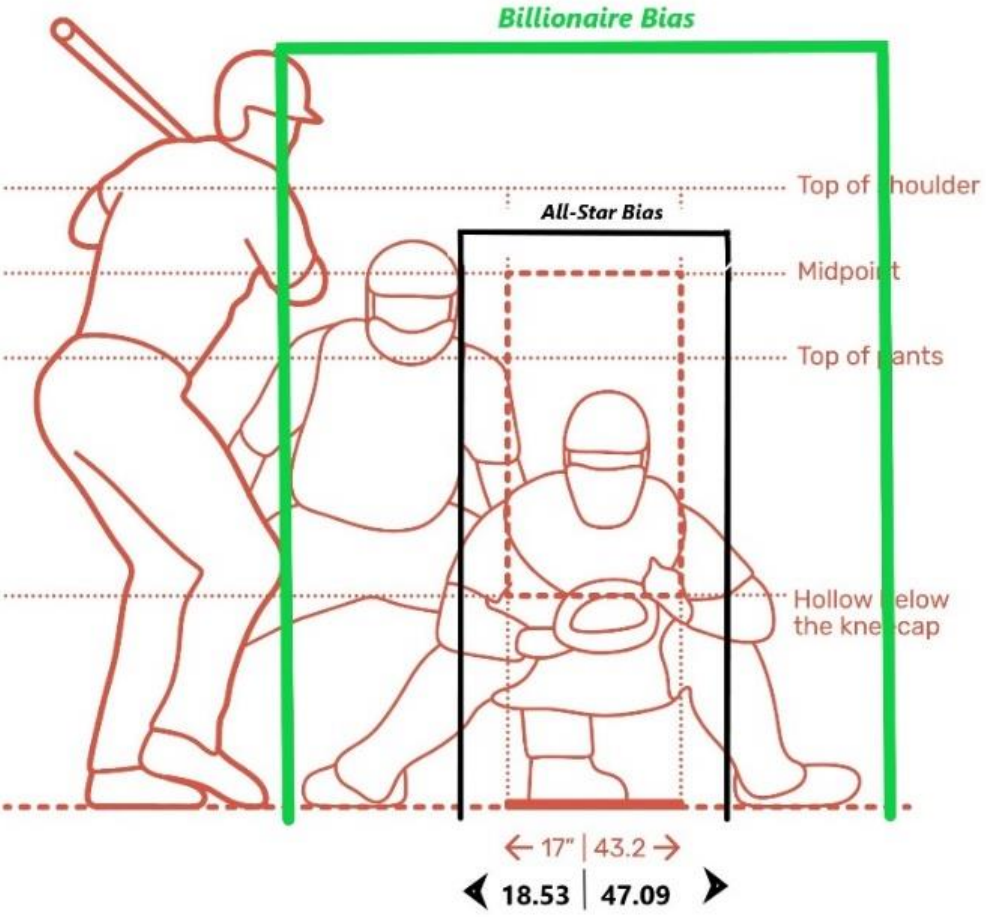
Iridium Factor Five calls for "experience." They have it. The Davis Polk lawyers who appear on the most recent bill have been collectively admitted to practice in New York for more than 500 years.[33] If John Davis, Frank Polk, and Allen Wardwell themselves came back from the dead to appear in White Plains to represent Purdue, they would have less experience than the current Davis Polk team.[34]

The culture of billion-dollar Chapter 11, of which Factor Five is a part, teaches that the way to win approval for your settlement is to fill the seats with men who did similar settlements with the same lawyers and the same executives in the same court before. That part of the culture is wrong. The benefits of "competency and experience" should be to produce a legal strategy that succeeds on its merits—not as a fudge factor to bias the assessment of the merits.

Courts can be compared to umpires calling balls and strikes. In baseball, researchers uncovered a problem of umpires unconsciously adjusting the strike zone to favor All-Stars.[35] In baseball, that bias is recognized as a problem; the strike zone is defined by the edges of the plate, and it's not supposed to shrink or grow on account of anything like *Iridium* Factor Five. In this

[33] See ECF No. 2615, Exhibit B (Professional and Paraprofessional Fees) (listing dates of admission to New York bar for 68 Davis Polk attorneys who billed the Estate in February 2021).
[34] The three attorneys graduated from law school in 1895, 1897, and approximately 1889; in this hypothetical, they would arrive at Purdue's bankruptcy in 2021 with 373 years of experience.
[35] See Nicholas Bakalar, *Ball? Strike? It Depends: Is the Pitcher an All-Star?*, N.Y. Times, July 7, 2014, *available at* https://www.nytimes.com/2014/07/08/sports/baseball/study-finds-umpires-ball-strike-calls-favor-all-star-pitchers.html?smid=url-share (in a study of 756,848 pitches, the incorrect calls in favor of All-Star pitchers were so significant that "an All-star gets an automatic 9 percent advantage based not on his performance but on his reputation").

part of *Iridium*, the Second Circuit hit a foul ball.



Factor Five Regarding The Bankruptcy Judge

Iridium Factor Five also appears to indicate that whether a settlement is approved can depend on the degree of "experience and knowledge of the Bankruptcy Court Judge."[36] This Factor implies that the very same settlement could be un-approvable if it were proposed to one judge, but approvable if it were proposed to a different judge.

The Committee on Accountability believes that the lawful result in a case should not depend on the selection of the judge. The Committee has observed a pattern, in which mega bankruptcies are often brought to the same small group of lawyers and judges. Those lawyers and judges produce settlements. Then they receive the next generation of mega cases and produce settlements in them, referring back to the cases they settled before. A specialized practice evolves. The lawyers and judges who embrace the biggest role for bankruptcy courts in American life — including releases for people who are not bankrupt — get the biggest cases. The cycle amplifies itself, like a form of natural selection.

If lawyers and judges were finches in the Galapagos, the few who want mega bankruptcies to replace state court trials would become their own breed. They would take over their island and grow giant beaks to gobble up the system of justice.

For these reasons, the fifth *Iridium* factor should not be considered in this case.

[36] *Motorola, Inc. v. Official Committee of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452 (2d Cir. 2007). For additional discussion of the issues presented in this section, see Laura Napoli Coordes, The Geography of Bankruptcy, 68 Vand. L. Rev. 381 (2015).

***Iridium* Factor #6: The Nature and Breadth of Releases to be Obtained by Officers and Directors**

Factor Six considers "the nature and breadth of releases to be obtained by officers and directors." This is a sufficient reason to reject the Sackler settlement all by itself. The reason why respected scholars are writing about the Sacklers getting away with it is because people understand that the Sacklers' attempt to use Purdue's corporate bankruptcy to get personal immunity is the most audacious use of the bankruptcy system ever. The Committee on Accountability has not identified another example in U.S. history of billionaires who are not bankrupt receiving releases from bankruptcy court. To do that in this case – when the billionaires made their fortune from a national tragedy, tens of thousands of people were killed, crimes were admitted, and no individual has been held accountable – that would stand out forever.

The Committee on Accountability is mindful of the fact that it does not have the most experienced bankruptcy counsel in this case. However, it is evident that other people are also troubled by the "nature and breadth of releases to be obtained by officers and directors" here. After David and Kathe Sackler testified before Congress in December, Representatives introduced legislation that would prohibit the Court from releasing many claims against the Sacklers.[37] As of this week, twenty-seven members of Congress are Co-Sponsors of the SACKLER Act.[38]

[37] Press Release, Maloney, DeSaulnier Introduce SACKLER Act to Prevent Bad Actors from Evading Responsibility Through Bankruptcy Proceedings, Mar. 19, 2021, *at* https://oversight.house.gov/news/press-releases/maloney-desaulnier-introduce-sackler-act-to-prevent-bad-actors-from-evading.

[38] Reps. Carolyn Maloney (NY); Mark DeSaulnier (CA); Katherine Clark (MA); Ann Kuster (NH); Alexandria Ocasio-Cortez (NY); Ayanna Pressley (MA); Rashida Tlaib (MI); Eleanor Holmes Norton (DC); Stephen Lynch (MA); James McGovern (MA); Rosa DeLauro (CT); Ritchie Torres (NY); Cori Bush (MO); Gerald Connolly (VA); Peter Welch (VT); Jim Cooper (TN); Charlie Crist (FL); Jahana Hayes (CT); Jimmy Gomez (CA); Ro Khanna (CA); Janice Schakowsky (IL); Mark Pocan (WI); Andre Carson (IN); Jamaal Bowman (NY); Katie Porter (CA); David Trone (MD); and Jackie Speier (CA).

Earlier today, in a speech on the House floor, Chairwoman Carolyn Maloney urged members of the House of Representatives to support the SACKLER Act because it is "a common sense bill . . . to promote accountability for America's opioid crisis."[39]

The Yale Law Journal accepted a forthcoming article that highlights the Sacklers' conduct in this case as an example of "Bankruptcy Grifters," bad actors that "latch onto others for benefits they do not deserve."[40]

An important, foreseeable consequence of the immunity promised to officers and directors in this case is the certainty of lengthy appeals. To build the result in this case on such an unstable foundation guarantees that it will be litigated all over again in the District Court, and the Second Circuit, and in a petition for certiorari to the Supreme Court. Even before a plan has been sent out for a vote, the Committee on Accountability has heard from attorneys interested in taking this case to the Supreme Court. People who had their legal claims against the Sacklers extinguished and

[39] Rep. Carolyn Maloney, Remarks delivered on the floor of the U.S. House of Representatives, April 16, 2021, *at* https://www.youtube.com/watch?v=_ow7RVFI9uA.
[40] Lindsey Simon, Bankruptcy Grifters, Yale L. J. (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817530.

received no compensation at all under the plan will appeal.[41]

Some of the legal issues posed by a nonconsensual settlement with the Sacklers extend beyond bankruptcy law to the fundamental protections in the Bill of Rights. The relevant Constitutional provisions include the Due Process Clause and the Seventh Amendment.[42]

Bankruptcy specialists are excited that this case could be the one to resolve the circuit split between *Lowenschuss* and *Johns-Manville*, perhaps in 2024. It has all the right ingredients: boundary-breaking tactics, plenty of lawyers, and facts crucial to the health and safety of all Americans. But it would be better to resolve the case in a way that does not violate people's rights, so there's no need to appeal. Appeals take time and money. The Committee on Accountability has calculated that the Sacklers could spend $1 billion on lawyers per year, every year through 2039, before they run out of money.[43] Bright students who are still in high school today could go to college and law school, join a firm, and become millionaires defending the Sacklers before the money is all gone. The appeals may cause this whole bankruptcy to be sent back and done all over again.

***Iridium* Factor #7: The Extent to Which the Settlement is the Product of Arm's Length Bargaining**

The *Iridium* factor ending at number seven, acknowledges the importance of bargaining. When adverse parties represent their interests in bargaining for a settlement, and reach a mutual

[41] *See* ECF No. 2488, Disclosure Statement, at 182 ("There is no guarantee that the validity and enforceability of the Channeling Injunction or the application of the Channeling Injunction to the Channeled Claims and Released Claims arising out of or related thereto will not be challenged, either before or after Confirmation of the Plan").
[42] *See e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) ("we have held that absence of notice and opt-out violates due process"); *and Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class.)
[43] Assuming $10.8B fortune reported in Forbes in December 2020, and 7% annual investment returns, the Sacklers could cover most, but not all, of the $1 billion per year of legal fees from their returns, so that level of spending would eat into their fortune and they would run out of money in approximately 2039. The fortune is managed by David Sackler, who said his work to "make the family richer" is "literally the hardest job in the world." Tarpley Hitt, Sackler Family Secrets: New Book Reveals OxyContin Heirs' Self-Pitying Emails, *Daily Beast,* Apr. 8, 2021.

agreement, our system gives that agreement respect. The proposed Sackler settlement does not meet that standard because it seeks to strip the rights of people who were never included in the bargaining.

The people who negotiated the Sackler settlement do not share our priorities. That was confirmed during the hearing on March 24, when Purdue's counsel explained Purdue's approach to the bargaining they have done. Counsel enthused about the complexity:

> [T]he facts here are actually vastly more complicated because, in fact, we all love to say the Sacklers, but of course, the Sacklers split and then split and then split again. And part of the analysis that has been done with extraordinary, painstaking care over, by now, several years, is to weigh and assess their recoverability against each individual Sackler Pod…
>
> Raymond Sackler was married once and had two children. Richard and Jonathan who live in the United States and most of their assets are in United States, and … Mortimer Sackler was married three times and I believe ceased to be a U.S. citizen many decades ago and there are children and grandchildren from each of those three marriages, each of whom got separate, fractioned distributions, many of which live overseas and have never been on the board, and that is one of thousands of factors . . . and I can't say more than this because I actually would be violating of the Court order in the UCC-Debtor AHC Tripartite Stipulation No. 2 about the trade was, we got unbelievable amounts of information from them about their net worth to an extraordinarily granular level …. [44]

Listening to the hearing reminded the Committee on Accountability that Purdue does not represent our interests. The Committee is not making decisions about the Sacklers based on fractioned distributions, marriages, or citizenship. We are concerned about who caused the opioid epidemic, and how they did it. That is the question that matters to the people who were hurt, and it is the question Purdue wants to avoid.

The reason to have a justice system is to empower people to seek justice. When hundreds of survivors sued Larry Nassar, the predator who assaulted young gymnasts, many of those brave women and girls were not focused on the structure of Nassar's assets. They were not concerned

[44] March 24, 2021 hearing at 78-79.

with whether Nassar stashed his money in trusts or pods. Gymnast Rachael Denhollander explained that she wanted to fight back against a culture of abuse. She said: "[t]he culture of abuse is created by how we respond to the predators and how we respond to the victims."[45] Rachael is right.

For Purdue to purport to bargain on behalf of its victims turns the "bargaining" of Factor Seven upside down. Much of the value of bargaining is to be able to speak and question and listen for yourself. Some members of the Committee on Accountability testified at the sentencing of Purdue Executives in 2007; others spoke at the December 2020 Congressional oversight hearings regarding the Sacklers. They spoke about why these cases are important to them, and about the experience of being harmed by opioids and even seeing their children killed by them. American heard their voices, and believed them. Survivors and victims cannot be adequately represented by Purdue.

Purdue is focused on accounting reports and the work "that has been done with extraordinary, painstaking care over, by now, several years, is to weigh and assess their recoverability against each individual Sackler pod." Those are ways to avoid the issue that matters: whether the Sacklers engineered an epidemic of addiction, death, and misery. Imagine if those years of painstaking care had instead been used to tell us the truth about whether the Sacklers caused the opioid crisis and who assisted them.

If the Sacklers spend the next twenty years attending trials across America, they will come face to face with people they hurt. Maybe the Sacklers will want to bargain with some of those families. Maybe the Sacklers will apologize. Maybe the next wealthy lawbreakers watching this case will get the message that you can't buy your way out of trouble if your business takes away

[45] Matt Mencarini, 18 More Alleged Victims Sue MSU, Nassar, Lansing State Journal, Jan. 10, 2017, *available at* https://www.lansingstatejournal.com/story/news/local/2017/01/10/larry-nassar-michigan-state-lawsuit/96246098/.

lives.

Conclusion

The *Iridium* factors show there should not be a forced settlement of claims against the Sacklers in this case. With that in mind, the motion to extend the injunction as to non-Debtors should be denied.

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Respectfully Submitted,
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