Congress of the United States
Washington, DC 20510

August 6, 2021

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Garland:

We write to you today urging the Department of Justice ("DOJ") to file an immediate direct appeal of Purdue Pharma, L.P.'s ("Purdue") plan of reorganization, in order to avoid releasing the Sackler family from accountability for the opioid crisis they helped create.

Purdue filed for bankruptcy in 2019 as a means of dealing with the thousands of cases against the company for its role in the opioid crisis.[1] From the outset of this case, Purdue's owners, members of the Sackler family (the "Sacklers"), have piggybacked off of Purdue's bankruptcy case to avoid personal accountability for their actions at Purdue.

First, the Sacklers have obtained nearly two years of stays from litigation against them. Now, in a matter of days, the Bankruptcy Court will convene for the Confirmation Hearing of Purdue's Chapter 11 Plan of Reorganization (the "Plan").[2] Under the Plan, the Sacklers will be granted releases for themselves and their accomplices, not just from Purdue's claims against them, but from their own direct liability to Purdue's creditors, irrespective of those creditors' consent ("nonconsensual third-party releases"). The Sacklers, who bear a significant responsibility for the opioid crisis, are solvent, non-debtor parties who are abusing the bankruptcy system to avoid accountability for their actions. The DOJ has the ability and the responsibility to put an end to the Sackler's irresponsible and unfair efforts.

The United States is one of Purdue Pharma's largest creditors. On June 30, 2021, House Oversight and Reform Committee Chairwoman Carolyn B. Maloney and Congressman Mark DeSaulnier sent you a letter urging the DOJ to oppose the Plan because its terms were in direct conflict with the DOJ's prior position regarding the unlawfulness of the nonconsensual release of government claims brought against non-debtors, such as those brought by state attorneys general against the Sacklers.[3]

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[1] New York Times, "Purdue Pharma, Maker of OxyContin, Files for Bankruptcy," Jan Hoffman and Mary Williams Walsh, September 15, 2019, https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html.

[2] The Confirmation Hearing is set for August 12, 2021.

[3] Letter from Chairwoman Carolyn B. Maloney, House Committee on Oversight and Reform, and Rep. Mark DeSaulnier, to Attorney General Merrick Garland, Department of Justice, June 30, 2021, https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2021-06-29.CBM%20DeSaulnier%20to%20Garland-DOJ%20re%20Purdue%20Plan%20of%20Reorganization.pdf.

On July 19, 2021, the DOJ filed a "statement" with the U.S. Bankruptcy Court in the Southern District of New York to express its "fundamental concerns" with the nonconsensual third-party releases in the Plan.[4] More specifically, the DOJ stated that these releases violate due process, are not permitted under the Bankruptcy Code, and that bankruptcy courts lack authority to approve the releases in the Plan.[5]

The DOJ provided an in-depth analysis of the constitutional rights at issue in this case. At their core, the proposed nonconsensual third-party releases in the Plan violate the due process rights of thousands of people because they deprive them of their property (in this case, their claims against the Sacklers) without reasonable notice and an opportunity to be heard.[6] The non-consenting creditors in this case, including individual victims and several state Attorneys General, want to litigate their cases against the Sacklers. However, they will be unjustly denied that opportunity if the Plan is confirmed.

Despite the arguments your agency raised against the nonconsensual third-party releases in Purdue's Plan, the DOJ did not actually object to the Plan or even vote against the Plan.[7] In fact, your agency did not vote on the Plan at all.[8] In failing to cast a ballot, the DOJ has effectively voted to *approve* the Plan that it claims is unconstitutional.[9]

There is still time for the DOJ to play a key role in this case by seeking an immediate direct appeal to the Second Circuit Court of Appeals on the constitutionality of the Plan's nonconsensual third-party releases.[10] Such an immediate direct appeal is appropriate as there is no controlling precedent on the constitutionality of nonconsensual third-party releases either in the Second Circuit or from the Supreme Court of the United States and this case involves a matter of public importance.[11] If the DOJ pursues this appeal, it should also consider asking the

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[4] Statement of the United States Regarding the Shareholder Release filed by Audrey Strauss, United States Attorney for the Southern District of New York, on behalf of the United States of America, with hearing being held on 8/9/2021, July 19, 2021, https://restructuring.primeclerk.com/purduepharma/Home-DocketInfo.

[5] *Id.*

[6] *Id.*

[7] In contrast, the United States Trustee did object to the plan. Objection of the United States Trustee to the Sixth Amended Joint Chapter 11 Plan of Purdue Pharma L.P. and Its Affiliated Debtors, *In re Purdue Pharma, L.P.*, No. 19-23649 (RDD) (Bankr. S.D.N.Y. July 19, 2021) (Dkt. No. 3256).

[8] *See* Exhibit A to Preliminary Declaration of Christina Pullo of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, *In re Purdue Pharma, L.P.*, No. 19-23649 (RDD) (Bankr. S.D.N.Y. July 26, 2021) (Dkt. No. 3327).

[9] Disclosure Statement for the Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, *In re Purdue Pharma, L.P.*, No. 19-23649 (RDD) (Bankr. S.D.N.Y. June 3, 2021) (Dkt. No. 2983) § I.H ("The Debtors will argue to the Bankruptcy Court that if no holders of Claims in a particular Class that is entitled to vote on the Plan vote to accept or reject the Plan, then such Class shall be deemed to accept the Plan."). *See also In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1266 (10th Cir. 1988) (inaction by a nonvoting single class creditor constituted acceptance by the class); *In re Adelphia Commns., Corp.*, 368 B.R. 140, 260-63 (Bankr. S.D.N.Y. 2007) (following *Ruti-Sweetwater*).

[10] Whether the appeal is an immediate direct appeal or an interlocutory appeal depends on whether a confirmation order by a non-Article III bankruptcy judge that contains a non-consensual release of personal injury and wrongful death claims can be considered a final order. For purposes of this letter, we refer to an appeal, whether direct or interlocutory, as a direct appeal.

[11] 28 U.S.C. § 158(d)(2)(A)(i).

Court of Appeals for a stay of the Plan pending appeal to avoid having the court nullify the appeal by invoking the doctrine of equitable mootness.[12] Some Courts of Appeal rely on this controversial doctrine to avoid unwinding bankruptcy plans that go into effect, even if a plan is wrongly confirmed.

In light of the DOJ's concerns about the constitutionality and lack of Second Circuit and U.S. Supreme Court precedent on the legality of nonconsensual third-party releases and the lack of a trustee or examiner motion to evaluate the merits of the Plan, we respectfully request that the DOJ take its next opportunity to intervene in the case by appealing the Plan on constitutional grounds.

We also seek your response to the following questions:

1. Will the DOJ seek an immediate direct appeal of the Plan and a stay of the Plan pending appeal to avoid the applicability of the doctrine of equitable mootness?

2. Why didn't the DOJ, representing a creditor holding a $2 billion claim in this case, cast a vote on the Plan?

3. If the DOJ is concerned about the constitutionality of the nonconsensual third-party releases in the Plan, why did the agency not vote against the plan and instead take an action that is effectively interpreted as being in favor of the Plan?

4. Is it now official DOJ policy that nonconsensual third-party releases are unconstitutional and will it object to their use in future cases?

Sincerely,

Elizabeth Warren
United States Senator

Richard Blumenthal
United States Senator

Carolyn B. Maloney
Member of Congress

Mark DeSaulnier
Member of Congress

[12] 28 U.S.C. § 158(d)(2)(D). The United States may also seek a stay of the Plan from the Court of Appeals if the Bankruptcy Court declines to act. Fed. R. Bank. P. 8007(b).