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and

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
	:	Chapter 11
PURDUE PHARMA L.P., *et al.*,	:	
	:	Case No. 19-23649 (RDD)
Debtors.[1]	:	
	:	(Jointly Administered)

[1] The Debtors in these cases, 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 L.P. (0495), SVC Pharma L.P. (5717) and SVC Pharma Inc. (4014). Purdue's corporate headquarters is located at One Stamford Forum, 201 Tresser Boulevard, Stamford, CT 06901.

PURDUE PHARMA, L.P., *et al*.,	:	
	:	Adv. Pro. No. 19-08289 (RDD)
Plaintiffs,	:	
	:	
v.	:	
COMMONWEALTH OF MASSACHUSETTS, *et al*.,	:	
	:	
	:	Obj. Due: 10/04/19 at 2:00 p.m.
Defendants,	:	Hrg. Date: 10/11/19 at 10:00 a.m.
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THE STATES' COORDINATED OPPOSITION TO DEBTORS' MOTION FOR PRELIMINARY INJUNCTION OF STATE ENFORCEMENT ACTIONS AGAINST PURDUE

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

Twenty-four states[2] and the District of Columbia (collectively, the "States"),[3] respectfully submit this opposition (the "Opposition") to the Motion for Preliminary Injunction [Docket No. 2] (the "Motion") filed by Purdue Pharma L.P. and certain of its affiliates (collectively, "Purdue") seeking to enjoin the States (and other states) from prosecuting their police and regulatory power actions against Purdue.

In support of this Opposition,[4] the States state as follows:

I. INTRODUCTION

1. Every State, whether opposing the Motion or not, is in the thick of a devastating opioid crisis that has resulted in hundreds of thousands of deaths, debilitating addictions of the States' citizens and unquantifiable impacts on families, communities and society at large. This crisis was fueled by Purdue's years-long and continuing unlawful conduct promoting, marketing, and selling its opioid-related products, including OxyContin. According to the Centers for Disease Control, more than 130 people (on average) die each day from opioids (which translates to approximately 35,100 deaths during the requested 270-day stay). The States (opposing or not) will bear the most significant burden in trying to abate this crisis. Indeed, it has and will cost the States billions; and obtaining localized relief defining Purdue's illegal conduct and enjoining it from continuing or happening again is a pivotal component for constraining this epidemic.

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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. Please note that for the purposes solely of this Consolidated Objection, the State of Washington is filing a separate response to Purdue's Motion regarding the request for injunctive relief for itself.

[3] The States have associated as an unofficial committee which is being referred to as the Ad Hoc Group of Non-Consenting States. Because the individual States are the named defendants in this adversary proceeding, however, they are objecting to the Motion individually (but in a collective fashion) through this Consolidated Opposition.

[4] This Opposition addresses only Purdue's request to stay all police power actions against itself and its affiliates. It complements the States' Coordinated Opposition to Purdue's Motion for Preliminary Injunction of State Enforcement Actions Against the Sacklers.

2. For years, Purdue deceived the medical community and the public about OxyContin, intentionally tempering the beliefs of prescribers and patients that opioids are dangerous.[5] Purdue used a deceptive and unfair marketing campaign to convince prescribers to prescribe more prescription opioids to patients, at higher doses, and for longer periods of time.

3. That Purdue currently finds itself mired in litigation arising from its illegal conduct is unsurprising given its criminal history. In 2007, Purdue's predecessor company, Purdue Frederick Company ("Purdue Frederick"), and three of its executives pled guilty to federal charges stemming from an illegal misbranding scheme to increase OxyContin sales. The guilty pleas resulted in Purdue Frederick paying approximately $635 million in criminal and civil penalties, fines, and forfeitures to the federal government. Separately, Purdue Frederick paid $19.5 million to certain state governments to resolve related law enforcement actions and entered into a Consent Judgment that required it to cease its illegal conduct.

4. Purdue, however, did not cease its misconduct. Instead, Purdue doubled down and continued its deceptive promotion of opioid products by falsely addressing prescriber concerns about opioids' true risk of addiction and blaming those who became addicted to its drugs. Purdue's deceitful promotion led to an increase in prescriptions that has allowed Purdue to generate more than $11 billion dollars in profits since the 2007 guilty plea.

5. Purdue's decades-long misconduct and failure to comply with its prior agreements to cease violating the law prompted the States to file lawsuits (the "State Police Power Actions")

[5] Studies conclusively establish that OxyContin is dangerous and highly addictive, so much so that mere usage could prove fatal.

to protect the States' residents and save lives by compelling Purdue to immediately stop all unlawful conduct and to abate the crises it created.

6. Despite its long-standing and documented inability to comply with the law (which resulted in the State Police Power Actions), Purdue now seeks to preliminarily enjoin more than 2,600 actions for 270 days, arguing with only the thinnest of evidence that they must be halted to preserve the goals of these chapter 11 cases. Motion; Memorandum of Law in Support of Motion for a Preliminary Injunction [Docket No. 3 (the "Memorandum"); Declaration of Jesse DelConte [Docket No. 5] ("DelConte Decl."); and Declaration of Jamie O'Connell [Docket No. 6] ("O'Connell Decl.").

7. The reality, however, is that Purdue is essentially seeking a stay of far fewer actions, including the twenty-five (25) pending State Police Power Actions that should be allowed to continue for the protection of each State's citizens. Although the Motion relies on there being over 2,600 actions from which Purdue allegedly needs protection, approximately 2,200 of those actions effectively have been stayed by the severing or proposed severing of Purdue from the multi-district litigation currently being administered by the United States District Court for the Northern District of Ohio. As such, the Court should evaluate the Motion based on the State Police Power Actions of the States.

8. In any event, Purdue has not met its high burden of showing that section 105(a) of the Bankruptcy Code,[6] supports the imposition of an injunction against the State Police Power Actions. It has not shown that section 105(a) should be used to thwart section 362(b)(4), which permits the continuation of the State Police Power Actions notwithstanding section 362(a)'s

[6] Unless otherwise noted, section references are references to sections of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*.

automatic stay, and 28 U.S.C § 1452 which prohibits the removal of police power actions from state court to federal bankruptcy court. It has not alleged, much less proven, any extraordinary circumstance (other than litigation costs, which are insufficient) sufficient to override the Bankruptcy Code's clear mandate that police power actions are not to be stayed.

9. Purdue also has not shown there is a reasonable likelihood of a successful reorganization. Although Purdue has described the basic terms of a proposed Settlement Structure (as defined in the Memorandum), which, among other things, implicitly requires broad, non-consensual third party releases, Purdue admits that there is no settlement with any party.[7] Furthermore, if these evidentiary deficiencies were not enough, the fact that the States, which represent more than half the population of the United States,[8] oppose the Settlement Structure (and its required non-consensual releases) compels the conclusion that Purdue cannot demonstrate a reasonable likelihood of a successful reorganization.

10. Nor has Purdue shown that it will suffer irreparable harm unless the State Police Power Actions are stayed. Indeed, as noted above, the very premise of the Motion—that costs to litigate police power actions are so vast as to interfere with Purdue's reorganization efforts—is misleading given that nearly 85% of those actions appear to be halted by agreement and less than a handful of State Police Power Actions will go to trial or administrative adjudication in the next 90 days. Moreover, based on Purdue's own declarant's deposition testimony discussed below,

[7] In addition to non-consensual third-party releases (which have not been highlighted by Purdue in the Memorandum, but the States understand are an intended exchange for any contribution from the Sackler family), the proposed Settlement Structure consists of (i) the transfer of Purdue's assets to a public benefit trust; (ii) a liquidation of Purdue's non-U.S. affiliates and the contribution of those sale proceeds to satisfy claims; and (iii) the contribution by Purdue's shareholders of $3 billion, with the ***hope*** of further contributions from the sales of their ex-U.S. pharmaceutical businesses. Memorandum at 14-15 (emphasis added). The success of this "Settlement Structure" is highly speculative. It presupposes funding abatement efforts from the continued sale of the very opioids that caused the crisis in the first place and economic benefits based off drugs that are not yet on the market and may never be.

[8] According to the Census Bureau's estimates for 2018, the States constitute approximately 53% of the United States population (173,234,704 out of 327,167,434). https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html (last visited Oct. 3, 2019).

Purdue cannot ascribe any negative impact on its workforce from the continuation of the State Police Power Actions. Any negative impact exists, if at all, independent of these actions and reflects the undisputed fact that Purdue has promoted opioids through false and deceptive practices and continues to manufacture and sell them. Most tellingly, Purdue's declarant, Jamie O'Connell, testified, in effect, that Purdue's seeks this stay primarily to force a settlement consistent with the Settlement Structure and its implicit releases of the Sackler family and not to avoid harm to itself. O'Connell Decl. ¶ 13.

11. In contrast, the States (and by extension, their citizens) will suffer irreparable harm if the State Police Power Actions are stayed. Enforcement of States' consumer protection laws and prompt prosecution of those who harm the States' citizens are among the paramount duties of Attorneys General, made only more important by this devastating opioid crisis. All States have a critical interest in protecting their citizens by demonstrating that Purdue's unlawful and dangerous practices are, and unless enjoined in accordance with the regulatory requirements of each state continue to be, a threat to the public welfare before a local court familiar with each State's respective consumer protection and public health laws, not only to hold Purdue to account but to deter egregious and harmful conduct by others. Purdue's other creditors should share this goal.

12. In sum, the public interest in these chapter 11 cases goes well beyond the distribution of Purdue's assets, which will be addressed in this Court. The State Police Power Actions serve the public's non-monetary interests. Prosecution of the State Police Power Actions will allow the States to uncover the full extent of Purdue's misconduct, bring Purdue to public justice, provide full equitable relief for the public's benefit, and deter others from misconduct. This Court should not strip the States of their core function to enforce their own regulatory laws

in their owns courts and administrative bodies, just as many other courts have refused to do when asked to interfere with the exercise of state police power.

II. RELEVANT BACKGROUND[9]

A. Purdue's Businesses and Elaborate Corporate Structure

13. Purdue and its affiliates are closely held drug companies founded by members of the Sackler family, and they are directly or indirectly owned and controlled by members of the Sackler family through trusts, partnerships and holding companies. Purdue and its affiliates make up only a part of the entities owned by members of the Sackler family, including other drug companies that have contributed to the world-wide opioid crisis.

14. Purdue Pharma Inc., a New York company, is the general partner of Purdue Pharma L.P. Until 2018, members of the Sackler family held a majority of the seats on Purdue Pharma Inc.'s board of directors (the "Board"). The Sackler family members have now resigned from the Board, but only in the face of an ever-increasing number of lawsuits suing them individually, and only after handpicking their replacements.

B. Purdue's Manufacturing and Aggressive Marketing of OxyContin

15. Since the 1990s, Purdue's primary business has been the manufacture, promotion, and distribution of opioids nationwide. In or around December of 1994, Purdue submitted a New Drug Application (the "NDA")[10] for OxyContin to the U.S. Food & Drug Administration (the

[9] The facts set forth herein are upon information and belief and based upon publicly available information, including the allegations set forth in the States' lawsuits against Purdue. Copies of the States' complaints against Purdue are available at available at https://www.mass.gov/lists/state-lawsuits-against-purdue-pharma.

[10] The FDA's webpage explains that the "NDA application is the vehicle through which drug sponsors formally propose that the FDA approve a new pharmaceutical for sale and marketing in the U.S." https://www.fda.gov/drugs/developmentapprovalprocess/howdrugsaredevelopedandapproved/approvalapplications/newdrugapplicationnda/default.htm (last visited Oct. 1, 2019).

"FDA"). *See Agreed Statement of Facts*[11], at ¶ 13. Beginning at that time, Purdue engaged in deceptive practices that irresponsibly and dramatically increased opioid abuse.[12]

16. Indeed, without evidence or support (and contrary to known facts), Purdue marketed, promoted, and mischaracterized OxyContin as "less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications." *Id.* at ¶ 20.[13] To broadcast this misstatement, Purdue employed a large staff of sales representatives, and issued false marketing materials, which misrepresented OxyContin's benefits, and downplayed its risks, thereby encouraging the drug's use for less acute, longer-lasting pain, including arthritis, back pain, sports injuries, and fibromyalgia. OxyContin became the best-selling opioid in the nation. It has been estimated that approximately 80% of heroin abusers started down the path of addiction and abuse through the use of prescription opioids.

C. The 2007 Guilty Plea in Connection with the Release and Marketing of OxyContin

17. In 2007, Purdue Frederick pled guilty to a federal felony charge and three of its executives pled guilty to a federal misdemeanor charge for intentionally promoting false or misleading information about OxyContin and introducing the "misbranded" drug into interstate commerce.[14]

18. As part of the Plea Agreement, Purdue Pharma, L.P. entered into a Corporate Integrity Agreement (the "CIA"), which, in relevant part, required the appointment of a

[11] The Agreed Statement of Facts was entered in *United States v. Purdue Frederick Co.*, No. 07CR00029 (W.D. Va.), as part of the settlement with the U.S. government (the "Plea Agreement"). *See infra* at 9. A copy of the Agreed Statement of Facts is *available at* https://www.documentcloud.org/documents/279028-purdue-guilty-plea.

[12] OxyContin is not the only opioid drug developed and marketed by Purdue.

[13] Although the NDA presented clinical studies suggesting that OxyContin, dosed every 12 hours, was as safe and as effective as immediate-release oxycodone, dosed every six hours, Agreed Statement of Facts at ¶ 13., the NDA did not, nor could it possibly, provide studies establishing that OxyContin was (i) safer or more effective than immediate-release oxycodone or any other pain medication and (ii) less addictive, less subject to abuse, or less likely to cause tolerance and withdrawal issues commonly associated with opioids. *Id.* at ¶ 14.

[14] Notwithstanding the guilty pleas, Purdue subsequently paid bonuses totaling $8 million to two of the three executives. The company's earlier wrongdoing is described in the Agreed Statement of Facts.

compliance officer to serve as a member of Purdue's senior management and make periodic compliance reports directly to Purdue's Board. The Plea Agreement explicitly required the Board itself to comply with the rules prohibiting the misbranding of the company's products, undergo training to ensure that the rules were understood, and report any subsequent violations.

19. In 2007, certain Purdue entities also entered into consent judgments (collectively, the "Consent Judgments") with twenty-five States and Washington, D.C.[15] As a part of many of the Consent Judgments, Purdue Pharma, Inc., Purdue Pharma L.P., and the Purdue Frederick Company affirmatively agreed to cease false, deceptive, or misleading marketing. Certain of those judgments also required that Purdue monitor abuse and diversion information and, in some cases, report its findings to the authorities.

D. The State Police Power Actions

20. Neither the CIA nor the Consent Judgments deterred Purdue (or the Sacklers), however. Purdue not only continued its deceptive scheme to misrepresent OxyContin's addictive properties and dangers; but it also worked shamelessly to increase the frequency, dosage, and time period for OxyContin prescriptions to achieve greater profits.[16] To be clear, Purdue's unlawful conduct continues to this day in the form of continued sales based on the deceptive and unfair marketing Purdue engaged in for over a decade.

21. The Centers for Disease Control and Prevention has declared opioid abuse to be a "public health epidemic." Between 1999 and 2016, more than 200,000 people in the United States

[15] The 2007 Consent Judgments were with Arizona, Arkansas, California, Connecticut, the District of Columbia, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, and Wisconsin.

[16] Additional relevant facts are detailed in the complaints filed by the States, available at https://www.mass.gov/lists/state-lawsuits-against-purdue-pharma, and summarized below.

died from overdoses directly related to prescription opioids, with recent estimates suggesting that more than 130 people in the United States due from opioid overdoses ***every day***.[17]

22. Given this clear public health crisis and the critical role Purdue played in it, the States filed the State Police Power Actions against Purdue to protect their residents, stop Purdue's unlawful conduct, and require Purdue to abate the public nuisances it has created.

23. The crux of each State Police Power Action is that Purdue engaged in deceptive marketing and promotion aimed at increasing the market for opioids and boosting OxyContin sales. All State Police Power Actions include a claim for violations of that State's consumer protection laws. Most of the actions include a claim for public nuisance for which the States are seeking an order requiring Purdue to abate the nuisance, the damaging effects of which continue. Additional claims include fraud, negligence *per se*, elder abuse, and violations of racketeering and other statutes. All the States' actions include police power claims and requests for injunctive relief. Contrary to Purdue's description, the requests for injunctive relief in the State Police Power Actions are not "only ancillary" to unstayed monetary claims. Injunctions are critical to abating this crisis. Injunctions ensure not only that wrongful conduct will stop; but they also ensure that wrongful conduct will not be repeated or restarted[18] and if so, there is a ready, local forum in which to compel compliance.[19]

[17] *See* https://www.hhs.gov/opioids/about-the-epidemic/index.html (last visited Oct. 1, 2019)

[18] As noted below in paragraph 76, police and regulatory powers excepted from the automatic stay includes obtaining relief for alleging discontinued conduct because there is always the risk that it might begin again.

[19] Purdue's offer to subject itself to a "voluntary" injunction from this Court does not mitigate the police and regulatory nature of the State Police Power Actions. As discussed below, the proposed injunction is deficient and likely beyond the Court's jurisdiction. If entered, it would turn this federal Bankruptcy Court into the monitor for Purdue's regulatory compliance for every jurisdiction in the United States.

E. The State Police Power Actions Have Substantial Merit

24. Purdue suggests that enjoining the State Police Power Actions is not invasive because those actions lack merit as a matter of law. Memorandum at 9-11. The State Police Power Actions, however, have withstood judicial scrutiny.[20] To date, none have been fully dismissed. Of the eighteen motions to dismiss filed by Purdue, the States have prevailed at least partially in nine and are awaiting rulings in the other nine. Significantly, every decision thus far that has addressed the States' claims for violations of consumer protection/unfair trade practices or similar laws has found these claims to be valid as a matter of law.

25. In the most recent ruling, a Massachusetts court denied Purdue's motion to dismiss in its entirety, holding that the Massachusetts Attorney General stated valid claims against Purdue for violations of that State's unfair and deceptive practices law and public nuisance. *Commonwealth of Massachusetts v. Purdue Pharma L.P., et al.*, No. 1884-CV-01808 (Mass. Super. Ct. Sept. 16, 2019). The Massachusetts court rejected Purdue's arguments that (i) the Massachusetts Attorney General's consumer fraud claim is barred because it conflicts with (is preempted by) federal law, (ii) her nuisance claim fails because there was no "public right" infringed, and (iii) the "learned intermediary" doctrine breaks the chain of causation. *Id.* at 5. The Massachusetts court noted that eight other courts also have rejected similar arguments by Purdue. *Id.*

26. Importantly, with respect to federal preemption, the Massachusetts court found the North Dakota ruling relied upon by Purdue to support this Court's issuance of an injunction unpersuasive:

[20] Purdue's reliance on a North Dakota decision to the contrary to argue that the State Police Power Actions lack merit, however, is not persuasive. As discussed in paragraph 23, the case was easily dismissed by a Massachusetts Court recently as an "outlier" of "questionable value." It should be given no weight in this Court's evaluation of whether the State Police Powers Actions have merit.

> This holding appears to be an outlier and is of questionable value, however, particularly given a decision handed down by the United States Supreme Court that same day which clarified the showing a drug manufacturer must make on a claim of "impossibility preemption." *Merck Sharp & Dohme Corn, v. Albrecht*, 139 S.Ct. 1668 (2019).

Id. at 7-8. Purdue's showing with respect to federal preemption is no stronger in this adversary proceeding than it was in Massachusetts.

27. The lack of any adjudicated decision against Purdue (Memorandum at 9) also has no bearing on the merits of the State's claims because this reflects scheduling issues, not merit determinations. Regardless, several States are very close to trial, having weathered every attempt to dismiss their cases.[21] For example, the State of Maryland's scheduled administrative hearing date is January 21, 2020. And, the State of Washington has a five-week jury trial scheduled to begin on February 24, 2020. Any stay of these actions that interferes with a determination of liability—and certainly a stay of 270 days—will significantly prejudice the States.

F. The Motion

28. On September 18, 2019, Purdue filed a Complaint for Injunctive Relief [Docket No. 1] (the "Complaint") and the Motion. The Motion requests a nine month/270 day stay of actions and investigations by various governmental entities (the same time period requested in the Complaint).[22] Although the Motion collectively refers to all actions brought by governmental entities as the "Governmental Actions," it fails to distinguish between the State Police Power

[21] After the commencement of these cases, some State Courts have stayed State Police Power Actions pending rulings from this Court. For the avoidance of doubt, the States subject to these orders will seek to have these stays lifted in the event the Court denies Purdue's Motion.

[22] Given that the Complaint and the Motion seek identical relief, the Motion appears to be nothing more than an attempt by Purdue to circumvent the procedural protections afforded to adversary proceedings and obtain all the relief requested by summary motion practice.

Actions and actions brought by other governmental entities, such as counties, cities or other political subdivisions, which may or may not be the exercise of police and regulatory power.

III. LEGAL ARGUMENT

29. The Motion should be denied in its entirety with respect to the State Police Power Actions because Purdue has not met its substantial burden.

A. Section 362(b)(4) Categorically Excepts the State Police Power Actions from Section 362(a)'s Automatic Stay

30. None of the State Police Power Actions are subject to section 362(a)'s automatic stay. Purdue concedes as much by focusing exclusively on section 105(a) for the unprecedented preliminary injunction it seeks. Although Purdue declined to advance an automatic stay argument, the police-power exception to the automatic stay in section 362(b)(4) (which reflects a Congressional decision in favor of permitting police power actions to proceed notwithstanding a bankruptcy) exposes the impropriety of Purdue's attempt to enjoin the State Police Power Actions under section 105(a).

31. Section 362(b)(4) contains an express exception to the automatic stay that permits "governmental units," like States,[23] to enforce police and regulatory powers (other than a money judgment) against a debtor:

> The filing of a petition . . . does not operate as a stay . . . of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

11 U.S.C. 362(b)(4).

[23] 11 U.S.C. § 101(27) defines "governmental unit" to include "State[s]."

32. Courts uniformly look to the relevant Committee Reports to understand Congress's intent regarding the broad scope of this important exception:

> [This provision] excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of ***fraud***, environmental protection, ***consumer protection***, ***safety***, or similar police or regulatory laws, ***or attempting to fix damages for violation of such a law***, the action or proceeding is not stayed under the automatic stay.

City of New York v. Exxon Corp., 932 F.2d 1020, 1024 (2d Cir. 1991) (quoting H.R. Rep. No. 95-595, at 343 (1978)) (original emphasis removed, first and second emphasis added).

33. Congress enacted section 362(b)(4) to eliminate debate over whether a governmental unit can exercise its police and regulatory authority to allow "the enforcement of laws affecting health, welfare, morals, and safety despite the pendency of the bankruptcy proceeding." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1107 (9th Cir. 2005); *accord, Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986) ("It is clear from the legislative history that one of the purposes of this exception is to protect public health and safety.").

34. As the Second Circuit has explained, "the purpose of this exception is to prevent a debtor from frustrating necessary governmental functions by seeking refuge in bankruptcy court." *SEC v. Brennan*, 230 F.3d 65, 71 (2d Cir. 2000) (citations and internal quotation marks omitted); *accord, In re Universal Life Church, Inc. v. United States*, 128 F.3d 1294, 1297 (9th Cir. 1997) ("[B]ecause bankruptcy should not be 'a haven for wrongdoers,' the automatic stay should not prevent governmental regulatory, police and criminal actions from proceeding.").

35. Importantly, "[t]he language of [this exception] is unambiguous—it does not limit the exercise of police or regulatory powers to instances where there can be shown imminent and identifiable harm or urgent public necessity." *Matter of Commonwealth Oil Ref. Co.*, 805 F.2d

1175, 1184 (5th Cir. 1986); *see also, California ex rel. Brown v. Villalobos*, 453 B.R. 404, 411 (D. Nev. 2011) ("We disagree with the bankruptcy court's determination that the police[-]power exemption only applies to actions which are urgently needed to protect public safety and health.").

36. The State Police Power Actions fit easily within section 362(b)(4)'s exception to the automatic stay. These enforcement actions seek, among other things, to establish Purdue's liability for unfair and deceptive trade practices, and to enjoin and hold Purdue and others liable for the massive health crisis created by Purdue's production, promotion, and marketing of opioids. As such, these actions unquestionably "relate primarily to matters of public health and welfare, and the money damages sought will not inure, strictly speaking, to the economic benefit of the [States]," but rather, are brought to further "significant area[s] of state policy." *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 488 F.3d 112, 133 (2d Cir. 2007).

37. Furthermore, case law is clear that the automatic stay does not apply to the State Police Power Actions brought under various state consumer-protection statutes that prohibit unfair, deceptive, or abusive acts and practices. *See, e.g.*, *In re Gen. Motors LLC Ignition Switch Litig.*, 69 F. Supp. 3d 404, 412 (S.D.N.Y. 2014) (finding enforcement action under California's Unfair Competition Law and False Advertising Law "falls within the police-power exception" because it is "fundamentally a law enforcement action designed to protect the public"); *In re First All. Mortg. Co.*, 263 B.R. 99, 108 (B.A.P. 9th Cir. 2001) ("[I]t is well-established that consumer protection is a valid exercise of the police and regulatory power for purposes of § 362(b)(4)."); *In re Gandy*, 327 B.R. 796, 804 (Bankr. S.D. Tex. 2005) (holding that "where the government is enforcing these enumerated examples [*e.g.*, fraud, consumer protection, and safety], the governmental unit is clearly enforcing public rights").

38. Additionally, police power actions alleging public nuisance, such as the State Police Power Actions, are also categorically excepted from the automatic stay. *See, e.g.*, *In re Javens*, 107 F.3d 359 (6th Cir. 1997) (holding automatic stay inapplicable to condemnation and demolition of debtor's property alleged to be public nuisance); *In re D'Mello,* 473 B.R. 207, 210 (Bankr. E.D. Mich. 2011) (holding automatic stay inapplicable to enforcement of court order to abate public nuisance, although enforcement of money judgment was stayed).

39. In sum, there can be no serious argument that the automatic stay applies to the State Police Power Actions.[24] Unsurprisingly, therefore, Purdue is left looking only to section 105(a) for the extraordinary injunction that it seeks. *See In re Hoerr*, No. 04-82851, 2004 WL 2926156, at *5 (Bankr. C.D. Ill. Dec. 13, 2004) (admonishing that section 105(a) "is most often asserted as a last resort").

B. Section 105(a) of the Bankruptcy Code Does Not Support the Imposition of a Stay Against the State Police Power Actions: Purdue Has Not Met Its Burden

40. Recognizing there is no basis under section 362(a) to stop the prosecution of the State Police Power Actions, Purdue relies on the Court's inherent equitable powers under section 105(a) of the Bankruptcy Code to demand a stay/injunction against the States. Section 105(a) does not provide a basis for injunctive relief against the States in this case.

41. The continuation of a government action pursuant to its police and regulatory powers, even if it interferes with reorganization or estate assets, is not sufficient to warrant the grant of an injunction under section 105 of the Bankruptcy Code. Unlike private actions, "injunctions of state regulatory actions are a rare remedy, appropriate only in exigent circumstances where the state regulatory action seriously threatens the bankruptcy process." *In re*

[24] For all Purdue's bluster regarding preserving their rights to argue later that the automatic stay does apply, Purdue cannot do so in this adversary proceeding. The Complaint's two counts and request for relief rely exclusively on section 105(a).

Matter of Brennan, 198 B.R. 445, 451 (D.N.J. 1996); *see also Penn Terra Ltd. v, Dep't of Envtl. Res., Commonwealth of Pa.*, 733 F.2d 267, 273 (3d. Cir. 1984) (enjoining a government action under section 105(a) is appropriate only where "the exercise of State power . . . may run so contrary to the policy of the Bankruptcy Code that it should not be permitted"). Purdue has not demonstrated that such exigent circumstances exist.

42. As illustrated by the examination of the preliminary injunction factors below, Purdue has failed to show exceptional circumstances here. Instead, Purdue effectively seeks to have section 362(b)(4) read out of the Bankruptcy Code. Purdue's request, however, is contrary to long-standing Supreme Court guidance on the extraordinarily limited scope of section 105. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) ("The short answer to these arguments is that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); *Law v. Siegel*, 571 U.S. 415, 421 (2014) ("It is hornbook law that § 105(a) does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." (citation and internal quotation marks omitted)).

43. But even if section 105(a) is available to Purdue, Purdue must still prove its entitlement to a preliminary injunction. This requires that Purdue show (1) a probability of success on the merits; (2) that Purdue would suffer irreparable harm if the injunction is not granted; (3) the States would not suffer irreparable harm if the injunction is issued; and (4) the public interest would not be harmed if the injunction is issued. *See eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391-92 (2006); *see also In re Go West Entm't, Inc*. 387 B.R. 435, 440 (Bankr. S.D.N.Y. 2008) (setting forth first two factors only).

44. Purdue's burden of proof and persuasion is extremely high. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." (citation omitted)). Because Purdue seeks to alter the status quo by preliminarily enjoining the State Police Power Actions, which are not subject to the automatic stay, Purdue must "meet an even higher standard." *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 33 (2d Cir. 1995); *accord, e.g.*, *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011) ("The burden is even higher on a party . . . that seeks a mandatory preliminary injunction that alters the status quo . . . .") (citation and internal quotation marks omitted).

1. Purdue Cannot Demonstrate a Likelihood of Success on the Merits

45. The Second Circuit has not conclusively established what a debtor must demonstrate to show a likelihood of success on the merits when seeking injunctive relief under section 105(a). *See, e.g.*, *In re United Health Care Org.*, 210 B.R 228, 233 (Bankr. S.D.N.Y. 1997) (noting the Second Circuit has not resolved the issue of the test for injunctive relief under section 105(a)). It has not articulated whether "probability of success on the merits" refers to the probability of success in a specific lawsuit or probability of a successful reorganization. With respect to police power actions that are otherwise exempt from the automatic stay pursuant to section 362(b)(4), bankruptcy courts in this district have discussed probability of success in the context of the merits of the adversary proceeding. *Go West*, 387 B.R. at 440 (stating "[p]robability of success means that the Debtor is likely to succeed in *this* lawsuit."); *see also In re Beker Indus. Corp.*, 57 B.R. 611, 619 (Bankr. S.D.N.Y. 1986). Other cases involving a request for injunctive relief under section 105(a) as to non-debtor third parties have examined the likelihood of success

of the debtor's reorganization, although not in the case of a police and regulatory action. *See, e.g.*, *In re United Health Care Org.*, 210 B.R. at 233.

46. Given the precedent in this District that the lawsuit should be evaluated when deciding a debtor's likelihood for success on the merits where police power is involved, Purdue's request should fail. As demonstrated above, Purdue cannot show that the State Police Power Actions are not excepted from the automatic stay by section 362(b)(4) or that the State Police Power Actions are not the enforcement of policy and regulatory power.

47. But even if one were to try to assess "likelihood of success on the merits" in terms of whether Purdue is likely to be able to confirm a plan of reorganization built around the Settlement Proposal, it also cannot demonstrate, by "a clear showing," a likelihood of success.

48. First, the cases cited by Purdue with respect to injunction standards (Memorandum at 18-19) are of limited relevance here. They do not involve enjoining police power actions. They also do not involve situations where there "are reasons to conclude that the debtor(s) could not reorganize." *See In re Lyondell Chem. Co.*, 402 B.R. 571, 590 (Bankr. S.D.N.Y. 2009) ("there is no reason to believe or suspect that [the debtors'] reorganization will fail …. if there are reasons to conclude that the debtor(s) *could not* reorganize, that plainly should affect debtors' ability to invoke this factor") (emphasis in original); *In re Calpine Corp.*, 365 B.R. 401, 410 (S.D.N.Y. 2007) ("[t]here is really no dispute that there is a strong likelihood that the Debtors can successfully reorganize."); *In re Soundview Elite Ltd.*, 543 B.R. 78, 119 (Bankr. S.D.N.Y. 2016) ("Any chapter 11 plan [the trustee] might propose is unlikely to be controversial."); *In re W.R. Grace & Co.*, 386 B.R. 17, 33 (Bankr. D. Del. 2008); ("no party is suggesting that the case should be converted to chapter 7 or that reorganization is not likely").

49. Second, assuming that "probability of a successful reorganization" in the context of evaluating a request for injunctive relief under section 105(a) is similar to the evaluation required when deciding a stay relief motion under section 362(d)(2)(B), where courts are required to determine whether there is "a reasonable possibility of a successful reorganization within a reasonable time," *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 376 (1988), Purdue also cannot demonstrate "by a clear showing" its ability to succeed for the following reasons, among others:

a. Purdue has provided no meaningful detail about its plan of reorganization from which the Court or any other party can assess the likelihood any plan will be confirmed. The Settlement Structure does not provide any detail regarding the treatment of creditors, like the States, or describe the value of their claims, nor does it identify how contributions, even potential contributions from members of the Sackler family, will be used. The O'Connell Declaration and the DelConte Declaration filed by Purdue in support of the Motion do not even describe a plan of reorganization, much less describe how any such plan is likely to be confirmed. None of these deficiencies were cleared up at Mr. DelConte's deposition where, among other things, he (i) admitted having no detail concerning the proposed Settlement Structure, or its anticipated treatment of the States as creditors in bankruptcy, Transcript, Deposition of Jesse DelConte, Sept. 26, 2019 ("DelConte Dep."),[25] at 252-85, (ii) did not know with any specificity how

[25] A copy of the relevant portions of the DelConte Dep. is attached as Exhibit A. to the *Declaration of Andrew M. Troop in Support of the States Coordinated Oppositions* (the "Troop Dec.") filed concurrently with this Opposition.

any monetary contribution to the Settlement Structure from the Sacklers would be used, or to whom it would be paid, or who would receive any such contribution, *id.* at 263-64, and (iii) acknowledged having no discussions about plan confirmation or the characterization or treatment of creditors under any such plan. *Id*. at 265-69. And at Mr. O'Connell's deposition, he merely confirmed that Purdue does not need any monetary contribution from the Sackler family for its operations. O'Connell Dep. at 316.

b. Purdue has not shown that there is enough creditor support to confirm any plan (much less support for a plan based on the Settlement Structure), or even for that matter, that there is any agreement in place with anyone regarding the Settlement Structure. No written agreements were filed with the Motion. Indeed, when asked, Purdue's declarant, Mr. Delconte, did not know whether precise terms of the settlement had been reached by anyone, or whether an agreement was "done or whether it's an agreement in principal [sic]." *Id*. at 269-70.

c. Purdue cannot show that its plan is "not patently unconfirmable" or that it has "a realistic chance of being confirmed." *See*, *e.g.*, *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 157 (3d Cir. 1993) ("while 'a lift stay hearing should not be transformed into a confirmation hearing,' '[t]he 'effective reorganization' requirement enunciated by the Supreme Court ... require[s] a showing by a debtor ... that a proposed or contemplated plan is not patently unconfirmable and has a realistic chance of being confirmed.'") (quoting *In re 266 Washington Assocs.*, 141 B.R.

275, 281 (Bankr. E.D.N.Y. 1992), *aff'd*, 147 B.R. 827 (E.D.N.Y.1992)); *Mercado v. Combined Invs., LLC,* (*In re Mercado*), 523 B.R. 755, 762-63 (B.A.P. 1st Cir. 2015) ("Without deciding the issue with the same scrutiny as a confirmation hearing, the debtor's proposed plan must not be obviously unconfirmable."); *Canal Place Ltd. P'Ship v. Aetna Life Ins. Co.* (*In re Canal Place LP*), 921 F.2d 569, 577 (5th Cir. 1991) (debtor failed to carry its burden of showing a reasonable prospect of a successful reorganization); *In re Bldg. 62 LP*, 132 B.R. 219, 223 (Bankr. D. Mass. 1991) (noting "the plan is, at the present time, unconfirmable."). Here, Purdue has made no showing how it can confirm a plan based on the Settlement Structure that, among other things, will seek broad releases over the objection of the States who represent more than half the population of the United States.

d. Purdue has not demonstrated that its ability to operate, fund research and development of new drugs, market those drugs successfully and realize value from any of the business lines described in Mr. O'Connell's Declaration is anything more than speculative.

e. Purdue has not demonstrated that Purdue's non-U.S. affiliates can be effectively liquidated, and that, as manufacturers and sellers of opioids that used, upon information and belief, the same or similar deceptive marketing practices as Purdue, those entities will not themselves fail or become subject to similarly overwhelming claims by the governmental units in jurisdictions where they have done business. *See, e.g., OxyContin goes global — "We're only just getting started*" by Harriet Ryan, Lisa Girion and Scott Glover

(Dec. 18, 2016), *available at* https://www.latimes.com/projects/la-me-oxycontin-part3/.

f. Purdue has neither demonstrated that the Sackler family is committed to making a contribution in exchange for releases or that they can or cannot do so independent of taking value from Purdue's non-U.S. affiliates that manufacture and sell opioids. Indeed, Mr. O'Connell confirmed that no diligence with regard to the Sackler family has been undertaken by Purdue. O'Connell Dep. at 311-312.

50. Indeed, not a single shred of evidence submitted with the Motion addresses the likelihood that Purdue can confirm a plan of reorganization based on the Settlement Structure. Rather, the Motion is supported exclusively by declarations that set forth aggregate litigation costs to date, as well as projected future litigation expenses (without disaggregating the costs and expenses of actions of creditors supporting the proposed Settlement Structure), describe Purdue's product lines (O'Connell Decl. at ¶¶ 15-36), and generally describe the effect of litigation on Purdue's human resources. DelConte Decl. at ¶¶8-20.

51. In light of the above, Purdue's reliance on the decision in *TK Holdings, Inc. v. Hawaii (In re Takata, Inc.)*, Case No. 17-11375, Adv. Pro. No. 17-50880 (Bankr. D. Del.) to support its demand for injunctive relief (Memorandum at 20) is misplaced. The facts in *Takata* differ substantially from this case. Takata manufactured defective airbags that were installed by manufacturers in automobiles sold throughout the United States. Tr. of Aug. 16, 2017 Hearing (Oral Ruling), *Takata*, ECF No. 238, ("*Takata* Tr.") at 7-8.[26] When the airbags failed, drivers and

[26] A copy of this transcript is attached as Exhibit D to the Declaration of Benjamin S. Kamenetzky filed in support of the Motion. Docket No. 4.

passengers were injured or killed. *Id.* at 7:17–21. The National Highway Traffic Safety Administration issued a mandatory recall under its supervision. *Id.* at 23:9–13. During the recall, Takata entered chapter 11 bankruptcy with a reorganization framework that involved a prearranged sale of substantially all of its assets pursuant to a reorganization plan. *Id.* at 8:11–21. Takata retained, however, assets and operations related to manufacturing the replacement kits under NHTSA's supervision. *Id.* In the wake of the recall, two states and a territorial government sued Takata for relief, including penalties.

52. In an oral ruling, the United States Bankruptcy Court for the District of Delaware discussed at length section 362(b)(4)'s exemption and recognized that section 105(a) injunctions should be only rarely used. *Id.* at 22–23. Recognizing, however, that consumers nationwide remained at risk from the airbag and that the debtor's reorganization was an essential component of the recall that would provide these consumers relief, the court granted a short-term injunction for 90 days, rather than the longer injunction the debtors sought. *Id.* at 23.

53. The distinctions between *Takata* and this case are stark. Takata entered bankruptcy with a prearranged asset sale as well as a NHTSA order that dictated the terms of its replacement kit production. In other words, Takata had a plan and that plan included eliminating the harm that had been caused by its defective airbags by replacing them. These debtors have no plan, and they cannot, nor have they even suggested, that the Settlement Structure will eliminate the opioid crisis. Purdue has provided nothing to the Court but the loose details of the Settlement Structure, which is not adequately supported by declarations of any of its corporate representatives. Given the absence of any details, the States, and this Court, cannot determine whether a chapter 11 reorganization is feasible or its chances of success under the circumstances.

54. In sum, Purdue argument boils down to: its chapter 11 cases are likely to result in a successful reorganization if it gets a preliminary injunction of 270 days. Memorandum at 19. But if all a debtor had to do is allege that time without expense will lead to a successful reorganization, any debtor could easily satisfy this low bar early in the bankruptcy process by simply stating the obvious: that a stay of otherwise excepted government litigation is financially advantageous to the debtor because of a reduction in legal bills.

55. Further, a 270-day injunction deprives the States of the ability to undertake necessary discovery, pursue motion practice, and proceed to trial, and thereby establish the validity and amount of their claims. Liquidating the amount of the States' claims would also seem to be in the interest of Purdue and its other creditors. As discussed elsewhere, the resolution of a State's claim against Purdue will need to be resolved in state court. Purdue cannot remove police and regulatory actions to this court; and the States have not waived sovereign immunity to compel them to have their claims liquidated in this Court. To the extent the success of any plan filed by Purdue relies on obtaining the agreement of the States to such a plan (Memorandum at 19 (proposing that "claimants could maximize the benefits to all creditors and to the public as a whole by pursuing a consensual plan of reorganization")), it is not possible for any State to evaluate the merits of any plan, without having first determined the likely viability and value of its own claims.

2. Purdue Has Not Demonstrated It Will Suffer Irreparable Harm Without the Injunction

56. A debtor seeking a preliminary injunction under section 105(a) also must demonstrate irreparable injury if preliminary injunctive relief is not granted. *Go West*, 387 B.R. at 440. Purdue contends that, without a stay of "the active litigation," it will suffer imminent irreparable harm to its reorganization efforts. Memorandum at 23. In support of this contention, Purdue alleges the continuation of the State Police Power Actions will undermine the Settlement

Structure because the estates will continue to expend legal fees and human resources defending the remaining State Police Power Actions—in other words, staying litigation against Purdue constitutes an all or nothing proposition. *Id*. at 24.

57. Purdue has failed to meet its burden of demonstrating the State Police Power Actions constitute a "threat to the reorganization efforts" (*id*. at 26) that warrants such relief.

58. First, Purdue's projected legal expenses are dramatically overstated. Although Purdue describe the extent of its aggregate legal expenditures in 2019 and its projected expenditures through the end of the year (Memorandum at 25-26; O'Connell Decl. at ¶¶ 16-19), its Motion does not acknowledge the vast majority of actions against it (more than 2,200) have been effectively stayed, whether voluntarily or otherwise. Purdue also fails to describe the portion of expenditures previously incurred that is attributable to State Police Power Actions,[27] or to defending litigation that already has been settled or effectively stayed. Transcript, Hearing on First Day Motions, Sept. 17, 2019, ("First Day Tr."), at 14-15 (statement of Mr. Huebner that Purdue has settled with Oklahoma and Kentucky, as well as obtaining support from 24 states and 5 territories for the settlement framework); and at 154-55 (statement of Ms. Cyganowski that the MDL PEC and other governmental entities also have supported the settlement framework).

59. For this reason, it is unreasonable for this Court to assume that the 2019 year to date legal expenditures set forth in the O'Connell Declaration and the Motion represent an accurate forecast of Purdue's costs of litigation with respect to the State Police Power Actions, or that those costs represent a substantial threat to Purdue's income and assets. In fact, Mr. O'Connell admitted the projected legal expenditures set forth in his Declaration were based on estimates provided by

[27] Mr. O'Connell acknowledged that he did not know and had never seen documents that would enable him to analyze, which portions of Purdue's litigation cost estimates were attributable to particular matters. Transcript, Deposition of Jamie O'Connell, Sept. 27, 2019 ("O'Connell Dep.") at 158, 162-66. A copy of the relevant portions of the O'Connell Dep. is attached as Exhibit B. to the Troop Dec.

Purdue's management, and that he did not adjust his estimates based even on important changes to Purdue's litigation status. O'Connell Dep. at 226-28. Specifically, Mr. O'Connell acknowledged that Purdue had been severed from the MDL cases (representing about 2,200 cases against Purdue), and that litigation was not pending against Purdue with respect to the MDL cases or the 24 states who had agreed in principle to the Settlement Structure. *Id*. at 213-219; *see also id*. at 222-28 (admitting Mr. O'Connell cannot place an estimated dollar value on the savings attributable to the cessation of MDL litigation). Given that the State Police Power Actions pursued by the States represent only 24 states and the District of Columbia (First Day Tr., at 15) (statement of Mr. Huebner), not the 2,625 cases on which Purdue has grounded its request (*id*. at 13), the State Police Power Actions cannot be responsible for the majority of Purdue's legal expenditures.[28]

60. Based on the Motion and supporting documents, it is not possible for the Court, or the States, to evaluate the size of Purdue's expenditures on State Police Power Actions relative to Purdue's income and assets, or the corresponding burden or alleged harm to Purdue or its estates. Purdue bears the burden of demonstrating that the cost of defending the State Police Power Actions poses "irreparable harm" to its reorganization efforts, and its general declarations concerning aggregate costs of litigation do not meet this burden. *See, e.g*., *Beker*, 57 B.R. at 630-31 (stating that future costs of attorney's fees are speculative and do not constitute a basis for injunctive relief).

61. Second, although Purdue cites as ongoing sources of irreparable harm "key resignations" and problems "recruiting new talent to fill vacancies" as well as "negative public sentiment" (Memorandum at 24; DelConte Decl., at ¶¶ 16-18), Purdue does not explain how these problems will be ameliorated by the draconian imposition of a preliminary injunction on the State

[28] Mr. O'Connell admitted he did not know how many States, or even how many governmental entities, had pending actions against Purdue. O'Connell Dep. at 125-32.

Police Power Actions.[29] Purdue does not specifically contend, and cannot demonstrate, the States' lawsuits, rather than Purdue's own prepetition and ongoing business practices, are responsible for its employment challenges.[30] Purdue also cannot demonstrate that granting the demanded relief will resolve its employment challenges.

62. Third, Purdue has failed to demonstrate through credible evidence that the State Police Power Actions will divert current management's attention away from the bankruptcy process in a way that will irreparably impede that process.[31] Indeed, one of Purdue's declarants testified that Purdue's principal litigation-focused employee spends only a day or two a week on litigation. DelConte Dep. at 180. Courts have been appropriately skeptical of such conclusory (and self-serving) claims by debtors, concluding that the resources needed to respond to litigation do not amount to irreparable harm warranting a discretionary stay under section 105(a). *See, e.g.*, *EEOC v. Rath Packing Co.*, 787 F.2d 318, 325 (8th Cir. 1986) ("[L]itigation expenses alone do not justify a stay of a proceeding."); *EEOC v. Consol. Freightways Corp. of Del.*, 312 B.R. 657, 661 (W.D. Mo. 2004) ("The added burden that will be placed on [an officer] and other . . . employees in defending this suit does not rise to the level of irreparable harm.").

63. Fourth, Purdue ignores the fact that the requested injunction will not obviate the time and expense necessary to liquidate the States' claims. *See In re First All. Mortg. Co.*, 264

[29] Mr. DelConte subsequently testified that he did not know the specific circumstances that contributed to employee departures . DelConte Dep. at 83-95. Mr. DelConte acknowledged that, of the 30 to 50 employee departures during the six months preceding the petition date, a number may have been "decisions made by management" (DelConte Dep., at 85-86), and key personnel departures were influenced by "the environment," which included "negative news articles and repeated references to lawsuits accusing the company and its leaders of fraud." *Id*. at 90.

[30] Mr. DelConte admitted he did not rely on any documents to support the statements in his Declaration concerning the amount of time employees devoted to working on litigation outside the bankruptcy, or difficulties in hiring. DelConte Dep. at 167-72, 185-86. Mr. DelConte stated he had one conversation with another employee of Alix Partners, named Isabel Arana, who stated "it is tough to recruit given … the stigma of Purdue, for them to go out and bring people – bring people in." DelConte Dep. at 174-75.

[31] Despite the statements in his Declaration concerning the burdens of litigation, Mr. DelConte acknowledged in deposition testimony he did not know the extent of pending depositions and written discovery. DelConte Dep. at 228-34.

B.R. 634, 656 (C.D. Cal. 2001) (stating "[t]he relevant comparison is not between the costs of defending the actions in multiple forums and the costs of not defending them at all, but rather between defending the actions in multiple forums and defending them in the bankruptcy proceeding."). Purdue effectively asks this Court and the States to infer, without evidence, that the stay of the State Police Power Actions during the bankruptcy process will so minimize the need for Purdue's expenditure of human resources and legal costs as to make those costs negligible. Vague assertions of increased cost and distractions associated with defending government police power actions are simply not the kind of irreparable harm that warrants an injunction of that litigation. *In re Beker*, 57 B.R. at 630-31.

64. Indeed, if Purdue's position that cost and time alone are sufficient to obtain section 105(a) injunctions against government entities, the exception from the automatic stay that Congress carefully provided to enable these governmental entities to protect the public by enforcing their police and regulatory powers would be rendered illusory and debtors could demonstrate irreparable harm in every case. But, "by creating the regulatory and police powers exception to the automatic stay, Congress expressly indicated that in most cases the concerns addressed by such actions are more important than the goals of efficiency and maximizing the estate." *First All.*, 264 B.R. at 654; *see also Penn Terra*, 733 F.2d at 278 ("Since Congress did provide for exceptions, however, we may assume that the goal of preserving the Debtors' estate is not always the dominant goal."). Purdue has failed to meet its burden of demonstrating irreparable harm.

3. The States and Their Citizens Would Be Irreparably Harmed by the Proposed Injunction

65. The States, and not Purdue, would suffer irreparable harm from the proposed injunction, even if it is imposed only for a short time. The importance of pursuing the State Police Power Actions to the States and their citizens cannot be overstated.

66. Strict enforcement of States' consumer protection laws, and prompt prosecution of those who seek to deceive and mislead the citizens of the States, reflect a State's core responsibility to its citizens. The need to exercise this responsibility is highlighted in the face of the opioid crisis. Wrongdoers like Purdue should not be permitted to shield themselves from the consequences of their misconduct by running to bankruptcy court and obtaining a stay that allows them to evade justice. If the generalized circumstances on which Purdue relies were to justify granting a stay, the States would be gravely harmed: their ability to protect the public from deceptive marketing practices that pose a substantial risk to public health and safety through resort to state courts and processes would be eviscerated not only in the opioid space, but wherever regulatory and police powers should be exercised. This is a specialized harm, suffered only by governmental units.

67. As bankruptcy courts have acknowledged, government litigants (like the States) have a unique interest in litigating a debtor's misconduct in the government litigant's chosen venues. *See First All.*, 264 B.R. at 659 (observing "the 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"); *In re Wolf Fin. Grp., Inc.*, 1993 WL 913278 at *9-11 (Bankr. S.D.N.Y. Dec. 15, 1994) (denying injunctive relief under section 105(a) as to government actions which did not place the reorganization at risk or impair the court's jurisdiction, and noting the imposition of a stay would undermine the public policy goals of the governmental actions concerning the enforcement of federal securities laws).

Attorneys General, whose enforcement actions are brought in the public interest and are intended to deter wrongdoing by others, have a significant interest in retaining their ability to conduct pre-lawsuit civil investigations, and to litigate resulting lawsuits publicly. *See, e.g.*, *In re GlaxoSmithKline PLC*, 699 N.W. 2d 749, 755 (Minn. 2005) (noting that the State's analogous statutory duty to enforce state antitrust laws "must be done publicly, for educational purposes and to deter similar conduct by others" to be "fully effective"). As noted above, the exception to the automatic stay in section 362(b)(4) exists to ensure that the States are able to pursue precisely these objectives.[32]

68. States have a clear interest in collecting and presenting their evidence and prosecuting to judgment their claims in the forums of their choice, to establish that the charged conduct did happen and was illegal. *See, e.g.*, *Go West*, 387 B.R. at 443 (observing that "the States have important interests in administering certain aspects of their judicial systems") (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12-13 (1987)); *In re Pacific Gas & Elec. Co.*, 263 B.R. 306, 322-23 (Bankr. N.D. Cal. 2001) ("The public interest is better served by deference to the regulatory scheme and leaving the entire regulatory function to the regulator."). Contrary to Purdue's assertion that the State Police Powers Actions "ultimately seek monetary relief" (Memorandum at 28), all of the States have an interest in demonstrating in open court within their States that Purdue engaged in unlawful and dangerous practices with devastating consequences for the public.

[32] Although Purdue contends the bankruptcy process "harmonizes" creditors' interests and avoids conflicting judgments (Memorandum at 25 (citing *In re Johns-Manville Corp.*, 31 B.R. 627 (S.D.N.Y. 1983); *In re Muralo Co., Inc.*, 301 B.R. 690 (Bankr. D.N.J. 2003)), it relies on authority that concerns the entry of injunctive relief under section 105(a) against *private* litigants, not the use of the court's power to grant injunctive relief where the case in question, like the State Police Power Actions, is otherwise excepted from the stay as an exercise of the government's police and regulatory powers under section 362(b)(4) and truly public concerns, public rights, are involved. *See Johns-Manville*, 31 B.R. 627 (referring to section 105(a) injunction as to private entity in asbestos case); and *Muralo*, 301 B.R. 690 (also referring to section 105(a) injunction as to private entity in asbestos case).

69. Additionally, public disclosure is an overriding interest in all the State Police Power Actions. *See In re Prescription Opiate Litig.*, 927 F. 3d 919, 934-38 (6th Cir. 2019) (authorizing the public disclosure of numerous documents previously filed with the DEA's Automation of Reports and Consolidated Orders System ("ARCOS"), relating to the flow of prescription opioids through the manufacture and distribution system nationwide, and acknowledging the immense public interest in the ARCOS documents to casting light on the opioid crisis); *see also* Lesser, Benjamin, *et al*., "How Judges Added to the Grim Toll of Opioids," Reuters, Sept. 10, 2019 (last accessed on Sept. 25, 2019 at https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges/) (describing the role of litigation protective orders in keeping information about public health and safety from disclosure); Glantz, Stanton, "Lawsuits Against Companies Aren't Just About Getting Money," Washington Post, Sept. 9, 2019 (last accessed on Sept. 25, 2019 at https://www.washingtonpost.com/opinions/2019/09/09/lawsuits-against-companies-arent-just-about-getting-money-theyre-about-revealing-truth/) (chronicling use of litigation by states attorneys general to obtain injunctive relief in the form of documents and other types of public disclosure). Indeed, Purdue would continue this tradition of secrecy by seeking the entry of a protective order designed to ensure that its documents remain hidden from the public's view.

4. Purdue's Proposed Voluntarily Self-imposed Injunction Does Not Change the Analysis

70. Purdue's offer to subject itself to an injunction by this Court to eliminate "any need" for the States to continue the State Police Power Actions does not, in fact or law, enhance its request for an injunction against the States. Memorandum at 7, 29.

71. First, if the Court were to issue the requested "voluntary" injunction and compel States to litigate violations by Purdue in Bankruptcy Court, the Court would be granting itself

jurisdiction over police and regulatory action by the States that, as set forth above, are uniquely within the province of the States.

72. Second, and to highlight the point that Purdue effectively is asking this Court to resolve police and regulatory claims excepted from the automatic stay, Purdue's proposed "voluntary" injunction does not encompass the injunctive relief which the States have requested in the State Police Power Actions or believe is required. Though perhaps appearing fulsome on first pass, the proposed injunction is insufficient to ensure the end of Purdue's wrongful conduct.

73. During the "year of intense and arduous negotiations" cited by Purdue in its Motion, the States engaged in detailed negotiations over the terms of adequate injunctive relief against Purdue. The proposed "voluntary" injunction fails to include several key limitations that the States believe are essential to an injunction on Purdue's conduct.

74. For example, many States believe that Purdue must be enjoined from all promotion of opioids. The proposed "voluntary" injunction limits the "promotion" of opioids in a way that would not result in a complete ban. Also, there is no ban on funding third parties who may, through "educational" programs, promote the use of opioids or the treatment of pain through the use of opioids. There is no ban on promotion of drugs for opioid-induced side effects or on the promotion of the treatment of pain in a manner that encourages the use of opioids. There is no provision requiring the monitoring and reporting of potentially problematic customers. There is no restriction on the sale of high-dose opioids. Each of these limitations that is omitted in Purdue's proposed "self-injunction" is rooted in conduct Purdue engaged in to push the sale of its opioid products regardless of risk and in violation of the law. In light of Purdue's history, a history in which Purdue found a way around the injunctive terms of the 2007 settlement and came up with

new ways to violate the law, it is imperative that the injunctive relief against Purdue be strong, detailed, thorough, and enforceable by the States in their States.

75. Each state has a particularized interest in vindicating, through open litigation in a public forum, its citizens' interest concerning their health and welfare, the burden on the state public health system, the integrity of consumer protection laws, and other factors that cannot be remedied by a voluntary injunction. *See GlaxoSmithKline*, 699 N.W. at 755.

76. Furthermore, to the extent the State Police Power Actions set forth claims for public nuisance, such claims are not premised on past conduct alone, but on the future consequences of Purdue's activities as well. Mere claims of improved conduct do not obviate the need, and the right, of the government to seek and obtain injunctive relief preventing future misconduct. *See, e.g.*, *First All.*, 264 B.R. at 648 ("[I]t is inappropriate for it to be determined in the bankruptcy proceeding that governmental actions will serve no purpose because the offending behavior has allegedly stopped."). *See also, In re Bloomfield Nursing Operations, LLC, et al.,* Case No, 4:18-cv-00374-O (N.D. Tex. Sept. 26, 2019) (holding that New Mexico could liquidate false claims act claims against the debtors in New Mexico, notwithstanding representations that the offending contact has ceased because "the fact that they have not operated in seven years does not prevent them from beginning new operations in year eight. Additionally, the lag of litigation presents the constant possibility of a wrongdoer ceasing their illegal conduct by the time the actual prosecution begins, but this does not mean that those wrongful acts should go unpunished. Allowing such actions to go unpunished would go against the purpose of the § 362(b)(4) exception, which is to "prevent a debtor from frustrating necessary governmental functions by seeking refuge in bankruptcy court." (citation omitted)).

77. Finally, but perhaps most significantly, the concept that an Article I bankruptcy court could regulate the conduct of a debtor under state law through an injunction that would usurp state police and regulatory power is not only unprecedented, it is beyond this Court's jurisdiction. Indeed, the fact that this Court cannot sit as the enforcer of state police power (or indeed federal police and regulatory power) is embodied in 28 U.S.C. § 1452, which prohibits the removal of police and regulatory actions to this Court.

78. Ignoring the extraordinary context and pressing public concerns with which this case arrives before the Court, Purdue downplays its culpability for engaging in public wrongdoing, and instead wrongly decries the States' interests as purely monetary. The Court should look past these misplaced arguments and find that the harm to the States outweighs the harm to Purdue.

5. The Public Interest Served by the State Police Power Actions Supersedes the Preservation of the Bankruptcy Estate

79. The public interest weighs so heavily in favor of the States as to be practically dispositive. The States are charged with enforcing consumer protection laws for the benefit of their citizens. Pursuing those who mislead the public, obtaining judicial determinations of what constitutes unlawful business practices, and stopping those practices—especially those involving opioids in the context of a deadly opioid epidemic—is indisputably a core function of State Attorneys General enforcing a State's police and regulatory responsibilities. The States have an important interest in protecting the public at large from the danger of continuing inappropriate OxyContin prescriptions, remedying the ongoing consequences of past improper sales and marketing activities and making clear what constitutes improper practices for the future. The whole public benefits when States vindicate their consumer protection laws though state process.

80. Incredibly, Purdue contends that stopping the State Police Power Actions is in the public interest, and not simply its own interests. Memorandum at 29. Purdue characterizes the

State Police Power Actions as "overlapping claims" that pose a risk of "inconsistent judgments," (*id.*), which might result in inequitable recoveries for similarly situated creditors. But this potential is no different than any set of otherwise similar claims asserted against a debtor under different state law. The Bankruptcy Code allows claims only to the extent that they are allowed under state law. 11 U.S.C. § 502(b)(1). State governments have and will assert different claims against Purdue under the unique laws of that state on behalf of different government units, which may lead to different results by state, even on the same facts. "Such different recoveries are inherent to a federal system of government, and bankruptcy proceedings were not intended to substitute some different concept of what is equitable." *First All.*, 264 B.R. at 658.

81. Moreover, there is no enhanced recovery to any State by being first to liquidate a monetary claim against Purdue in a State Police Power Action as Purdue seems to imply, because as section 364(b)(4) makes clear, and the States acknowledge: any money judgment obtained by a government would be entered, but not enforced, during bankruptcy. *Penn Terra*, 733 F.2d at 275 ("Quite separate from the entry of a money judgment, however, is a proceeding to *enforce* that money judgment."). Permitting States to continue their Police Power Actions, therefore, will not upset the public interest, even under Purdue's overly narrow understanding of that interest.

82. Indeed, Congress already has concluded that permitting these police and regulatory actions to continue is in the public interest. Congress has already decided that the rights of the public to prosecute misconduct outweigh concerns over diminishing an estate. Purdue should not be allowed "to do indirectly that which it is prohibited from doing directly under the Code." *In re Fla. Bay Banks Inc.*, 156 B.R. 673, 677 (Bankr. N.D. Fla. 1993); *In re Soto*, 500 B.R. 679, 683 (Bankr. S.D.N.Y. 2013) (observing that "[s]ection 105(a) is not a license for a court to disregard the clear language and meaning of the bankruptcy statute and rules") (quoting *Official Comm. of*

Equity Sec. Holders v. Mabey, 832 F 2d 299, 302 (4th Cir. 1987) (internal quotation marks omitted)). "Where important state law or general equitable principles protect some public interest, they should not be overridden by federal legislation unless they are inconsistent with explicit congressional intent such that the supremacy clause mandates their supersession." *Penn Terra*, 733 F.2d at 273.

83. The public has an overwhelming interest in uncovering the full extent of Purdue's misconduct, bringing it to public justice, providing full equitable relief for the benefit of the public, and deterring others from similar misconduct. The opioid crisis, in which Purdue has played a significant role, is a national public health emergency that has killed hundreds of thousands of people. It has lowered the average lifespan nationally and will kill thousands more if not abated.

IV. CONCLUSION

84. Purdue's request to be protected from State Police Power Actions should be denied. The Bankruptcy Code reflects a Congressional balance between minimizing the potential burden on estates and the enforcement of state police and regulatory power in favor of the latter. The Court should not exercise discretion to upset this balance. But even if the Court is inclined to evaluate the balance independently, for the reasons set forth above, the scales still tip heavily in favor of the States.

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