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Bankruptcy Can Establish True Peace: The Importance of Non-Consensual Third-Party Releases in Purdue Pharma's Chapter 11 Case

Introduction

Third-party releases are a common topic of discussion within the bankruptcy community—so common that whenever a court issues a ruling that deviates from the jurisdictional norm, a host of new articles on the topic are quickly added to the already extensive literature. Nonetheless, plans involving third-party releases in higher-profile cases garner wide attention, like those releases recently proposed in the chapter 11 cases (the "Chapter 11 Cases") of Purdue Pharma L.P. and its debtor affiliates.[1]

While the national press has suggested that the third-party releases proposed in the Purdue chapter 11 plan of reorganization (the "Plan")[2] are extraordinary,[3] this type of release is actually now fairly standard in large chapter 11 cases, especially when, as in the Chapter 11 Cases, the released parties have agreed to contribute significant consideration to channeling trusts that will fund recoveries for creditors.

At the time of writing of this article, the United States Bankruptcy Court for the Southern District of New York had approved the adequacy of the disclosure statement filed in connection with the Plan (the "Disclosure Statement").[4] Importantly, however, the Court has not yet approved the releases proposed in the Plan; rather, it entered its order approving the Disclosure Statement, ruling that the Debtors have (among other things) provided sufficient information and transparency to allow creditors to make an informed decision on the financial merits of the Plan, including the details of the consideration being provided in exchange for the proposed third-party releases.[5] The Court has scheduled a confirmation hearing to consider approval of the Plan, including the third-party releases, for August 9, 2021.

In light of the ongoing solicitation of the Plan, it is naturally difficult to speculate how the Court will rule at the confirmation hearing. No matter the outcome, this article emphasizes the importance of third-party releases to the success of cases like Purdue. Without such releases, at best, the Chapter 11 Cases would have been significantly more protracted and expensive. And at worst, the Chapter 11 Cases would be culminating with liquidation instead of confirmation.

I. Case Background: Early Positioning for Approval of Third-Party Releases

Purdue and its controlling shareholders have been the target of civil investigations and thousands of lawsuits since at least June 2016 in connection with the opioid crisis and Purdue's involvement in the same.[6] The ultimate owners of Purdue are trusts, the beneficiaries of which are members of the families of the brothers Raymond and Mortimer Sackler.[7]

Accordingly, in view of the prevalence of third-party releases in chapter 11 plans generally and the nature of the Chapter 11 Cases in particular, it was no surprise to learn, upon the filing of the Chapter 11 Cases, that the Debtors, the Sackler Family Members, and a critical mass of plaintiff constituencies had long been negotiating the terms of a global resolution to resolve the mounting litigation (the "Settlement Framework"),[8] a resolution that would include third-party releases for, among others,

the Sackler Family Members.[9] At the core of this Settlement Framework was a projected chapter 11 filing for Purdue,[10] since the protections afforded to a chapter 11 debtor would be necessary to implement certain aspects of the Settlement Framework, such as the proposed channeling injunctions.[11] As the Debtors wrote in their Disclosure Statement:

> The Debtors commenced the Chapter 11 Cases because chapter 11 was the only way to halt the destruction of value and runaway costs associated with the Pending Actions; centralize all of the claims against the Defendant Debtors; address the claims asserted against them efficiently; resolve the litigation rationally; and consummate a global resolution of the Pending Actions—all while conserving the assets of the Debtors' Estates so that billions of dollars in value could be preserved and vital opioid overdose rescue and addiction treatment medications could be delivered to communities across the country impacted by the opioid crisis.[12]

That is not to say that the Chapter 11 Cases were commenced for the benefit of the Sackler Family Members. To the contrary, even before discussions around the Settlement Framework began, Purdue took certain actions to position itself for a chapter 11 filing that would be both able to withstand creditor scrutiny and viable. For one, the company went to great lengths to ensure separation from the Sackler Family Members: it hired sophisticated restructuring counsel that was entirely independent from the Sackler Family Members, required the resignation of the entire board of directors, and then, over time, staffed the board with independent directors who not only were unaffiliated with the Sackler Family Members and Purdue, but also had decades of experience in the insurance, pharmaceutical, and restructuring fields.[13] Purdue also amended its corporate formation documents to establish a special committee of the board with exclusive authority over the prosecution, defense, and settlement of any causes of action that Purdue could assert against its shareholders, including members of the Sackler Family Members and their affiliates.[14] These actions were presumably taken to facilitate unbiased and productive settlement discussions—even those concerning third-party releases—that could withstand anticipated creditor challenges in bankruptcy court.

Indeed, such pre-petition discussions resulted in the version of the Settlement Framework that was presented to the Court at the outset of the Chapter 11 Cases. The ability to present a mutually acceptable, if not final, Settlement Framework to the Court on the first day of the case also set the tone of cooperation with the Sackler Family Members that has persisted throughout the Chapter 11 Cases.

The pre-petition iteration of the Settlement Framework consisted of three components.[15] First, Purdue's then-shareholders (i.e., the Sackler Family Members) would relinquish their equity stake in Purdue and consent to the transfer of all of Purdue's assets to a trust for the benefit of creditors and the general public, free and clear of liabilities.[16] Second, the Sackler Family Members would engage in a sale process for their non-debtor non-U.S. pharmaceutical companies with the proceeds thereof to be contributed to the trust as well.[17] Finally, the Sackler Family Members would contribute at least an additional $3 billion over seven years (in addition to the value of all 24 entities in accordance with the first component), with the hope that the sales of their non-debtor non-U.S. pharmaceutical businesses (in accordance with the second component) would generate the contemplated substantial further contributions.[18]

Within the first week of the Chapter 11 Cases, the Debtors, the Official Committee of Unsecured Creditors appointed in the Chapter 11 Cases, and certain shareholder parties entered into a Case Stipulation that supplemented the Debtors' automatic stay under section 362 of the Bankruptcy Code. It stipulated, inter alia, an injunction to prevent litigation against or investigations into the Sackler Family Members.[19] Correspondingly, the Debtors agreed in the Case Stipulation that, in the first 180 days of the case (subject to extension), they would not settle estate causes of action against the Sackler Family Members, file a plan of reorganization, or enter into a restructuring support agreement.[20] Presumably, this was to permit the parties to continue discussing the terms of the Settlement Framework while maintaining the status quo.

Over the course of a year, the Debtors engaged in mediation in two phases, the first of which achieved allocation of estate resources among major creditor constituencies and a commitment from various non-federal public claimants and private claimants to accept distributions in the form of funding for programs designed to abate the opioid crisis.[21] The second phase of the mediation, the scope of which was expanded by order of the Court,[22] resulted in material improvements to the terms of the initial Settlement Framework in exchange for releases and injunctions for the Sackler Family Members under the Plan.[23] The settlement reached pursuant to the revised Settlement Framework forms the basis of the Plan, which the Debtors state "enjoys broad support from most of the Debtors' significant creditor groups."[24]

II. The Plan

A. Current Settlement Framework[25]

As it pertains to the Sackler Family Members, the Plan version of the Settlement Framework requires that the Sackler Family Members pay an aggregate $4.5 billion[26] over nine to ten years to the National Opioid Abatement Trust ("NOAT"), which is to be formed pursuant to the Plan, and, in turn, will be exclusively dedicated to programs designed to abate the opioid crisis. Of that sum, $225 million has already been paid to satisfy a civil settlement with the United States Department of Justice, while the remaining $4.275 billion will be paid under the Plan.[27] The settlement funds will ensure that there will be sufficient funding to meet the terms of public and private settlements.[28] Without such funds, the Debtors would struggle to satisfy such settlements.[29] In addition, NOAT and another trust formed under the Plan will indirectly own post-emergence Purdue ("NewCo"), and the net value generated by NewCo will be directed toward abating the opioid crisis.[30] The Sackler Family Members will have no role in the governance or operations of NewCo.[31] In addition, the Sackler Family Members will be required to sell all of their direct or indirect interests in the non-U.S. pharmaceutical companies, with proceeds being escrowed for the benefit of NOAT and other trusts established under the Plan.[32] The Sackler Family Members will also release the Debtors from any and all claims that they may hold against the Debtors.[33] Put simply, the Settlement Framework topples the empire that the Sackler Family Members built.[34] At the same time, as discussed infra in Part III, the Settlement Framework also serves as the keystone to the success of the Chapter 11 Cases.

In exchange for such consideration, the Sackler Family Members and specified parties associated with them will receive broad, but not all-encompassing, releases of potential claims of the Debtors' estates and of third-parties (the "Shareholder Releases") and an injunction under the Plan.[35] Notably, the Shareholder Releases and the injunction specifically exclude from their scope any criminal action or criminal proceeding arising under a criminal provision of any U.S. statute.[36] The Shareholder Releases are not only given by the Debtors, but are also deemed to be given by certain non-Debtors.[37]

The Disclosure Statement states that the special committee of the Debtors' board, tasked with prosecuting, defending, and settling any causes of action that Purdue could assert against its shareholders, extensively examined the Debtors' and third-parties' potential causes of action against the Sackler Family Members, and determined that the Shareholder Releases and injunction were fair, equitable, and in the best interest of the Debtors' estates.[38]

B. Public Perception of Non-Consensual Third-Party Releases

A third of the forty-eight objections filed to the Disclosure Statement raised concerns about the fairness and the constitutionality of the proposed Shareholder Releases. Unsurprisingly, most objections were filed by parties who were not supportive of the initial Settlement Framework that had been negotiated pre-petition. Others were filed by parties who were addressing earlier versions of the Plan. The Court determined that the Disclosure Statement provided adequate information on the Shareholder Releases, overruled these objections, and entered the Disclosure Statement Order.

The Shareholder Releases remain subject to approval as part of Plan confirmation. Since the entry of the Disclosure Statement Order and at the time of writing of this article, another five objections or letters have been filed, and the Debtors may receive further opposition by the Department of Justice.[39] The media has publicized the purported unfairness and injustice of the proposed Shareholder Releases.[40] And in response to the proposed Plan, the House of Representatives even proposed a bill, cynically dubbed the Stop shielding Assets from Corporate Known Liability by Eliminating non-debtor Releases ("SACKLER") Act, which would bar the release of government claims against non-debtor parties in bankruptcy cases.[41] However, this public perception reflects an under-appreciation for the extensive research, review, and negotiations that went into determining whether the Shareholder Releases are appropriate, and perhaps a misunderstanding of the well-known legal standards for approving non-consensual third-party releases in the Second Circuit (in which the Court is located).

III. Non-Consensual Third-Party Releases

At a hearing in February 2020, before the Plan was filed or any third-party releases were proposed in the Chapter 11 Cases, the Court commented sua sponte, "If this case is going to achieve what I think the parties hope it can achieve, the issue of third party releases and exculpations will be front and center."[42] Judge Drain further remarked that, contrary to the position taken by some parties in other cases before the Second Circuit Court of Appeals, the Court has not only the power, but also the jurisdiction to approve a third-party release.[43] In the context of the Chapter 11 Cases, he further noted that the "only way to get true peace, if the parties are prepared to support it and not fight it in a meaningful way, is to have a third party release" for the Sackler Family Members "as part of confirmation of a plan with all of confirmation's protections."[44]

This section explores third-party releases, why they are seen as controversial, and how different courts tend to treat them. The article does not speculate as to how the Court will rule on the Shareholder Releases; however, the article concludes by arguing that, without them, the Debtors' would lack the creditor consensus necessary to confirm a plan.[45]

A. Releases Generally

The Bankruptcy Code does not per se codify the permissibility of releases in chapter 11 plans. However, the case law has evolved to provide for them, and it is now common for debtors and parties-in-interest to resolve their disputes through compromises or settlements of claims as part of a chapter 11 plan. Today, section 1123(b)(3) of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure—and decades of encouragement by bankruptcy courts across the country—are typically cited as the basis for releases. Compromises are favored in bankruptcy because they minimize the cost of litigation and further the parties' interests in expediting administration of a bankruptcy estate.[46]

A debtor's release of claims against a non-debtor (i.e., a debtor release) is one form of consideration for a plan settlement of claims. Another form of consideration is a debtor's agreement to include a third-party release under a chapter 11 plan, where either (i) a claimant consents to release claims against other non-debtor third-parties (i.e., a consensual third-party release), or (ii) a claimant releases claims against other non-debtor third-parties without specifically providing consent (i.e., a non-consensual third-party release).

1. Debtor Releases

Generally, courts do not question the validity of debtor releases so long as the debtor's decision to release claims is a valid exercise of the debtor's business judgment, is fair and reasonable, and is in the best interests of the debtor's estate.[47] In the Chapter 11 Cases, the Debtors' proposed releases of potential claims against the Sackler Family Members do not appear to be at issue. Accordingly, debtor releases themselves are not explored in detail in this article. Nevertheless, many of the seminal cases that examine debtor releases form the basis for courts' decisions regarding the more controversial non-consensual third-party releases by non-debtors.

Some bankruptcy courts, including those in the influential District of Delaware and the Southern District of New York, consider whether the debtor release is "fair and equitable" under a balance of the factors described by the *Martin* court for approval of a settlement under Bankruptcy Rule 9019: (a) the probability of success in litigation; (b) the likely difficulties in collection; (c) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (d) the paramount interest of the creditors.[48]

Other bankruptcy courts may also consider the *Master Mortgage* factors to determine whether a release by a debtor should be approved: (a) whether there is an identity of interest between the debtor and the third-party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate; (b) whether the non-debtor has made a substantial contribution; (c) the essential nature of the release to the extent that, without the release, there is little likelihood of success; (d) an agreement by a substantial majority of creditors to support the release, specifically if the impacted class or classes "overwhelmingly" vote to accept the plan; and (e) whether there is a provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the release.[49] Importantly, a court need not find that all of these factors have been met to approve a debtor's release of claims.[50] Rather, such factors are "helpful in weighing the equities of the particular case after a fact-specific review."[51]

2. Third-Party Releases

The other type of releases often proposed as part of a chapter 11 plan involve the release of a non-debtor third-party by another non-debtor third-party. Such releases, commonly called third-party releases, may be consensual or non-consensual. Consensual third-party releases involve a claimant consenting to release claims against non-debtor third-parties. Non-consensual third-party releases involve a claimant being bound by such releases.

Consensual. Numerous courts have recognized that a chapter 11 plan may include a release of non-debtors by other non-debtors when such release is consensual.[52] Consensual releases are permissible on the basis of general principles of contract law.[53] The law is clear that a release is consensual where parties have received sufficient notice of a plan's release provisions and have had an opportunity to manifest consent to the release.[54]

Consent, or lack thereof, can be express, where the claimant: (i) votes to accept the plan and—depending on the construction of the plan—affirmatively elects to opt into or out of granting the release of the non-debtor third-party; (ii) votes to reject the plan and thereby rejects the release of the non-debtor third-party; or (iii) objects to the plan on the ground that the release of the non-debtor third-party is improper.[55]

Or consent can be implied, where the third-party: (i) votes to accept the plan, but does not opt out of granting the release of the non-debtor third-party; or (ii) abstains from both voting on the plan and opting out of the release of the non-debtor third-party.[56]

Non-Consensual. In contrast to consensual third-party releases, a non-consensual third-party release binds a claimant to the release regardless of consent.[57] As discussed in more detail below, such releases are the subject of much debate and a long-standing circuit split.

B. Circuit Split

Courts, scholars, and practitioners disagree over the propriety of non-consensual third-party releases.[58] The majority of courts, including those in the First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits, agree that the general equitable powers conferred by section 105(a) of the Bankruptcy Code allow for the release of claims against non-debtor third-parties.[59] By contrast, the minority of courts, including those in the Fifth, Ninth, and Tenth Circuits, hold that section 524(e) of the Bankruptcy Code prohibits non-debtor third-party releases.[60] Because the circuit split is well-documented elsewhere in the bankruptcy

jurisprudence, and because the Purdue Court has already expressed its views on the jurisdictional debate in the context of the Chapter 11 Cases, this article will only compare the legal standards applied by certain courts that adopt the majority view. In particular, this article only discusses case law from courts in the Southern District of New York (or, where applicable, the Second Circuit Court of Appeals) and the District of Delaware (or, where applicable, the Third Circuit Court of Appeals); Delaware and New York are among the primary venues in which the Debtors could have filed their Chapter 11 Cases.[61]

Courts in the Second and Third Circuits concur that non-consensual third-party releases are the exception, not the rule.[62] But the courts disagree over both the statutory basis for granting such releases, and whether a plan can provide for releases between non-debtor claimants without claimants having any say in the matter.

Cue the SACKLER Act and the media's indignation over the Debtors' proposed Shareholder Releases. The Plan does not contemplate claimants' voluntarily voting to accept the Shareholder Releases, and thus—as currently proposed—they are non-consensual. Indeed, requiring the third-party releases in the Purdue Plan to be consensual would almost assuredly result in a rejection of (and the ultimate failure) of the Plan; the Sackler Family Members are seen as playing a central role in the opioid crisis, and any consideration they exchange for a release is likely to be viewed as not being enough. Accordingly, the Debtors' structuring of the Plan to include non-consensual Shareholder Releases is eminently predictable. And in the face of these concerns, the Debtors proposed the Shareholder Releases with the Second Circuit's legal test in mind so as to maximize their chances of approval of these non-consensual third-party releases.

1. Southern District of New York

The applicable standard for approval of non-consensual third-party releases was set forth by the Second Circuit Court of Appeals in *Metromedia*.[63] In *Metromedia*, the court held that releases by non-debtors of third-parties may be approved where: (a) the releases are important to a debtor's plan; (b) the released party provides a substantial contribution; (c) the enjoined claims are channeled to a settlement fund rather than extinguished; (d) the enjoined claims would indirectly impact the debtor's reorganization by way of indemnity; (e) the plan otherwise provides for full payment of the enjoined claims; or (f) the affected creditors consent to the releases.[64] This analysis "is not a matter of factors and prongs."[65] Rather, in performing this assessment, courts undertake a holistic review and examine the full set of circumstances of each case to determine if the release is important to the success of the plan.[66]

The bankruptcy courts in the Southern District of New York have applied the *Metromedia* standard to approve non-consensual releases of claims by non-debtors against third-parties where the released parties have made substantial contributions to the bankruptcy case or where, absent a release, liability of a third-party would trigger an indemnification obligation of the debtors.[67] Contribution is substantial if, for example, a claimant waives significant claims against the debtor's estate in exchange for the releases,[68] or provides a monetary contribution that allows for a recovery to creditors that may otherwise not receive as great a recovery.[69] However, mere financial contribution in exchange for releases may be insufficient.[70]

To that end, the bankruptcy courts in the Southern District of New York have criticized proposed third-party releases that are drafted as broadly as possible without targeting particular claims of concern.[71] Such broad releases preclude the court from assessing the specific claims being released and whether the released parties made any contribution that provided specific recoveries to the claimholders providing the release.[72] In the Second Circuit, although courts will grant non-consensual third-party releases, they must bear a reasonable relationship to the protection of the estate.[73]

As the Debtors will surely write in their memorandum of law and attempt to show in their declarations in support of the Plan, the Sackler Family Members are making a substantial contribution to the Plan. Although the public may protest, billions of dollars in cash is unquestionably a substantial consideration, especially as augmented by the following additional "softer" contributions:

First, the cash settlement is going to fund programs designed to abate the opioid crisis and also fund public and private settlements. The cash settlement will be funneled through channeling trusts.

Second, the Sackler Family Members will be required to use their best efforts to sell or cause to be sold their interests in certain Purdue subsidiaries, with any proceeds being escrowed for the benefit of the Plan trusts.

Third, the Sackler Family Members will release claims against the Debtors. In addition, enjoined claims will be channeled to a settlement fund, rather than extinguished.

Finally, the releases are integral to the confirmation of the Plan. Without them, it is extremely unlikely that the Sackler Family Members would have been induced to agree to the Settlement Framework, as was clear from even the early days of the Chapter 11 Cases when the debtors and other major constituents requested an injunction for the Sackler Family Members' benefit.[74]

All of these factors weigh in favor of the Court's approving the Shareholder Releases under the *Metromedia* standard.

2. District of Delaware

The bankruptcy courts in the Third Circuit, like those in the Second Circuit, have allowed non-consensual third-party releases and channeling injunctions where exceptional circumstances warrant such relief.[75] The Third Circuit has instructed that the "hallmarks" of a permissible non-consensual release are "fairness, necessity to the reorganization and specific factual findings to support these conclusions."[76] These hallmarks also include the requirement that the releases be "given in exchange for fair consideration."[77] The Third Circuit's decision in *Continental* did not explicitly identify "fair consideration" as a "hallmark" for a third-party release and channeling injunction; however, the Third Circuit's subsequent decision in *United Artists* discussed *Continental* and clarified that "[a]dded to these requirements [i.e., *Continental*'s three hallmarks,] is that the releases 'were given in exchange for fair consideration.'"[78]

The fairness of the release turns on the balance of the *Master Mortgage* factors.[79] The necessity of the release depends on whether the scope of liability was "sufficiently onerous to jeopardize the debtors' reorganization if not resolved via [a trust-injunction mechanism]."[80] Mere involvement in the negotiation of a plan or plan settlement may not be sufficient to warrant a release of third-party claims.[81]

As to the specific factual findings prong, lower courts within the Third Circuit have approved non-consensual releases and channeling injunctions under section 105(a) of the Bankruptcy Code in extraordinary cases where the *Continental* hallmarks were present.[82] Other decisions from courts in the Third Circuit have construed *Continental* to permit non-consensual releases coupled with a channeling injunction in certain circumstances.[83]

For the same reasons as those articulated above, if the Debtors had commenced their Chapter 11 Cases in the District of Delaware, there is still a good chance that the Shareholder Releases would be approved.[84]

C. Third-Party Releases as a Mechanism for "True Peace"

The factors that courts in the District of Delaware examine when deciding whether to approve non-consensual third-party releases are very similar to, and equally stringent as, those required by courts in the Southern District of New York. For instance, the requirements for substantial contribution, payment of enjoined claims, and necessity (or at least importance) of the releases are common factors between the two jurisdictions. And in all cases, courts will weigh the specific circumstances surrounding the case, the plan, and the releases.

In addition to the Shareholder Releases likely passing either the Second Circuit's or the Third Circuit's test, the specific circumstances present in the Chapter 11 Cases warrant approval of the Shareholder Releases. Most persuasively, the Shareholder Releases are essential to implementing the Plan in a way that maximizes possible recoveries to all creditors. First, they were given in exchange for considerable funding for programs designed to abate the opioid crisis, which will have the most equitable and widest-reaching impact on creditors of the Debtors. They also allow for speedy recoveries and the efficient resolution and settlement of issues that would otherwise require protracted litigation. Moreover, any lawsuits filed by third-parties against the Sackler Family Members after the effective date of the Plan would inevitably require the Debtors' involvement, which would further deplete post-emergence assets and the value of distributions to creditors under the Plan. Next, that the Debtors were willing to extend consideration in the form of the Shareholder Releases facilitated constructive participation throughout the restructuring process as a whole, thereby minimizing unnecessary litigation during the pendency of the Chapter 11 Cases. Finally, the releases and the consideration provided in exchange therefor address the Sackler Family Members' civil liabilities related to the opioid epidemic, while not releasing the Sackler Family Members from any criminal liability related thereto.

Judge Drain's early comment regarding the value of the Shareholder Releases for the sake of “true peace” was particularly prescient. If the Shareholder Releases are approved in the Plan, practitioners should look to the Settlement Framework as a template for obtaining court approval of third-party releases in complex reorganization cases, particularly in the mass tort context, that would otherwise collapse under the weight of expensive and extended litigation.

Footnotes

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1 In re Purdue Pharma L.P., et al., Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. 2019).

2 Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, ECF No. 2982, In re Purdue Pharma, L.P., Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. June 3, 2021).

3 See, e.g., Geoff Mulvihill, AP Interview: State AG pushes accountability in opioid cases, ASSOCIATED PRESS, June 7, 2021, https://apnews.com/article/health-opioids-business-government-and-politics-44acd14c5c16b379645a2a9b73e51074; Opioid addiction activists, AGs push back against Purdue Pharma bankruptcy plan, ASSOCIATED PRESS, March 17, 2021, https://www.marketwatch.com/story/opioid-addiction-activists-ags-push-back-against-purdue-pharma-bankruptcy-plan-01615990928.

4 Order Approving (I) Disclosure Statement for Fifth Amended Chapter 11 Plan, (II) Solicitation and Voting Procedures, (III) Forms of Ballots, Notices and Notice Procedures in Connection Therewith, and (IV) Certain Dates with Respect Thereto, ECF No. 2988, In re Purdue Pharma, L.P., Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. June 3, 2021) (“Disclosure Statement Order”).

5 Disclosure Statement Order.

6 Disclosure Statement Art. II.D.

7 See, e.g., Danny Hakim, Roni Caryn Rabin, and William K. Rashbaum, Lawsuits Lay Bare Sackler Family's Role in Opioid Crisis, N.Y. TIMES, April 1, 2019, https://www.nytimes.com/2019/04/01/health/sacklers-oxycontin-lawsuits.html.

8 Disclosure Statement Art. I.B.

9 The Plan defines the “Sackler Family Members” as “(i) all Persons who are descendants of either Raymond R. Sackler or Mortimer D. Sackler, (ii) all current and former spouses of such descendants, and (iii) all current and former spouses of Raymond R. Sackler, Mortimer D. Sackler or any of their respective descendants.” Plan Section I.1. The Plan defines the “Shareholder Released Parties” as:

> [C]ollectively, (i) the Shareholder Payment Parties; (ii) the Persons identified on Appendix H to the Disclosure Statement; (iii) all Persons directly or indirectly owning an equity interest in any Debtor on the date on which such Debtor commenced its Chapter 11 Case; (iv) Sackler Family Members; (v) all trusts for the benefit of any of the Persons identified in the foregoing clause

> (iv) and the past, present and future trustees (including, without limitation, officers, directors and employees of any such trustees that are corporate or limited liability company trustees and members and managers of trustees that are limited liability company trustees), protectors and beneficiaries thereof, solely in their respective capacities as such; (vi) all Persons (other than the Debtors) in which any of the Persons identified in any of the foregoing clauses (i) through (v) own, directly or indirectly, an Interest and/or any other Person that has otherwise received or will receive grants, gifts, property or funds from any of the Persons identified in any of the foregoing clauses (i) through (v), solely in their respective capacities as such; and (vii) with respect to each Person in the foregoing clauses (i) through (vi), such Person's (A) predecessors, successors, permitted assigns, subsidiaries, controlled affiliates, spouses, heirs, executors, estates and nominees, in each case solely in their respective capacities as such, (B) current and former officers and directors, principals, members, employees, financial advisors, attorneys (including, without limitation, attorneys retained by any director, in his or her capacity as such), accountants, investment bankers (including, without limitation, investment bankers retained by any director, in his or her capacity as such), consultants, experts and other professionals, solely in their respective capacities as such, and (C) property possessed or owned at any time or the proceeds therefrom; provided that the Debtors and the Excluded Parties shall not be Shareholder Released Parties.

10 Disclosure Statement Art. III.F.

11 See Plan Section 10.8; See also 11 U.S.C. § 105(a).

12 Disclosure Statement Art. II.D.

13 Sept. 18, 2019 Hrg. Tr. 21:2–23:10; Disclosure Statement Art. II.E.1.

14 Disclosure Statement Art. II.E.2.

15 Disclosure Statement Art. I.B; Sept. 18, 2019 Hrg. Tr. 13:17–14:18.

16 Disclosure Statement Art. I.B.

17 Disclosure Statement Art. I.B.

18 Disclosure Statement Art. I.B.

19 Case Stipulation Among the Debtors, the Official Committee of Unsecured Creditors and Certain Related Parties, ECF No. 291, In re Purdue Pharma, L.P., Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. Oct. 11, 2019), as amended by Amended and Restated Case Stipulation Among the Debtors, the Official Committee of Unsecured Creditors and Certain Related Parties, ECF No. 518, In re Purdue Pharma, L.P., Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. Nov. 20, 2019) (the "Case Stipulation").

20 Case Stipulation.

21 Case Stipulation.

22 Order Expanding Scope of Mediation, ECF No. 1756, In re Purdue Pharma, L.P., Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. Sept. 30, 2020).

23 Disclosure Statement Art. I.B.

24 Order Expanding Scope of Mediation.

25 This article is not intended to summarize all of the terms of the Settlement Framework; the current Settlement Framework proposed in the Plan is expectedly complex, resolves multiple disputes, and involves dozens of individuals, entities, and yet-to-be-formed entities. Nevertheless, this section provides a brief overview.

26 On July 7, 2021, a group of previously non-consenting state attorneys generals (the "Non-Consenting States") reached an agreement with the Debtors, wherein the states agreed not to oppose the Plan in exchange for, *inter alia*, the Sackler Family Members agreeing to pay an additional $50 million and the Debtors agreeing to release additional documents to the public document repository to be established under the Plan. Mediator's Report, ECF No. 3119, In re Purdue Pharma, L.P., Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. July 7, 2021). The amounts to be paid pursuant to the Settlement Framework in the current version of the

Plan do not include this enhanced consideration. Several Non-Consenting States did not join in the July 7 agreement.

27 Order Expanding Scope of Mediation.

28 Disclosure Statement Art. I.D.

29 Disclosure Statement Art. I.D. ("[T]he contribution required under such settlement ensures that these Chapter 11 Cases will not collapse into the quagmire of expensive litigation and years of delay that would result if the Debtors cannot meet the terms of the Private-Side Resolutions, the DOJ Resolution, or the resolution with the Non-Federal Public Claimants, which are all embodied in the Plan.").

30 Disclosure Statement Art. I.B.

31 Disclosure Statement Art. I.B.

32 Disclosure Statement Art. I.Z.

33 See Plan § 10.7(c).

34 Thomas Mann's novel Buddenbrooks (1901) stereotypically describes the creation and dissolution of a family fortune over four generations. In the case of Purdue, this process was shortened by two generations: Purdue was built around the invention of Betadine (a powerful disinfectant) by the first generation of Sacklers, and undone by the sales practices for OxyContin (an addictive analgesic) by the second generation.

35 See generally Plan §§ 10.7–10.13.

36 Disclosure Statement Art. I.F.

37 Disclosure Statement Art. I.F.5.

38 See Disclosure Statement Art. I.Y, I.Z.

39 See Vince Sullivan, Reps Urge DOJ to Deny Sacklers Releases In Purdue Ch. 11, LAW360, June 30, 2021, https://www.law360.com/bankruptcy/articles/1399259/reps-urge-doj-to-deny-sacklers-releases-in-purdue-ch-11.

40 See, e.g., Gerard Posner and Ralph Brubaker, The Sacklers Could Get Away With It, N.Y. TIMES, July 22, 2020, https://www.nytimes.com/2020/07/22/opinion/sacklers-opioid-epidemic.html.

41 H.R. 2096, 117th Cong. (2021).

42 Feb. 21, 2020 Hrg. Tr. 39:16–18.

43 Feb. 21, 2020 Hrg. Tr. 39:19–40:8.

44 Feb. 21, 2020 Hrg. Tr. 40:11–16.

45 See, e.g., Letter from Debtors to Judge McMahon, ECF 3108, In re Purdue Pharma, L.P., Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. June 16, 2021) ("As noted in the Disclosure Statement, the Plan is supported by almost every stakeholder group in these Chapter 11 Cases, including the UCC, the AHC, the MSGE, the Native American Tribes Group, the PI Group, the Hospitals, the TPPs, the Ratepayers, and the NAS Committee. As of the date hereof, the Debtors understand that the Non-Consenting States Group expects to object to the Plan, including on the grounds of one of the issues with respect to which we would ask Your Honor to preside as a joint tribunal.").

46 See, e.g., In re Martin, 91 F.3d 389, 393, 36 Collier Bankr. Cas. 2d (MB) 600 (3d Cir. 1996); In re Rosenberg, 495 B.R. 196, 200 (Bankr. E.D. N.Y. 2010) (citations omitted).

47 Ryan M. Murphy, Shelter from the Storm: Examining Chapter 11 Plan Releases for Directors, Officers, Committee Members, and Estate Professionals, 20 J. Bankr. L. & Prac. 4 Art. 7 (2011).

48 In re Martin, 91 F.3d at 393; See also In re Motors Liquidation Company, 555 B.R. 355, 365–66 (Bankr. S.D. N.Y. 2016), order aff'd, appeal dismissed, 2017 WL 3491970 (S.D. N.Y. 2017) (citing In re Iridium Operating LLC, 478 F.3d 452, 462, 47 Bankr. Ct. Dec. (CRR) 243, Bankr. L. Rep. (CCH) P 80874 (2d Cir. 2007)).

49 See In re Zenith Electronics Corp., 241 B.R. 92, 110, 35 Bankr. Ct. Dec. (CRR) 329, 43 Collier Bankr. Cas. 2d (MB) 206, 53 Fed. R. Evid. Serv. 523 (Bankr. D. Del. 1999) (citing In re Master Mortg. Inv. Fund, Inc., 168 B.R. 930, 935, 31 Collier Bankr. Cas. 2d (MB) 240 (Bankr. W.D. Mo. 1994)).

50 See, e.g., In re Washington Mutual, Inc., 442 B.R. 314, 346 (Bankr. D. Del. 2011).

51 In re Indianapolis Downs, LLC., 486 B.R. 286, 303 (Bankr. D. Del. 2013).

52 See, e.g., Indianapolis Downs, 486 B.R. at 305 (collecting cases); In re Spansion, Inc., 426 B.R. 114, 144 (Bankr. D. Del. 2010) (stating that "a third party release may be included in a plan if the release is consensual"); In re Metromedia Fiber Network, Inc., 416 F.3d 136, 142, 44 Bankr. Ct. Dec. (CRR) 276, 54 Collier Bankr. Cas. 2d (MB) 1033, Bankr. L. Rep. (CCH) P 80397 (2d Cir. 2005) ("Nondebtor releases

may also be tolerated if the affected creditors consent."); In re Genco Shipping & Trading Limited, 513 B.R. 233, 271 (Bankr. S.D. N.Y. 2014) ("Court will permit releases with respect to any affected party that consented to grant the releases or may be deemed to have done so through its ability to 'check the box' on the Plan ballots"); In re Lear Corp., 2009 WL 6677955, at *8 (Bankr. S.D. N.Y. 2009) (approving releases where ballots stated that a vote to accept or abstention from voting constitutes acceptance and assent to a plan release and injunction).

53 In re Coram Healthcare Corp., 315 B.R. 321, 336, 94 A.F.T.R.2d 2004-6268 (Bankr. D. Del. 2004).

54 See, e.g., In re Indianapolis Downs, LLC, 486 B.R. at 306 ("As for those impaired creditors who abstained from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots. Under these circumstances, the Third-Party Releases may be properly characterized as consensual and will be approved."); In re DBSD North America, Inc., 419 B.R. 179, 218–19 (Bankr. S.D. N.Y. 2009), aff'd, 2010 WL 1223109 (S.D. N.Y. 2010), judgment aff'd in part, rev'd in part, 627 F.3d 496 (2d Cir. 2010), opinion issued, 634 F.3d 79, 65 Collier Bankr. Cas. 2d (MB) 201, Bankr. L. Rep. (CCH) P 81933 (2d Cir. 2011) ("Except for those who voted against the Plan, or who abstained and then opted out, I find the Third Party Release provision consensual and within the scope of releases permitted in the Second Circuit."), aff'd 2010 WL 1223109 (S.D.N.Y. March 24, 2010), modified on other grounds, 634 F.3d 79 (2d Cir. 2011); In re Conseco, Inc., 301 B.R. 525, 528, 42 Bankr. Ct. Dec. (CRR) 55 (Bankr. N.D. Ill. 2003) ("The Article X release now binds only those creditors who agreed to be bound, either by voting for the Plan or by choosing not to opt out of the release. Therefore, the Article X release is purely consensual and within the scope of releases that Specialty Equipment permits.") (citing Matter of Specialty Equipment Companies, Inc., 3 F.3d 1043, 29 Collier Bankr. Cas. 2d (MB) 1215, Bankr. L. Rep. (CCH) P 75398 (7th Cir. 1993)).

55 In re Calpine Corp., 2007 WL 4565223 (Bankr. S.D. N.Y. 2007) ("Such releases by Holders of Claims and Interests provide for the release by Holders of Claims and Interests that vote in favor of the Plan, who abstain from voting and choose not to opt out of the releases, or who have otherwise consented to give a release, and are consensual."); In re Crabtree & Evelyn, Ltd., 2010 WL 3638369 (Bankr. S.D. N.Y. 2010) (finding that where creditors accepted a plan and the non-debtor releases were disclosed in disclosure statement and the ballot, creditors expressly consented to the non-debtor releases, and therefore, satisfied *Metromedia*).

56 Dorothy Coco, Third-Party Bankruptcy Releases: An Analysis of Consent through the Lenses of Due Process and Contract Law, 88 Fordham L. Rev. 231, 251 (2019) ("A creditor's affirmative vote for the plan and failure to opt out where an opt-out provision is present can constitute consent for the release consistent with contract law.").

57 See Murphy, supra note 38.

58 See Validity of Non-Debtor Releases in Bankruptcy Restructuring Plans, 18 A.L.R. Fed. 3d Art. 2.

59 Validity of Non-Debtor Releases in Bankruptcy Restructuring Plans, 18 A.L.R. Fed. 3d Art. 2. Section 524(e) of the Bankruptcy Code provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Section 105(a) of the Bankruptcy Code provides that: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

60 Validity of Non-Debtor Releases in Bankruptcy Restructuring Plans, 18 A.L.R. Fed. 3d Art. 2.

61 The Debtor entities are incorporated in either Delaware or New York. See Voluntary Petition for Non-Individuals Filing for Bankruptcy, ECF No. 1, In re Purdue Pharma, L.P., Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. Sept. 15, 2019).

62 See, e.g., In re Wash. Mut., Inc., 442 B.R. at 351 (citing In re Continental Airlines, 203 F.3d 203, 212, 35 Bankr. Ct. Dec. (CRR) 176 (3d Cir. 2000) ("[N]on-consensual releases by a non-debtor of other non-debtor third parties are to be granted only in 'extraordinary cases.'")); In re Metromedia Fiber Network, Inc., 416 F.3d at 141 ("While none of our cases explains when a nondebtor release is "important" to a debtor's plan, it is clear that such a release is proper only in rare cases.").

63 Metromedia, 416 F.3d at 141–42.

64 Metromedia, 416 F.3d at 141–42.

65 Metromedia, 416 F.3d at 142.

66 Metromedia, 416 F.3d at 142–43.

67 See, e.g., Findings of Facts, Conclusions of Law, and Order Confirming Second Modified Second Amended Joint Plan of Reorganization of Trident Holding Company, LLC and Its Debtor Affiliates, ECF No. 928, In re Trident Holding Company, LLC, Case No. 19-10384 (SHL) (Bankr. S.D.N.Y. Sept. 18, 2019) (granting non-consensual releases by non-debtors of third-parties on the basis that the released parties had made substantial contributions to the debtors' reorganization and/or were owed indemnification obligations by the debtors); In re Sabine Oil & Gas Corporation, 555 B.R. 180, 291–93 (Bankr. S.D. N.Y. 2016) (granting releases based on finding of substantial contribution by released parties and indemnification obligations owed by debtors to released parties); In re Genco Shipping & Trading Limited, 513 B.R. 233 (Bankr. S.D. N.Y. 2014); In re Charter Communications, 419 B.R. 221, 258–59, 52 Bankr. Ct. Dec. (CRR) 114 (Bankr. S.D. N.Y. 2009).

68 Findings of Fact, Conclusions of Law and Order Confirming the Amended Joint Chapter 11 Plan of Liquidation of LSC Communications, Inc. and Its Debtor Affiliates, ECF No. 1246, In re LSC Commc'ns, Inc., Case No. 20-10950 (SHL) (Bankr. S.D.N.Y. Feb. 24, 2021) (confirming a plan with non-consensual third-party releases where the non-debtor released party waived all of the more than $104 million in claims asserted against the debtors).

69 In re Spiegel Inc., 46 Bankr. Ct. Dec. (CRR) 272, 2006 WL 2577825 (Bankr. S.D. N.Y. 2006) (noting that contributions of over $260 million of cash and other consideration provided for distributions that otherwise would not have been made available).

70 In re Residential Capital, LLC, 2014 WL 1645350 (Bankr. S.D. N.Y. 2014) (citing In re Metromedia Fiber Network, Inc., 416 F.3d 136, 44 Bankr. Ct. Dec. (CRR) 276, 54 Collier Bankr. Cas. 2d (MB) 1033, Bankr. L. Rep. (CCH) P 80397 (2d Cir. 2005) (despite the ruling in Metromedia that non-debtor third-party releases are not justifiable simply on the ground that they were offered in exchange for a monetary contribution, finding that the non-debtor third-party release was valid because the non-debtor's $2.1 billion monetary contribution to the debtor's estate was a significant factor to achieving the plan confirmation and a global resolution of the debtor's bankruptcy, and because the release was a key component of the non-debtor's willingness to provide the contribution).

71 See, e.g., In re Aegean Marine Petroleum Network Inc., 599 B.R. 717, 723 (Bankr. S.D. N.Y. 2019) ("Instead of targeting particular claims and explaining why the release of those particular claims is necessary to some feature of the reorganization, the proposed releases usually are as broad as possible in their scope.").

72 Aegean Marine Petroleum, 599 B.R. at 723.

73 Lauzon, supra note 49 (citing In re Metromedia Fiber Network, Inc., 416 F.3d 136, 44 Bankr. Ct. Dec. (CRR) 276, 54 Collier Bankr. Cas. 2d (MB) 1033, Bankr. L. Rep. (CCH) P 80397 (2d Cir. 2005).

74 See supra note 18.

75 See In re Continental Airlines, 203 F.3d at 212–14 (examining the propriety of "non-debtor release and permanent injunction provisions"); In re Millennium Lab Holdings II, LLC., 945 F.3d 126, 139, Bankr. L. Rep. (CCH) P 83470 (3d Cir. 2019), cert. denied, 140 S. Ct. 2805, 207 L. Ed. 2d 142 (2020) ("Consistent with prior decisions, we are not broadly sanctioning the permissibility of nonconsensual third-party releases in bankruptcy reorganization plans. Our precedents regarding nonconsensual third-party releases and injunctions in the bankruptcy plan context set forth exacting standards that must be satisfied if such releases and injunctions are to be permitted, and suggest that courts considering such releases do so with caution.") (internal citations omitted); see also n re Lower Bucks Hosp., 571 Fed. Appx. 139, 144 (3d Cir. 2014) (considering a plan containing a non-consensual third-party release and finding that it could not conclude that the non-consensual third-party release "was exchanged for adequate consideration or was otherwise fair" (citing In re Spansion Inc., 426 B.R. at 144 ("describing an element of the Continental-derived test as 'whether the non-consenting creditors received reasonable compensation in exchange for the release'"); In re Global Indus. Technologies, Inc., 645 F.3d 201, 207, 54 Bankr. Ct. Dec. (CRR) 178, Bankr. L. Rep. (CCH) P 81998, 87 A.L.R. Fed. 2d 691 (3d Cir. 2011) (considering a plan containing a trust and channeling injunction for silica tort claims and explaining in dicta that "for the Plan to be approved as designed (i.e., with the inclusion of the Silica Injunction), the debtors needed to show that the Plan's resolution of silica-related claims is necessary or appropriate under 11 U.S.C. § 105(a), which, under our precedent, requires showing with specificity that the Silica Injunction is both necessary to the reorganization and fair." (citing Continental, 203 F.3d at 214)).

76 Continental, 203 F.3d at 214.

77 United Artists Theatre Co. v. Walton, 315 F.3d 217, 227, 40 Bankr. Ct. Dec. (CRR) 182, 49 Collier Bankr. Cas. 2d (MB) 1434, Bankr. L. Rep. (CCH) P 78777 (3d Cir. 2003) (citing Continental, 203 F.3d at 214–15).

78 United Artists, 315 F.3d at 227 (quoting Continental, 203 F.3d at 215).

79 See supra Section III.A.1; In re Wash. Mut., Inc., 442 B.R. at 314 (citing In re Zenith Elecs. Corp., 241 B.R. at 110).

80 Millennium Lab Holdings II, 543 B.R. at 712 (citing In re Global Indus. Technologies, Inc., 645 F.3d 201, 54 Bankr. Ct. Dec. (CRR) 178, Bankr. L. Rep. (CCH) P 81998, 87 A.L.R. Fed. 2d 691 (3d Cir. 2011)).

81 In re Wash. Mut., Inc., 442 B.R. at 354.

82 See, e.g., In re Blitz U.S.A., Inc., 2014 WL 2582976 (Bankr. D. Del. 2014) (approving a channeling injunction for tort claims relating to the Debtors' manufactured gasoline cans); In re Global Indus. Technologies, Inc., 2013 WL 587366 (Bankr. W.D. Pa. 2013) (approving channeling injunction for tort claims relating to silica products under section 105(a) of the Bankruptcy Code); In re Kaiser Aluminum Corp., 2006 WL 616243 (Bankr. D. Del. 2006), order aff'd, 343 B.R. 88 (D. Del. 2006) (approving three separate channeling injunctions under section 105(a) for mass tort claims relating to silica and coal tar pitch volatile products and noise-induced hearing loss); In re American Family Enterprises, 256 B.R. 377, 406–08 (D.N.J. 2000) (authorizing issuance of third-party release and channeling injunction for consumer fraud claims under 11 U.S.C. § 105(a)).

83 See, e.g., In re Lower Bucks Hosp., 471 B.R. 419, 464, (Bankr. E.D. Pa. 2012), aff'd, 488 B.R. 303, Bankr. L. Rep. (CCH) P 82401 (E.D. Pa. 2013), aff'd, 571 Fed. Appx. 139 (3d Cir. 2014) ("Confirmation of a plan that includes a third-party release requires that the court makes specific factual findings regarding the release's fairness and necessity." (citing Continental, 203 F.3d at 214)); In re Saxby's Coffee Worldwide, LLC, 436 B.R. 331, 338, 53 Bankr. Ct. Dec. (CRR) 193, 64 Collier Bankr. Cas. 2d (MB) 907 (Bankr. E.D. Pa. 2010), as amended, (Sept. 24, 2010) (denying requested releases under the circumstances, but acknowledging that non-consensual releases are permissible when the "plan is widely supported by the creditor constituency that includes the parties being restrained, accords significant benefits to that constituency and … the creditors being restrained are also being treated fairly"); In re Congoleum Corp., 362 B.R. 167, 192 (Bankr. D. N.J. 2007) (denying request for third-party release because "under the general jurisprudence for nonconsensual third party releases … [m]any of [the Continental] hallmarks are lacking in the proposed releases."); In re Genesis Health Ventures, Inc., 266 B.R. 591, 608, 38 Bankr. Ct. Dec. (CRR) 112 (Bankr. D. Del. 2001) (citing to the "threshold Continental criteria of fairness and necessity for approval of non-consensual third-party releases," but finding releases inappropriate under the circumstances).

84 That being said, at the time of the commencement of the Chapter 11 Cases, the issue was less clear in the District of Delaware, and the Debtors would have been taking some measure of risk in filing the Chapter 11 Cases there. The Third Circuit had just heard oral argument, but no decision had been rendered, in the Millennium Lab Holdings case. Three months after the Purdue bankruptcy commenced, the Third Circuit in Millennium Lab Holdings resolved the question of whether a bankruptcy court, "without running afoul of Article III of the Constitution, can confirm a Chapter 11 reorganization plan containing nonconsensual third-party releases and injunctions." The court of appeals, emphasizing that it reached its conclusion on "the specific, exceptional facts of this case," held that "the Bankruptcy Court was permitted to confirm the plan because the existence of the releases and injunctions was 'integral to the restructuring of the debtor-creditor relationship.'" In re Millennium Lab Holdings II, LLC, 945 F.3d at 129.

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