

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

In re:

BIRD GLOBAL, INC. *et al.*,

Debtors.

Chapter 11

Case Number 23-20514-CLC

(Jointly Administered)

**TORT CLAIMANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR
OBJECTION TO DEBTORS' CHAPTER 11 PLAN AND DISCLOSURE STATEMENT**

Dunya Abbo, Michael Allen, Natalie Armenta, Jill Asrael, Christopher Atwood, Lisa Beardslee, Holly Bittinger, Crystal Camposano, Robyn Cardy, Kalonji Cason, Kimberly Chartrand, Mirona Constantinescu, Beau Cullen, Christopher Dacey, Richard Davis, Clarina Durham, Jason Evangelou, Bianca Faura, Sylvia Fico, Jennifer Glaspell, Michael Graham, Elizabeth Helms, Kiara Hudson, Jorge Hurtado, Fahin Kamrany, Alexandra Kozel, Grace LaCrosse, Paul Lee, Carlos Lemus, Kimberly Leonard, Hector Martin, Brandon Mitchell, Kim Mulligan, Brandon Nelson, Thomas Olivas, Brian Olshevski, Joseph Payne, Renea Rice, Akeem Robinson, Perry Rubenstein, Lawrence Russo, Alexandra Scoggin, Andrea Silva, Annemarie Spitz, Tracy Squire, Jessie Trinh, Kim Youngbean, Lori Urban, Joanne Vizzini, Deborah West, Maria Wiegering, and Ziwei Zhu (collectively, the above-listed creditors shall be referred to as the “*Tort Claimants*”) file their Supplemental Brief (the “*Supplemental Brief*”) in support of their *Objection to Debtors' First Amended First Amended Joint Chapter 11 Plan of Liquidation* [ECF No. 779] (the “*Objection*”)¹ and as requested by the Court following the United States Supreme Court’s recent ruling in *Harrington v. Purdue Pharma L.P., et al.*, 144 S.Ct. 2017 (June

¹ Capitalized terms have the meaning ascribed to them Objection (and as they are defined in the Second Amended Plan and Second Amended Disclosure Statement) unless otherwise defined.

27, 2024). As requested by the Court, this Supplemental Brief is limited to how the *Purdue Pharma* ruling affects the proposed Bar Order and Channeling Injunction in the Plan.

The seminal case concerning litigation settlement bar orders in the Eleventh Circuit is *In re Munford*, 97 F.3d 449 (11th Cir. 1996). In *Munford*, the Eleventh Circuit concluded that a bankruptcy court's authority to enter bar orders in aid of settlement is derived from Section 105(a) of the Bankruptcy Code and Rule 16 of the Federal Rules of Civil Procedure. *Id.* at 454-5. The court noted that read together, Section 105(a) allows the bankruptcy court to enter "any order" while Rule 16 authorizes the use of special procedures to assist the parties in reaching settlement, and that this result was justified by public policy, and the burdensome costs of litigation on a bankrupt estate, the integral role of bar orders in facilitating settlement. *Id.* at 455.

In *Purdue Pharma*, the Supreme Court rejected the argument that a bankruptcy court can release and enjoin claims against a nondebtor without the affected claimants' consent using Section 105(a) of the Bankruptcy Code. The Supreme Court found that "Section 105(a) alone cannot justify the imposition of nonconsensual third-party releases because it serves only to carry out authorities expressly conferred elsewhere in the code." *Purdue Pharma*, 144 S. Ct. at 2082, n. 2 (emphasis added) (internal quotations marks and citations omitted). The Supreme Court then concluded that such express authority must be found elsewhere, shifting its focus to Section 1123(b)(6). The plan proponents argued that Section 1123(b)(6) allow a debtor to include in its plan, and a bankruptcy court to order, any provision not expressly forbidden by the Bankruptcy Code so long as that provision is appropriate and consistent with the broad purposes of bankruptcy, and because the Bankruptcy Code does not expressly forbid a nonconsensual third party release, a bankruptcy court may authorize one after finding it is appropriate. *Id.* at 2082. The Supreme Court rejected this argument as well, finding that Section 1123(b)(6)'s "catchall

phrase” must be interpreted in light of its surrounding context and embrace only those things that are similar to the examples that precede it. *Id.* Because the five subsections preceding Section 1123(b)(6) only concerned the debtor, it could not be fairly read to discharge debts of a nondebtor without the consent of affected claimants. *Id.* at 2083.

Like nonconsensual third-party releases, there is no express authority for bar orders in the Code that Section 105(a) can serve to carry out. Rule 16(c)(2)(I) of the Federal Rules of Civil Procedure, the rule and subsection referenced by the Eleventh Circuit in *Munford*, only provides that courts may consider and take appropriate action on using special procedures to assist in resolving disputes “when authorized by statute or local rule.” However, this leads back to the absence of the authorization of bar orders in the Code or Bankruptcy Rules.

In this case, the indemnification relationship between the Municipalities and the Debtors has been emphasized as a justification for the Bar Order, because a claim against a Municipality is akin to a claim against the Debtors. However, the indemnification relationship between the Sacklers and Purdue Pharma was relegated to a mere footnote in the *Purdue Pharma* majority opinion, with the Supreme Court appearing to disregard the indemnification argument almost entirely, noting the U.S. Trustee’s argument that bankruptcy courts have a variety of statutory tools to disallow or equitably subordinate potential indemnification claims the Sacklers might pursue so as not to deplete the estate. *Id.* at 2087, n. 7.

As in *Purdue Pharma*, the presence of an indemnification relationship between the Debtors and the Municipalities cannot justify the lack of authority for Bar Orders in the Bankruptcy Code. The Municipalities, only a few of which have even agreed to contribute any value to the Tort Claims Fund, have not asserted that any indemnification claims they may assert would be entitled to priority under the Bankruptcy Code, so presumably, as the Plan is currently

drafted, any indemnification claims would be classified as general unsecured claims and the Municipalities would share in any funds available to those claimants if not disallowed under Section 502(e)(1)(B) or subordinated under Section 510(c)(1). While the Debtors and Municipalities have operated under an assumption that all of the Tort Claims would be subject to the broad indemnification agreement, that conclusion is not a given, and it is possible that some of the Tort Claims may not be subject to indemnification but would nevertheless be barred by the Bar Order if the Plan is confirmed.

The Supreme Court was clear in *Purdue Pharma* that “the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants.” *Id.* at 2074. Similar to the release and injunction at issue in *Purdue Pharma*, the Bar Order and the Channeling Injunction are the functional equivalent of a discharge of claims of nondebtors against nondebtors, as they force all Tort Claims to be channeled to and paid solely from the Tort Claims Trust, and enjoin all Persons or Entities who currently hold or in the future may hold or assert a Channeled Claim from taking any action against the Municipalities. Channeled Claims broadly include, for example, any claim that is “related to” the “use ... of the Debtors’ micromobility vehicles[.]” Plan, pp. 5, 18. While these provisions do not extinguish Tort Claims entirely, they do extinguish any liability the Municipalities may have as to those claims without the consent of the affected Tort Claimants and without many of the Municipalities contributing any value to the Tort Claims Fund. They may also extinguish liability of the Municipalities for Tort Claims to which the Municipalities may not be entitled to indemnity. The Bankruptcy Code reserves benefit a discharge, and the functional equivalent of a discharge, to a debtor, a point that could not have been made more clear by the Supreme Court in

Purdue Pharma.

CONCLUSION

Class 6 voted overwhelmingly to reject the Plan. Thus, the Bar Order and Channeling Injunction are nonconsensual. Accordingly, the Bar Order and Channeling Injunction are incongruent with the Supreme Court's *Purdue Pharma* decision. The Tort Claimants respectfully request the Court deny confirmation of the Plan.

Date: July 16, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of *Tort Claimants' Supplemental Brief in Support of Their Objection to Debtors' Chapter 11 Plan and Disclosure Statement* was served on July 16, 2024, via the Court's Notice of Electronic Filing upon the Registered Users listed on the attached **Exhibit 1** and via email to these parties:

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