

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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In re:

BIRD GLOBAL, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 23-20514-CLC

(Jointly Administered)

**DONNA JACKSON TCHIRKOW'S BRIEF ON THE EFFECTS OF
HARRINGTON V. PURDUE PHARMA L.P. ON THE PROPOSED BAR
ORDER AND CHANNELING INJUNCTION**

Donna Jackson Tchirkow, Individually and as a Representative of the Estate of Nicholas Tchirkow ("Tchirkow"), files this Brief² regarding the effects of the Supreme Court of the United States's recent decision in *Harrington v. Purdue Pharma L.P.* on the Debtors' proposed Bar Order and Channeling Injunction under the Second Amended Joint Chapter 11 Plan of Liquidation [Dkt 802] (Plan) and in support would show the Court as follows:

1. On June 27, 2024, the Supreme Court issued its decision in *Purdue Pharma* based on the fundamental tenet that discharge in bankruptcy is limited to debtors and nothing in the law authorizes bankruptcy courts to extinguish claims against nondebtors without the claimants' consent. *See Purdue Pharma*, 603 U.S. —, 144 S. Ct. 2071, 2081-88 (2024).

¹ The address of the Debtors is 392 Northeast 191st Street, #20388, Miami, FL 33179. The last four digits of the Debtors' federal tax identification numbers are: (i) Bird Global, Inc. (3155); (ii) Bird Rides, Inc. (9939); (iii) Bird US Holdco, LLC (8390); (iv) Bird US Opco, LLC (6873); and (v) Skinny Labs, Inc. (8176).

² Tchirkow also incorporates by reference her prior objections to Debtors' Plan [Dkt. 778, 911].

2. In that case, the Sackler family—nondebtor third parties who owned and controlled Purdue Pharma L.P. (“Purdue Pharma”)—sought a settlement agreement as part of Purdue Pharma’s plan of reorganization under 11 U.S.C. § 1123(b)(6)’s catchall authority. *Id.* at 2077-80. Specifically, the Sacklers would return some \$4.325 billion of the \$11 billion in funds the family had withdrawn from Purdue Pharma in the years preceding Purdue Pharma’s bankruptcy in exchange for a release and injunction of all current and future opioid-related claims against the Sacklers. *Id.*

3. There, the Supreme Court recognized that the Sacklers were nondebtors. *Id.* at 2081. They had not sought bankruptcy relief. *Id.* They had not put all of their assets on the table for distributions, let alone the \$11 billion they had withdrawn from Purdue Pharma or the sums they had earned on those funds. *Id.* at 2080-81. Yet, they sought to exploit Purdue Pharma’s bankruptcy so as to extinguish all claims against them without the consent of the affected claimants. *Id.* at 2079-81. The Supreme Court found no basis under the law that would permit the nonconsensual release of nondebtor third party claims. *Id.* at 2081-88. Instead, the Supreme Court construed 11 U.S.C. § 1123(b)’s specific provisions as solely concerning the debtor—its rights and responsibilities, and its relationship with its creditors. *Id.* at 2081-84. As such, any catchall authority under 11 U.S.C. § 1123(b)(6) could not be read to endow a bankruptcy court with the “radically different” power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants. *Id.* at 2083. The Supreme Court bolstered its construction of 11 U.S.C. § 1123(b) through the context and history of the Bankruptcy Code, which limited the benefits of discharge to debtors who offered a “fair and full surrender of [their] property.” *Id.* at 2084-86.

4. Like the Sacklers, Debtors' insurers are nondebtors. They have not filed for bankruptcy. They have not placed all of their assets on the table for distributions to creditors, let alone the remaining coverage available under the applicable liability insurance policies.³ See Second Amended Plan, Exs. 1-4 [Dkt. 802]; Second Amended Disclosure Statement, § IV(Q) [Dkt. 801]. Yet, they similarly seek to exploit Debtors' bankruptcy so as to in effect extinguish all claims against the insurers without the consent of the affected tort claimants. Here, instead of relief under 11 U.S.C. § 1123(b)(6), the insurers seek their settlement agreements in the guise of a sale of Debtors' liability insurance policies under 11 U.S.C. § 1123(b)(3). See *id.* However, these settlement agreements fail for the same reasons the Supreme Court rejected the Sacklers' settlement agreement in *Purdue Pharma*—neither the specific provisions under 11 U.S.C. § 1123(b) nor the catchall authority under 11 U.S.C. § 1123(b)(6) permit what amounts to the discharge of nondebtors' debts without the consent of the affected nondebtor claimants. Under *Purdue Pharma*, Debtors cannot release the tort claimants' claims against the respective insurers and other nondebtors without their consent.

5. Further, while the insurance policies are property of the Debtors' estate, the proceeds under these policies are not. See *In re Edgeworth*, 993 F.2d 51, 54-56 (5th Cir. 1993); see also *In re CHS Elec., Inc.*, 261 B.R. 538, 541-42 (Bankr. S.D. Fla. 2001). Debtors have no interest in or rights to those proceeds. See *In re Edgeworth*, 993 F.2d at 54-56. Rather, these proceeds are reserved for tort claimants with claims arising under the respective policy terms. See *id.* And to the extent the applicable policy premiums are paid in full, these policies are not executory contracts. See, e.g., *In re Baird*,

³ For example, Underwriter's payment of \$11mm is just 15% of the \$70mm in coverage disclosed. See Second Amended Plan, ¶ 1.1(163); Second Amended Disclosure Statement, § IV(Q).

567 F.3d 1207, 1211-13 (10th Cir. 2009); *In re Fed.-Mogul Glob. Inc.*, 385 B.R. 560, 576 (Bankr. D. Del. 2008), *aff'd sub nom. In re Fed.-Mogul Glob.*, 402 B.R. 625 (D. Del. 2009), *aff'd sub nom. In re Fed.-Mogul Glob. Inc.*, 684 F.3d 355 (3d Cir. 2012); *In re Vanderveer Estates Holdings, LLC*, 328 B.R. 18, 25 (Bankr. E.D.N.Y. 2005).

6. Debtors couch these insurance settlement agreements as being made for tort claimants' benefit. Yet, Debtors in effect are seeking to convert only a portion of the non-estate insurance proceeds into estate assets. In exchange, tort claimants would be barred from pursuing claims against the settling insurers and other nondebtors. *See* Second Amended Plan, §§ III, VII, VIII, XIII & Exs. 1-4. Their claims would be channeled to proceeds from the sale, which will be placed in a tort claims trust to be distributed to all tort claimants irrespective of their interests in the proceeds based on policy years, terms, or applicability of self-insured retention (SIR). *See* Second Amended Plan, § VII, ¶¶ 7., 7.11, 7.12. Further, such distributions would be subject to more onerous requirements under the Tort Claims ADR Procedures, including determinations regarding choice of law, eligibility requirements for claims, ambiguity regarding settlements, an undisclosed release agreement, and a limitation on the number of their claims. *See* Second Amended Plan, Ex. 1, Schedule 3 at ¶¶ 2.6, 2.7, 5.3, 5.6, 5.7, 5.8, and Ex. C.

7. However, the tort claimants do not consent to extend the benefits of bankruptcy to Debtors' insurers and other nondebtors.

PRAYER

WHEREFORE, Donna Jackson Tchirkow respectfully requests the Court enter an order denying the Insurance Settlement Agreements and confirmation of the approval of

the *Debtors' Second Amended Joint Chapter 11 Plan of Liquidation* [Dkt. 802] and grant Tchirkow such other and further relief as the Court deems just and proper.

Respectfully submitted this 16th day of July 2024.

/s/ Vincent F. Alexander

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been served on counsel for Debtor, Debtor, the U.S. Trustee, and all parties receiving or entitled to notice through CM/ECF on this 16th day of July 2024.

/s/ Vincent F. Alexander

Vincent F. Alexander