IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re INSYS THERAPEUTICS, INC., et al, Debtors[1].	Chapter 11 Case No. 19-11292 (KG) Jointly Administered Hearing Date: July 8, 2019 at 9:00 a.m. (ET)

THE CITY OF PRESCOTT, ARIZONA; CITY OF SURPRISE, ARIZONA; CARROLL COUNTY, MARYLAND; AND HENRY COUNTY, MISSOURI OBJECTION TO DEBTORS' MOTION FOR ENTRY OF ORDER PURSUANT TO 11 U.S.C. §§ 105(A) AND 502(C).

The City of Prescott, Arizona; City of Surprise, Arizona; Carroll County, Maryland; and Henry County, Missouri (collectively, the "Municipalities"), by and through their undersigned attorneys, submit this Objection To Debtors' Motion For Entry Of Order Pursuant To 11 U.S.C. §§ 105(a) And 502(c) (the "Objection"), by which the Municipalities are asking this Court to deny the Debtors' request to implement a process for estimating categories of claims.

I. PRELIMINARY STATEMENT

The Debtors' Estimation Motion is a complex sleight of hand: it picks and chooses among concepts incorporated in the Bankruptcy Code, rearranges them to suit purposes the Code never intended, and requests relief that would entirely negate the carefully crafted protections the Code provides for creditors, all in the service of an expensive and unnecessary plan confirmation process.

The weakness in the Debtors' Estimation Motion is apparent from its very title: it is, among other things, a motion for an order "estimating Debtors' aggregate liability for certain

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are: Insys Therapeutics, Inc. (7886); IC Operations, LLC (9659); Insys Development Company, Inc. (3020); Insys Manufacturing, LLC (0789); Insys Pharma, Inc. (9410); IPSC, LLC (6577); and IPT 355, LLC (0155). The Debtor's mailing address is 1333 South Spectrum Blvd. #100, Chandler, Arizona 85286.

categories of claims," citing Sections 105 and 502(c) of the Bankruptcy Code, for the purpose of formulating and confirming a plan of reorganization.

There is no statutory basis for the relief the Debtors seek.

Section 502 addresses the allowance and disallowance of claims – not classes of claims. It does not apply to this situation in the first place.

Nor does any other section of the Bankruptcy Code contemplate estimating the aggregate amount of categories of claims. Therefore section 105 does not apply, because there is no provision of the Code to effectuate.

Even if Section 502 contemplated estimating categories of claims, the circumstances mandating estimation under Section 502(c) do not apply in this case. Section 502(c) provides that when it would unduly delay the closing of the estate to go through the regular process of liquidating a claim, or when a claim is for an equitable remedy, the claim must be reduced to a dollar amount and estimated.

The Debtors' Motion entirely ignores the basis for 502(c) and makes the unwarranted assumption that there are only two choices: exhaustively litigating each claim outside of the context of chapter 11, or rushing into an unnecessary, unauthorized, and ultimately useless estimate of the aggregate amount of several classes of claims the Debtor has identified. The Debtors do not even attempt to argue that the normal process for liquidating litigation claims in chapter 11, which has been done in hundreds of cases, is unavailable in these cases or that implementing such a process would unduly delay the closing of this estate.

Moreover, estimating a class of claims for purposes of plan confirmation is fruitless. It does not streamline the plan voting process, because although it would be possible to determine whether the numerosity requirement for approval is satisfied, it would not be possible to determine whether the 2/3 amount requirement is satisfied, because in an aggregate estimation there is no evidence of how much each creditor's claim is for.

Even if there were authority in the Code to estimate a class of claims for plan voting purposes, the Debtors have made no showing that their class division is the right one. For

example, personal injury claims and municipalities' litigation claims are all general unsecured claims – why would they be in different classes for plan purposes?

Finally, granting the relief the Debtors seek would not only do the Debtors no good, but it would have potentially disastrous consequences for the creditors in this case. The claimants here also have actions pending against scores of other defendants. The Debtors' Estimation Motion is entirely devoid of protections against claims of collateral estoppel and res judicata, which could severely limit recoveries against other defendants. If the Court were ever inclined to create an estimation process, the order granting that relief would have to be precisely tailored to protect the claimants' rights in other cases.

II. THE DEBTORS' ESTIMATED PROCEDURES AND CLASSIFICATIONS ARE FUNDAMENTALLY UNFAIR AND ONE-SIDED

a. The Debtors Have Not Established That Estimation Of The Claims Is Required To Avoid Undue Delay.

The Debtors bear the burden of establishing that estimation of claims is necessary to avoid undue delay.[2] *In re Dow Corning Corp.*, 211 B.R. 545, 562-74 (Bankr. E.D. Mich. 1997). "[W]hen dealing with a motion for estimation, a court starts with a baseline knowledge of what is involved with liquidating a claim. Therefore, the party moving for estimation must show that the normal mode of liquidating the claim would create undue delay in the bankruptcy process." *Id*. at 573. "From the plain language of 502(c), it is clear that estimation does not become mandatory merely because liquidation may take longer and thereby delay the administration of the case. Liquidation of a claim, in fact, will almost always be more time consuming than estimation. Nonetheless, bankruptcy law's general rule is to liquidate, not estimate. For estimation to be mandatory, then the delay associated with liquidation must be undue." *Id.* at 560-61.

[2] Section 502(c) provides that when it would unduly delay the closing of the estate to go through the regular process of liquidating a claim, or when a claim is for an equitable remedy, the claim must be reduced to a dollar amount and estimated.

Here, Debtors did not meet their required showing of undue delay. The Debtors' purported basis for estimation is that "[g]iven the volume of claims. litigating each of them would unduly delay administration of the Debtors' estate, potentially by years, if it were necessary to reduce them all of them to a final judgment." (Motion ¶ 28.) Yet the Debtors never argue that the normal process for liquidating litigation claims in Chapter 11 is unavailable. Nor do Debtors assert that implementing a liquidation process would in any way delay the closing of their estate. Instead, the Debtors generally allege that estimation is necessary because it may take "years" to litigate the claims. This is not sufficient.

Because Debtors have not provided any information that the delay associated with liquidation is undue, they have not sufficiently met their burden at this time. Their Motion should be denied.

b. The Debtors' Proposed Schedule For Estimation Of Claims Is Improper And Violates Due Process.

Debtors' proposed "streamlined" schedule for estimation of unliquidated claims is improper and insufficient to satisfy the requirements of 11 U.S.C. § 502(c). (*See* Motion ¶¶ 30-34.) Section 502(c) was designed to serve two purposes: first, "to avoid the need to await the resolution of outside lawsuits to determine issues of liability or amount owed by means of anticipating and estimating the likely outcome of these actions." *In re Enron Corp.*, No. 01-16034, 2006 WL 544463, at *3 (Bankr. S.D.N.Y. Jan. 17, 2006) (internal citation omitted). And second, "to promote a fair distribution to creditors through a realistic assessment of uncertain claims." *Id.* Without a doubt, as detailed below, Debtors' proposed, truncated discovery schedule for estimation does not "promote a fair distribution to creditors through a realistic assessment of uncertain claims." *See id.*

Additionally, "[u]sing estimation for claims allowance purposes, while permissible (and, indeed, expressly mentioned in section 502 (c)(1)), can sometimes raise due process concerns . . . ." *In re Chemtura Corp.*, 448 B.R. 635 , 649 n.46 (Bankr. S.D.N.Y. 2011).

Debtors' proposed schedule for the estimation of claims raises several due process concerns:

- Debtors are requiring all claimants to engage in a truncated schedule to locate and retain potential experts "within 21 days after the entry of the Proposed Scheduling Order." (Motion ¶ 33 (b) (emphasis added).) Not only will claimants need to expedite their search for an expert(s), but they must determine whether an expert has a conflict of interest—such that a new expert would have to be retained—and go through the approval process for retaining an expert. This is incredibly difficult to be done within three weeks with a case of this magnitude, which may require the retention of several different experts for certain claimants.[3] Debtors' proposal risks that claimants will lose their right to engage an expert to assist with preparing their cases. This should not be allowed.

- Debtors also note that they "will give such Participating Party access to certain documents produced by Insys in connection with various investigations and actions, as well as pleadings or settlements, in the form previously produced, most of which are standard single-page tiff format with unique page identifiers and either extracted or OCR text." (Motion ¶ 33 (c).) Yet Defendants failed to provide any substantive information about their document production. For example, they did not describe the overall size of the files that they will produce (i.e., the number of gigabytes or total number of pages of documents), where the documents will be stored, how the documents were collected, and who initially produced the documents; how the document production is organized; and the extent Debtors have asserted privilege over any of the materials in the document production, including whether a privilege log exists or will need to be created. Without supporting information about the document production, there is no way for claimants to determine whether Debtors will provide a sufficient production. As such, claimants, and the Court, cannot determine whether Debtors will engage in an adequate production for purposes of this Motion.

- Worse, Debtors provide that "[a]ll fact discovery requests shall be served within 24 days after the entry of the Proposed Scheduling Order; provided, however, that the document requests shall be limited to requests for categories of documents that are not already available in the Document Production." (Motion ¶ 33 (d) (emphasis added).) Depending on the volume of Debtors' production, it could take several weeks, or even months, for claimants to grasp the scope of documents that were produced, plus the need for additional time to determine whether there are any gaps in Debtors' production. Allowing only 24 days to review Debtors' production and determine if any additional discovery is necessary only benefits the Debtors because

[3] Further complicating matters is that some municipalities will likely need approval from a committee or other process before being allowed to retain an expert. It is unknown how long the process may take for a local government to act on a request to hire an expert.

claimants would be deprived of their right to investigate information relevant to their claims. Thus, Debtors' proposal is both arbitrary and unfair.

- Finally, Debtors propose that all "fact depositions shall be completed within 14 days of service of the responses and production described in (e) [regarding service of responses to discovery within 21 days of such requests]." (Motion ¶ 33 (f).) This is a highly complicated Chapter 11 proceeding that involves, among others, multiple states, municipalities, and individual claimants. Claimants will necessarily need to take depositions of Debtors' officers, directors, and key employees (plus coordinate deposition dates with Debtors and claimants), as well as subpoena third parties for deposition. Depositions cannot be adequately completed within this shortened time period, particularly where the parties are required to review Debtors' document production, engage experts, and serve written discovery in mere weeks. Debtors' proposed timeline for the completion of all fact depositions, therefore, unfairly benefits the Debtors.

Based on the above, Debtors' proposed schedule for estimation is contrary to the purpose of § 502(c). Debtors have essentially proposed eliminating all of claimants rights without any regard to due process or the merits of their claims. Adoption of Debtors' proposal would prevent claimants' meaningful discovery to determine a fair value of their claims. This should not be allowed, and Debtors' Motion should be denied.

c. <u>The Debtors' Proposed Categories Of Claimants Is Improper.</u>

Similarly, Debtors' proposed categories of claimants, that is, the "State AG Claims," "Municipality Claims," "Personal Injury Claims," and "Private Insurer Claims," (Motion ¶¶ 16-22), is also improper. For claim estimation purposes, "claims are to be appraised on the basis of what would have been a fair resolution of the claims in absence of bankruptcy." *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 722 (D. Del. 2005). Here, all of the claims in this matter are litigation claims. There is nothing in the Bankruptcy Code that allows a debtor to segregate identical claims into different categories simply for the debtor's convenience to confirm his or her plan.[4]

[4] Additionally, Debtors' citation to *In re Armstrong World Industries Inc.*, 348 B.R. 111 (D. Del. 2006), for the proposition that estimation can be used to favor one unsecured class over another is inapposite. (Motion ¶ 27.) There, the court was, among other things, concerned with whether the debtor's plan favored one class of creditors that had pending asbestos claims versus another class consisting only of future asbestos claims. *Id.* at 123-24. Unlike *In re*

Moreover, because the claims in the above-entitled matter are litigation claims, all of the claims have the same priority. Since all of the claims are litigation claims, this begs the question of why Debtors believe they must estimate how much is in each "category" of claims? The basis of Debtor's proposal cannot be that it would streamline the voting process because it would be impossible to determine whether the two-thirds amount required to approve a plan is satisfied.[5] In fact, there is no legitimate basis to discriminate against claimants other than to gerrymander the process to confirm the Debtors' Chapter 11 plan. This is improper and should not be allowed. For this additional reason, Debtors' Motion should be denied.

Even if there was authority in the Bankruptcy Code for discriminating against claimants with identical claims for plan voting purposes—which there is not—the Debtors have not indicated that their proposal is the ideal way to deal with the claims at issue. The Debtors have not provided any basis for why it is preferable to separate, for example, those who have personal injury claims from those municipalities with claims. The pending claims against Debtors are based on the same underlying facts, namely, wrongful conduct in connection with Debtors' marketing and sales of its opioids products.

However, should the Court be inclined to adopt a proposal that categorizes claims in the above-entitled matter, the Municipalities respectfully requests that the Court order additional briefing so that all parties can propose alternative categorizations of claims.

d. <u>Granting The Debtors' Requested Relief Will Have Unfair Consequences On Claimants.</u>

Finally, granting Debtors' requested relief not only benefits them at the expense of their creditors, but may also have disastrous consequences for the creditors outside of the bankruptcy proceeding. All of the claimants have actions pending against Debtors and scores of other defendants for wrongful conduct in connection with the marketing and sale of opioid-related products. The Debtors' Motion, however, does not mention the protection against claims of collateral estoppel and res judicata if a claimant participates in the bankruptcy and non-

Armstrong, Debtors are not proposing to split claimants by pending and future claims. Instead, Debtors are attempting to discriminate against claimants that currently have pending claims against them. Neither *Armstrong* nor the Bankruptcy Code allows such discrimination.

[5] This is because there is no evidence of the amount that each creditor's claim(s) is worth.

bankruptcy proceedings. It would severely limit the Municipalities ability to pursue their claims against other defendants in its matter if it is bound by the valuation of its claims in this case.

Therefore, if the Court is inclined to grant the Motion, Prescott respectfully requests that the Court order that any findings in this matter will not have res judicata or collateral estoppel effects on claimants' rights in other cases.

III. CONCLUSION.

For the foregoing reasons, the Municipalities requests that the Court deny the Motion in its entirety.

Dated: June 25, 2019

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CERTIFICATE OF SERVICE

I, Michael Busenkell, hereby certify that on June 25, 2019, I caused a true and correct copy of the *Municipality Litigation Claimants' Objection to Motion of Debtors for (I) Entry of Orders Pursuant to 11 U.S.C. Sections 105(a) and 502(c) (A) Establishing Procedures and Schedule for Estimation Proceedings and (B) Estimating Debtors' Aggregate Liability for Certain Categories of Claims, (II) Entry of Protective Order, and (III) Subordination of Certain Penalty Claims* to be served via CM/ECF upon those parties registered to receive such electronic notifications, via Hand Delivery on the parties listed below, and additionally served via First Class Mail, postage prepaid upon the parties listed on the attached service list.

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