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) Objection Deadline: November 1, 2019 at 4:00 p.m. Hearing: November 8, 2019 at 9:00 a.m. Re: Docket Nos. 613

STATE OF FLORIDA'S OBJECTION TO DISCLOSURE STATEMENT FOR JOINT CHAPTER 11 PLAN OF LIQUIDATION PROPOSED BY INSYS THERAPEUTICS, INC. AND ITS AFFILIATED DEBTORS

Creditor, The State of Florida (the "**State**"), by and through its undersigned counsel, files this objection (the "**Objection**") to the *Disclosure Statement for Joint Chapter 11 Plan of Liquidation Proposed by Insys Therapeutics, Inc. and its Affiliated Debtors* [ECF No. 613] (the "**Disclosure Statement**"),[2] and in support thereof, states as follows:

PRELIMINARY STATEMENT[3]

The Debtors filed these cases approximately four months ago with the intent to sell substantially all of their assets and immediately cease all business operations. The Debtors have now sold substantially all their assets and their only remaining obligations are to wind-down their

[1] The above-captioned debtors in these cases (the "Debtors"), along with the last four digits of each Debtor's federal tax identification number, 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 Debtors' mailing address is 1333 South Spectrum Blvd. #100, Chandler, Arizona 85286.

[2] The State has also filed a joinder to the objection to the Disclosure Statement filed by the by the court-appointment claimants leadership team in *In re National Prescription Opiate Litigation*, Case No. 17-md-02804, MDL No. 2804 (N.D. Ohio) [ECF No. 835].

[3] Capitalized terms used but not defined in the Preliminary Statement have the meanings ascribed to them in the body of the Objection.

business operations, collect royalties (if any), liquidate any contingent assets, and distribute the proceeds to their creditors.

The Debtors no longer have a business to operate. Yet, rather than file a typical "pot" plan whereby creditors whose claims are entitled to the same priority share *pro rata* in distributions, the Debtors have proposed an unnecessarily complicated and inequitable distribution scheme that is unfairly skewed in favor of creditors who have a voice in the Committee (primarily trade creditors) and prejudices those who have suffered the most disproportionate amount of damages from the Debtors' wrongdoing—the States of the United States of America. To that end, the Debtors, without any commercial or reasonable justification whatsoever, have improperly classified claims of equal priority separately in their Plan and have unfairly proposed disparate treatment of such similarly situated creditors to obtain an impaired voting class to support the Plan.

Despite an extremely complicated and expensive claims allowance process proposed by the Debtors early on in these cases, and ensuing weeks of negotiations among the Debtors, the Committee, the State, and other parties, no agreement with respect to allowance or treatment of the State's claims has been reached. Instead, without rhyme or reason, the Debtors have lumped the States, Municipalities, and Tribes in the same class (the "**SMT Class**") and have ascribed an artificially low aggregate claim value to the SMT Class of $597 million. Even more troubling, the Debtors acknowledge that the members of the SMT Class may have competing claims against each other. Yet the Debtors have abdicated their responsibilities to resolve claims and propose that the members of the SMT Class fend for themselves and figure out amongst themselves how the diminutive distribution to the SMT Class should be apportioned. The only parties that entered into an agreement with the Debtors regarding the allowance and extent of their claims are those with

voices on the Committee, who, by their influence, are slated to receive disparately favorable treatment under the Plan.

The Disclosure Statement describes a Plan that is patently unconfirmable. Not only does the Plan violate the classification requirements of the Bankruptcy Code and fail to treat similarly situated classes fairly and equitably, it also provides for unjustified releases and injunctions in favor of non-Debtor insiders and is not demonstrably feasible. As such, it would be a waste of time and resources to solicit votes on the Plan as described by the Disclosure Statement.

In addition to describing a fatally flawed Plan, the Disclosure Statement contains inadequate information for creditors to make an informed judgment about whether to accept or reject the Plan. The Disclosure Statement provides remarkably little detail about how Plan distributions will be funded and contains no projections or feasibility analysis other than general statements regarding potential sources of recovery. For example, while the Disclosure Statement vaguely refers to the preservation of avoidance actions, it fails to specify what those potential avoidance actions may be, who will bring them, who the likely targets of such litigation might be, and how these avoidance actions will benefit the estate. Moreover, the Disclosure Statement provides zero justification for the broad releases and injunctions in favor of insiders of the Debtors for creditors to determine whether such extraordinary relief is warranted. As such, the Disclosure Statement does not contain adequate information for a creditor to make an informed determination regarding whether to vote to accept or reject the Plan as required by section 1125 of the Bankruptcy Code.

Unless the Debtors radically amend the Plan and Disclosure Statement, the confirmation process will not be consensual and will result in increased administrative costs to these estates that

are, or will likely become, administratively insolvent. For these reasons, the Disclosure Statement should not be approved.

BACKGROUND

A. Procedural History & Relevant Facts

1. On June 10, 2019 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the District of Delaware (the "**Court**").

2. On the Petition Date, the Debtors filed the *Motion of Debtors for (I) Entry of Orders Pursuant to 11 U.S.C. §§ 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* [ECF No. 29] (the "**Estimation Motion**").

3. On June 19, 2019, the Office of the United States Trustee appointed the Official Committee of Unsecured Creditors (the "**Committee**") [ECF No. 88]. The Committee is comprised of one large trade vendor (that is also a co-defendant in numerous opioid litigation proceedings), an insurance company, a hospital, and five individual personal injury claimants.

4. Given that there are no State entity members on the Committee, the States have not had equal access to or influence upon the Debtors for the purpose of promulgating a fair consensual plan, notwithstanding that governmental creditors hold, by far, the largest distinct and aggregate claims in these cases.

5. On August 5, 2019, the Court entered an order [ECF No. 398] appointing former Bankruptcy Judge Carey as mediator and setting mediation for August 13-20, 2019 to facilitate

discussions among the Debtors, the Committee, and other mediation parties (including various state attorneys general and other unsecured creditors) regarding, among other things, the appropriate allocation of estate value among unsecured creditor classes. The participating parties continued settlement discussions subsequent to the conclusion of the mediation through mid-September.

6. As of the date of this Objection, the Debtors have sold substantially all of their assets. *See* various orders of this Court approving several asset sales at ECF Nos. 515, 525, 641, and 767.

B. <u>The Plan and Disclosure Statement</u>

7. On September 17, 2019, the Debtors filed their *Joint Plan of Liquidation of Insys Therapeutics, Inc. and its Affiliated Debtors* [ECF No. 612] (the "**Plan**"), along with the Disclosure Statement.

8. Without citing any justification for doing so, the Debtors have separately classified general unsecured creditors into 5 distinct classes in the Plan, each of which is receiving materially disparate treatment as a result of the "Plan Settlement" with the "Settling Creditors," consisting of the Committee and certain Personal Injury Claimants, Hospitals, NAS Children, Insurance Ratepayers, certain non-MDL Municipalities, and the TPPs (as such terms are defined in the Disclosure Statement).

9. The State is not one of the Settling Creditors, nor are most the Debtors' scheduled creditors or creditors that will eventually file claims prior to the December 9, 2019 claims bar date for government creditors.

10. The Debtors and the Settling Parties have unilaterally ascribed an estimated aggregate total claim of $597 million to the SMT Class (the "**Coerced SMT Claim Cap**"). *See*

Disclosure Statement at 44. The methodology for quantifying the Coerced SMT Claim Cap employed by the Debtors and Settling Parties is a mystery. What is clear, however, is that the Coerced SMT Claim Cap is artificially and materially undervalued. The Governmental Bar Date is December 9, 2019. The State believes that the aggregate amount of the SMT Class's claims will be several material multiples greater than the Coerced SMT Claim Cap.

11. By way of example only, on August 26, 2019, an Oklahoma state court entered a judgment against a group of opioid manufacturers. *See State v. Purdue Pharma LP*, No. CJ-20170816, 2019 WL 4019929 (Okl. Dist. Aug 26, 2019) (the "**Oklahoma Judgment**"). In the Oklahoma Judgment, the court found that the damages for **one year** of abatement of the same type of claims asserted by the State of Oklahoma against Insys equaled **$572,102,028**. That was the amount of damages for one type of claim for one year for one defendant. The cost of one year of abatement for one defendant, tracking only one of the theories of recovery under which the State sued the Debtors pre-Petition Date, is nearly equal to the Coerced SMT Claim Cap proposed by the Debtor and Committee as an aggregate allowed amount of the claims of **all** 50 States, plus territories, plus approximately 1,000 municipalities, plus 65 Native American tribes.

12. The Coerced SMT Claim Cap is a fiction and the Debtors have failed to explain why and how they and the Committee have proposed and calculated the Coerced SMT Claim Cap. The State disputes the Coerced SMT Claim Cap and believes other States and governmental entities, which together with the State have the most disproportionately large pecuniary interests in these cases, will also object to this glaring underestimation.

13. The Debtor and Committee are not shy about acknowledging that they do not want to deal with the State's claim. Indeed, they admit that "[r]ather than expend Estate resources in resolving [disputes between the States on the one hand and the MDL plaintiffs and Tribes on the

other] … the Debtors and the Creditors' Committee agreed … to combine these parties into a single Class 7 and allow the parties … in this class to determine amongst themselves the appropriate allocation of creditor recoveries among the various claimants in Class 7… ." (Disclosure Statement at P. 43).

14. Not only have the Debtors lumped admittedly competing claims together in one class and ascribed an artificially low number to the aggregate SMT Class claim, they have also abdicated their responsibility to deal with the claims by leaving it up to the SMT Class members to figure out claims allocation for themselves post-confirmation, *i.e.*, after the Chapter 11 administrative fees have been paid and after it becomes a liquidating trustee's problem.[4]

a. Classification and Treatment of Claims

15. The Debtors, without explanation, have placed substantially similar general unsecured claims in distinct classes and propose to treat general unsecured creditors in the most disparate of ways without articulating any justification for doing so.

16. The Disclosure Statement and Plan describe 5 different impaired classes of general unsecured creditors—(i) "Trade and Other Unsecured Claims" (Class 3), (ii) "Insurance Related Claims" (Class 4), (iii) "Hospital and NAS Monitoring Claims" (Class 5), (iv) "DOJ Claims" (Class 6); and (v) "SMT Group Claims" (Class 7)—and each class is slated to receive different recoveries under the Plan.

17. For example, the Class 3 trade class, estimated by the Debtors at $50 million, will receive a guaranteed 7% on their claims, financed partially by the first $3 million into the estate

[4] As of the date hereof, the reported Chapter 11 administrative fees and expenses through August 31, 2019 total approximately $17.9 million according to the estate professionals' monthly fee statements. Given the brief duration of these cases thus far, the State suspects that several millions of additional dollars have been incurred by estate professionals from September through the date of this filing.

(after all professional fees have been paid in full) (the "**Trade Set Aside**"). To put the scenario into context, after payment of administrative fees and the guaranteed $3 million to the trade creditors), the SMT Class and the Department of Justice (the "**DOJ**") together receive 45%[5] of available[6] estate assets up to $38 million (shared *pro rata* between the DOJ Claim (31.4%) and the SMT Class (68.6%)). As such, the most that could be distributed in the aggregate on account of the Coerced SMT Claim Cap under this scenario (assuming the liquidating trustee even collects and distributes $38 million) toward the aggregate SMT Group claim is $10,804,500 (i.e., 1.8% of a claim amount that is, in the kindest of terms, a "fiction").[7]

18. While in a reorganization case, there may be a reasonable business justification for separately classifying and disparately treating creditors of equal priority,[8] here, there is no on-going business and no commercial reason to preserve relationships with trade creditors. The Debtors' assets have all been sold and liquidated (except for the collection of Subsys royalty payments and whatever is collected from insurance policies and avoidance actions, which will also require the incurrence of more professional fees to collect).

19. The Disclosure Statement contains no explanation for the Plan's claims classification and treatment scheme. The Debtors have articulated no valid business or other reasonable justification for classifying the SMT Class's general unsecured claims separately from

[5] The other 55% goes to other unsecured creditors (which include the trade creditors, creditors holding insurance related claims, and Hospital/NAS claims). One must question why one group of unsecured claims is receiving less than other unsecured creditors whose claims are not entitled to any special priority under the Bankruptcy Code.

[6] (Net of professional fees, taxes, and other operating expenses)

[7] Any dollars in excess of $38 million, will go 80% to SMT Groups and DOJ to be distributed *pro rata* (the "**Subordinate Distribution**"). However, even the $38 million threshold is speculative and, at best, aspirational. There is no guarantee or even a reasonably calculated projection for availability of cash beyond the Trade Set Aside. Similarly, there is no guarantee of any future recoveries from products liability insurance (ear marked to Class at 5% of recovery) as the insurers have denied coverage and litigation costs will likely erode the value of proceeds available.

[8] (e.g., where the preservation of relationships with trade creditors or landlords is indispensable to preservation of reorganized debtor's enterprise value and ongoing business operations; or for the sake of administrative convenience).

the trade or personal injury claimants or for the inequitable and preferential treatment proposed for the other general unsecured creditors. Clearly (and even if the Coerced SMT Claim Cap were undisputed), the SMT Class's aggregate claim and the large number of creditors of which the SMT Class is comprised would swamp a singular general unsecured class and dictate its vote on the Plan.

b. <u>Plan Funding and Distributions</u>

20. The Debtors' reported cash at the time of the filing of the Plan is not enough to effectuate the Subordinate Distribution, and perhaps not even enough, after payment of all administrative claims and reserves for the liquidating trustee, to effectuate the Trade Set Aside in full.[9] Notwithstanding the Debtors' and the Committee's access to their respective able and well-compensated financial advisors, the Debtors have included no financial projections or estimations of recovery in support of the Plan.[10] Thus, it is unclear where the Plan's funding will come from beyond what the Debtors presently have on deposit.

21. The Disclosure Statement is silent regarding the collectability of $7 million of receivables listed on the consolidated balance sheet attached to the Debtors' Monthly Operating Report for August 2019 [ECF No. 674] (the "**August MOR**"), and which amount has decreased to approximately $6.38 million according to the September MOR. Similarly, there is no indication in the Disclosure Statement or the balance sheets attached to the August MOR or the September

[9] *See* Debtors' Monthly Operating Report for the period ending September 30, 2019 [ECF No. 827] (the "**September MOR**"). Per the September MOR, ending cash for the month of September was approximately $53 million, which sum includes proceeds of the sales of certain of the Debtors' assets. As of September 30, 2019, the Debtors' consolidated income statements show a loss of $13,154,171. Given that there are no revenue-generating operations and that the accrued estate professional fees and expenses as of September 2019 are largely unknown, the losses for the month of October (on an accrual basis) are likely significantly greater. From a cash flow perspective, the cash in these estates is quickly dissipating with no prospect for replenishing those losses.

[10] While this is a Plan of liquidation, the disclosure statement should include at least some estimates of recovery and available cash on the effective date of the Plan that would enable claimholders to make an informed decision whether to accept or reject the Plan.

MOR that the Debtors have any other outstanding receivables other than potential royalty payments related to the sale of Subsys and Lazanda, which the Debtors represented at the sale hearing could bring in anywhere from $0.00 to $20 million.

22. Moreover, any other sources of potential recoveries are speculative at best. For example, the Plan generally attempts to preserve avoidance actions, but fails to specifically describe the parties against whom such actions may be brought or even provide a general ball-park range of potential recoveries from avoidance actions.

23. Similarly, the Debtors indicate that the personal injury claimants will benefit from recoveries from the Debtors' insurance policies yet fail to disclose whether these are wasting policies. Moreover, given that coverage has already been denied by the primary insurer, the potential recovery (considering costs of litigating against the insurers vis-à-vis available policy amounts) is speculative and likely nominal.

c. Exculpations, Releases, and Injunctions

24. The Plan includes broad releases for and injunctions against proceeding against the Debtors, its professionals, assigns, employees, directors and officers – all called "Exculpated Parties" or "Released Parties". There is a reference to a list of parties excluded from the "Exculpated Parties" or "Released Parties," but no such list was attached to either the Plan or the Disclosure Statement.

25. Here again, the Debtors seek approval in the Plan of extraordinary relief in the form of releases and exculpations of non-Debtors without consent and without explaining why such parties should be released from valid third-party claims, or why such third parties should be enjoined from pursuing valid claims against non-debtor parties.

OBJECTION TO DISCLOSURE STATEMENT[11]

26. The Court should not approve the Disclosure Statement because (i) it fails to provide adequate information for creditors to make an informed decision of whether to vote to accept or reject the Plan as required by section 1125(b) of the Bankruptcy Code and (ii) it describes a Plan that is so patently unconfirmable that solicitating votes thereon would be a waste of time and resources.

A. The Disclosure Statement Contains Inadequate Information in Violation of Section 1125(a)(1) of the Bankruptcy Code.

27. Disclosure is essential under Chapter 11 of the Bankruptcy Code. Section 1125(a)(1) of the Bankruptcy Code requires that the proponent of a plan provide information about the debtor and the plan adequate to enable a hypothetical reasonable investor to make an informed judgment about the proposed plan. *See In re Lower Bucks Hosp.*, 571 Fed. Appx. 139, 141 (3rd Cir. 2012) (*citing* 11 U.S.C. §§ 1125(a)(1); 1126(b)(2)). "Without information sufficient to allow parties voting on the plan the opportunity to arrive at an independent and informed judgment, the disclosure statement cannot be approved." *In re. East Ridley Corp.*, 16 B.R. 429 (Bankr. E.D. Penn 1982).

28. The Disclosure Statement inadequately describes key considerations that are critical to creditors' ability to make an informed judgment about the Plan. Most notably, the Disclosure Statement fails to sufficiently describe how distributions to creditors will be funded, other than from the limited and uncertain funds the Debtors currently have on hand. As noted above, the Disclosure Statement includes no projections or estimates of recovery in support of the

[11] In bringing this Objection, the State does not waive its right to supplement the bases set forth herein for the Court to deny approval of the Disclosure Statement and numerous other independently sufficient objections to confirmation that it can and will raise in the event the Court conducts a confirmation hearing on the Plan.

Plan and fails to adequately describe what potential sources of recovery may be available. Although the Plan generally attempts to preserve avoidance actions, the Disclosure Statement provides no specific details regarding what claims may be brought, the parties against whom such actions may be brought, or even a possible range of monetary recoveries that may result from any avoidance actions. Moreover, the Debtors make no representations regarding the collectability of the $7 million of receivables identified in the August MOR (now $6.38 million under the September MOR) or whether the Debtors have any other outstanding receivables other than potential royalty payments related to the sale of Subsys and Lazanda, which by the Debtors own admission could yield nothing at all or up to $20 million. Such range demonstrates that any recovery on account of such royalties are wholly speculative.

29. Additionally, the Debtors indicate that the personal injury claimants will benefit from recoveries from the Debtors' insurance policies, yet fail to disclose critical details about such policies, such as whether they are wasting policies. Nor do the Debtors disclose the potential costs of litigating against the insurers, who have denied coverage, vis-à-vis available policy amounts. As such, creditors are left largely in the dark about how the Plan distributions will be funded and whether the Plan is feasible.

30. Moreover, the Debtors propose to relinquish any claims that third parties may have against non-Debtor insiders without any explanation of why such parties should be released and insulated from valid third-party claims, and the specific identities of those who are excluded from such protections.

31. Lastly, the Debtors should be required to explain the methodology used in estimating claims, including the Coerced SMT Claim Cap. Not only does the SMT Class have a right to know why their claims are being artificially depressed, but other creditors who are sharing

in the same Plan distributions as the SMT Class should also be provided with a realistic estimate of all claims.

32. Absent further details and explanations regarding how the Debtors will fund Plan distributions, why the extraordinary non-Debtor releases and injunctions are appropriate here, and the basis for the Debtors' claims estimates, creditors cannot make an informed decision of whether to accept or reject the Plan. As such, the Disclosure Statement does not contain adequate information as required under section 1125 of the Bankruptcy Code and cannot be approved as drafted.

B. The Disclosure Statement Should Not Be Approved Because It Describes a Plan that Is Patently Unconfirmable

33. The Court should further deny approval of the Disclosure Statement because the Plan it describes is incapable of being confirmed. Where it is clear that a plan cannot be confirmed and is thus patently unconfirmable, it is appropriate for a court to refuse to approve the disclosure statement. *See e.g.*, *In re American Capital Equipment, LLC,* 688 F.3d 145, 154 (3rd Cir. 2012) ("[A] '([c]ourt [should] not proceed with the time-consuming and expensive proposition of hearings on a disclosure statement … when the plan may not be confirmable because it does not comply with [confirmation requirement]'.") (citations omitted); *see also In re Phoenix Petroleum Co.*, 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) (where plan is so fatally flawed that confirmation is not possible, the court should refuse to consider the adequacy of disclosure); *In re Market Square Inn, Inc.*, 163 B.R. 64, 67-8 (Bankr. W.D. Pa. 1994) ("[S]ince it is clear that the plan is not capable of confirmation, it is appropriate to refuse approval of the disclosure statement."); *In re Filex, Inc.*, 116 B.R. 37, 41 (Bankr. S.D.N.Y. 1990) ("[The] court will not approve disclosure statement for an admittedly unconfirmable plan"). While Plan confirmation issues are typically reserved for the confirmation hearing, "[c]ourts have recognized that 'if it appears there

is a defect that makes a plan inherently or patently unconfirmable, the Court may consider and resolve that issue at the disclosure stage before requiring the parties to proceed with solicitation of acceptances and rejections and a contested confirmation hearing.' *American Capital Equip.*, 688 F.3d at 153 (citations omitted); *see also In re Main St. AC, Inc.,* 234 B.R. 771, 775 (Bankr.N.D.Cal.1999) ("It is now well accepted that a court may disapprove of a disclosure statement ... if the plan could not possibly be confirmed."). The instant Plan described by the Disclosure Statement cannot be confirmed because it violates various confirmation requirements under section 1129 of the Bankruptcy Code.

i. *The Plan Improperly Classifies General Unsecured Claims and Unfairly Discriminates Against the SMT Class*

34. A bankruptcy court may only confirm a plan that "complies with the applicable provisions of" the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). Section 1122 of the Bankruptcy Code, governing the classification of claims and interests, provides that only substantially similar claims may be placed in the same class, and permits a separate class of certain claims for administrative convenience. *Id.* at § 1122. While section 1122 is silent on whether substantially similar claims may be separately classified, courts have recognized that substantially similar claims that share common priority should generally be placed in the same class. *Save Our Springs (S.O.S.) Alliance, Inc. v. WSI (II)-COS, L.L.C. (In re Save Our Springs Alliance, Inc.)*, 632 F.3d 168, 174 (5th Cir. 2011); *see also In re Torgro Atl. City, LLC*, No. 08-13458, 2009 WL 1288367, at *11 (Bankr. D.N.J. May 7, 2009) ("Unsecured creditors will ordinarily comprise once class, whether trade, tort, public held debt or a deficiency of a secured creditor."). Courts in this Circuit have permitted deviation from this general rule only where the plan proponent articulates a "reasonable" justification for separately classifying substantially similar claims and where such classification is not designed solely to gerrymander an affirmative impaired vote on the plan to

satisfy section 1129(a)(10) of the Bankruptcy Code. *See Creditors Comm. v. Route 37 Bus. Park Assocs. (In re John Hancock Mut. Life Ins. Co.)*, 987 F.2d 154, 155 (3d Cir. 1993) (holding that separate classification of trade creditors [versus claims of insurance company] based on their [respective different] prepetition recourse was improper) (citing *In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987)); *see also In re Tribune Co.*, 476 B.R. 843, 853 n.l8 (Bankr. D. Del. 2012) ("[S]eparate classification of similar claims is permissible so long as there is a reasonable basis for separate classification and separate classification is not designed to 'gerrymander' votes or for an arbitrary or fraudulent purpose.").

35. The Debtor's separate classification of the Settling Parties from other creditor groups holding claims of the same priority appears to be nothing more than an impermissible attempt to gerrymander an impaired vote in favor of the Plan. In the instant cases, there is no distinction in the legal character of the unsecured claims; i.e., the trade creditors are merely general unsecured creditors, as is the State, as are the personal injury claimants, as are each and every creditor arbitrarily placed by the Debtors and the Committee in the SMT Class. Because all general unsecured creditors have the same rights to share *pro rata* in the Debtors' distributions after satisfaction of claims of higher priorities, they should be classified in the same class. The Debtors must, and have not, articulated any reasonable justification for separately classifying general unsecured claims and providing these claims with disparate treatment. Given that the Debtors have no ongoing business, the Debtors cannot cite to any commercially reasonable business justification for separately classifying the trade class and providing them with preferential treatment.

36. Absent any reasonable justification, the Plan's proposed classification scheme appears to be an improper attempt to gerrymander the affirmative impaired vote of the Settling

Parties' class. Given the magnitude of the claims of the States, municipalities, and tribes both in numerosity and the true value of their respective claims (not the fictitious and unrealistic Coerced SMT Claim Cap), and that the vast majority of the members of the SMT Class are not Settling Parties, the votes of the SMT Class rejecting the Plan would dominate a single class of unsecured creditors and preclude confirmation because no impaired class would vote in favor of the Plan as required under section 1129(a)(10) of the Bankruptcy Code.

37. Moreover, the disparate treatment of the Settling Parties and the SMT Class under the Plan demonstrates unfair discrimination in violation of section 1129(b)(1) of the Bankruptcy Code. This section provides that in the cram down context, a plan cannot be confirmed if a class of impaired creditors has not accepted the plan, unless, among other things, "the plan does not discriminate unfairly, and is fair and equitable" with respect to such impaired, non-accepting class. *See* 11 U.S.C. § 1129(b)(1). Here, the SMT Class is impaired, unlikely to vote in favor of the Plan, and is the subject of unfair discrimination by receiving disproportionately unfavorable treatment under the Plan compared to the Settling Parties.

38. Accordingly, the separate and disparate treatment of a class of mere unsecured creditors[12] with claims of no greater priority than the claims of the SMT Class of creditors is impermissible For these reasons, the Plan is not confirmable as presently conceived, and the Disclosure Statement should not be approved.

ii. *The Plan Fails to Satisfy Section 1129(a)(11)'s Feasibility Requirement*

39. The Plan described by the Disclosure Statement is further unconfirmable because it is not feasible. Section 1129(a)(11) requires that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any

[12] (including personal injury claimants who have been relegated to recoveries from insurance policies only).

successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan"—also known as the "feasibility" requirement. 11 U.S.C. § 1129(a)(11). The Third Circuit has recognized that "[e]ven a planned liquidation 'must be feasible.'" *American Capital Equipment, LLC,* 688 F.3d at 156 (internal citations omitted).

40. Although section 1129(a)(11) of the Bankruptcy Code "does not require a plan's success to be guaranteed, … the plan must nevertheless propose 'a realistic and workable framework[.]' … In other words, the plan must be 'reasonably likely [to] succeed on its own terms[.]' . . . ." *Id.* (internal citations omitted)*; see also In re Quigley Co., Inc.,* 437 B.R. 102, 142 (Bankr. S.D.N.Y. 2010) (plan was not feasible where funding source was "speculative at best and visionary at worst"). "In considering feasibility, 'a bankruptcy court must evaluate the possible impact of the debtor's ongoing civil litigation [.]' … A plan will not be feasible if its success hinges on future litigation that is uncertain and speculative, because success in such cases is only possible, not reasonably likely." *American Capital Equipment, LLC*, 688 F.3d at 156 (internal citations omitted).

41. Here, the Plan's sole source of funding is the Debtors' available cash on the Effective Date, the extent of which, without projections and given the mounting administrative fees, is uncertain at best. The Debtors cannot commit and have not committed to administrative solvency between the filing of the Plan and confirmation. Moreover, the only potential additional sources of recovery are: (a) royalties from the Subsys sale (estimated to bring in between **nothing** and $20 million based on the Debtors' representation at the sale hearing, and the Disclosure Statement is silent as to the likelihood of recovery); (b) proceeds from avoidance actions, which as stated above are merely speculative[13]; and (c) insurance proceeds from (i) a primary insurer

[13] Moreover, given that no potential avoidance action targets have been named, a liquidating trustee would likely be judicially estopped from bringing those claims. *See, e.g.*, *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General*

that has disavowed coverage and (ii) excess insurers that have no obligation to fund unless the liquidating trustee is successful in its litigation against the primary insurer. Accordingly, the Plan funding is speculative at best and therefore, the Plan is not feasible.

42. For the foregoing reasons, the Disclosure Statement cannot be approved because (a) it fails to provide adequate disclosure as required by section 1125 of the Bankruptcy Code, and (b) the Plan it describes, as proposed, is patently unconfirmable. Accordingly, the State respectfully requests that this Court enter an Order denying approval of the Debtors' Disclosure Statement and granting such other and further relief as is just and proper

RESERVATION OF RIGHTS

43. The State reserves the right to raise additional objections and concerns (i) at the hearing to consider approval of the Disclosure Statement, (ii) in connection with confirmation of the Plan, and (iii) in the event the Disclosure Statement and Plan are amended.

Respectfully submitted on November 1, 2019 by:

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Motors Corp., 337 F.3d 314 (3rd Cir. 2003) (finding that boilerplate language in disclosure statement that did not specify or attempt to place any monetary value on claims was not adequate to provide the level of notice required).

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CERTIFICATE OF SERVICE

I, Richard W. Riley, do hereby certify that on November 1, 2019, a copy of the foregoing ***State of Florida's Objection to Disclosure Statement for Joint Chapter 11 Plan of Liquidation Proposed by Insys Therapeutics, Inc. and Its Affiliated Debtors*** was served on the parties listed on the attached service list in the manner indicated.

/s/ Richard W. Riley
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