THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
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INSYS THERAPEUTICS, INC., *et al*	:	Case No. 19-11292 (KG)
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	:	
	:	**Obj. Deadline: January 6, 2020 at 4:00 p.m.**
Debtors.	:	**Hearing Date: January 16, 2020 at 9:00 a.m.**
	:	
	:	**Related to Docket No. 955**

UNITED STATES TRUSTEE'S OBJECTION TO SECOND AMENDED JOINT CHAPTER 11 PLAN OF LIQUIDATION OF INSYS THERAPEUTICS, INC. AND ITS AFFILIATED DEBTORS

In support of his objection to confirmation of the Second Amended Joint Chapter 11 Plan of Liquidation of Insys Therapeutics, Inc. and its Affiliated Debtors (the "Objection"), Andrew R. Vara, the United States Trustee for Regions 3 and 9 ("U.S. Trustee"), by and through his undersigned counsel, states as follows:

1. This Court has jurisdiction to hear this Objection.

2. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). This duty is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog").

3. Pursuant to 11 U.S.C. § 307, the U.S. Trustee has standing to be heard with regard to this Objection.

PRELIMINARY STATEMENT

4. The Debtors have proposed a plan whereby the holders of equity interests are to receive no distribution under the Plan, have no right to vote on the Plan, and are deemed to reject the same. Despite such treatment, the Debtors seek approval to deem all such shareholders to have consented to providing third party releases to non-debtor parties unless such shareholders return a form opting out of such releases by the voting deadline.

5. This Court, in *In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011), ruled that "any third-party release is effective only with respect to those who *affirmatively consent* to it by voting in favor of the Plan and not opting out of the third party releases." *Id.* at 355 (emphasis added). The Court clarified that an "opt out mechanism is not sufficient to support the third party releases . . . particularly with respect to parties who do not return a ballot (*or are not entitled to vote in the first place*). Failing to return a ballot is not a sufficient manifestation of consent to a third party release." *Id.* (emphasis added), citing *In re Zenith Electronics Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999). More recently, this Court also found that affirmative consent was necessary to support third party releases by equity holders not entitled to vote on a plan. *See In re Emerge Energy Services, LP*, 2019 Bankr. LEXIS 3717 at *54 (Bankr. D. Del., Dec. 5. 2019) ("Moreover, while the Debtors included on the ballot and Opt-Out Form notice to the recipients of the implications of a failure to opt-out, the Court cannot on the record before it find that the failure of a creditor or equity holder to return a ballot or Opt-Out Form manifested their intent to provide a release. Carelessness, inattentiveness, or mistake are three reasonable alternative explanations.")

6. Although some decisions issued by this Court have not required affirmative consent to third party releases to be provided by certain constituencies, there is no written decision from this Court that has allowed members of a class deemed to reject a plan to be treated as consenting to third party releases unless they return an opt-out form.

7. Requiring affirmative consent for the shareholders in these cases is important for two reasons. First, the shareholders are not receiving any distribution under the Plan, and therefore no consideration for giving any releases. Second, requiring an affirmative expression of consent helps to ensure there is true consent, rather than consent assumed by silence, which could be caused by factors such as the opt-out notice being wrongly addressed or misdelivered, or other mail failures or delays.

8. The U.S. Trustee also objects to deemed consent from those holders of general unsecured claims who do not return a ballot. Like the shareholders, silence from a creditor could simply mean the solicitation package never reached them.

9. The U.S. Trustee objects to the provision of the Plan that provides an $800,000 administrative claim to representatives of holders of State Claims and Municipality/Tribe Claims in Class 8, based on a theory of substantial contribution. They have not overcome the presumption in the Third Circuit's *Lebron* decision that they acted in their own self-interest and they are unable to show that their actions were designed to benefit the estate.

BACKGROUND

10. On June 10, 2019, the Debtors[1] filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

11. On June 19, 2019, an official committee of unsecured creditors (the “Committee)

[1] All capitalized terms not defined herein shall have the meaning ascribed to them in the Plan.

was appointed by the U.S. Trustee.

12. On September 17, 2019, the Debtors filed (i) their Joint Plan of Liquidation and (ii) Disclosure Statement for the Plan.

13. On October 8, 2019, the Debtors filed a motion for entry of an order approving the disclosure statement and approving solicitation procedures (Docket No. 715).

14. On December 4, 2019, the Debtors filed the (i) Disclosure Statement for Second Amended Joint Chapter 11 Plan of Liquidation of Insys Therapeutics, Inc. and its Affiliated Debtors (the "Disclosure Statement") (Docket No. 954) and the (ii) Second Amended Joint Chapter 11 Plan of Liquidation of Insys Therapeutics, Inc. and its Affiliated Debtors (the "Plan") (Docket No. 955).

15. On December 4, 2019, the Court entered an order approving the Disclosure Statement and approving the solicitation procedures (Docket No. 952).

16. Holders of Class 13 Equity Interests are receiving no recovery and are deemed to reject the Plan. Although the shareholders had no right to vote on the Plan, the Debtors' solicitation procedures provided for serving them with a form whereby they could opt-out of giving third party release to non-debtors.

17. Set forth below are certain of the provisions of the Plan that are relevant to the third party releases.

18. The Third Party Release provision is set forth in Section 10.5 (b) of the Plan, and provides in pertinent part as follows**:**

> *Releases by Holders of Claims and Interests*
>
> As of the Effective Date, for good and valuable consideration, the adequacy of which is hereby confirmed, including, without limitation, the service of the Released Parties before and during the Chapter 11 Cases to facilitate the liquidation of the Debtors and the implementation of the Trust Formation Transactions, and except as otherwise explicitly provided in the Plan or in the Confirmation Order, ***the Released Parties***

> ***shall be deemed conclusively, absolutely, (b) unconditionally, irrevocably and forever released, to the maximum extent permitted by law, as such law may be extended subsequent to the Effective Date, except as otherwise explicitly provided herein, by (i) the holders of all Claims who vote to accept the Plan, (ii) the holders of all Claims that are Unimpaired under the Plan, (iii) the holders of all Claims whose vote to accept or reject the Plan is solicited but who (a) do not vote either to accept or to reject the Plan and (b) do not opt out of granting the releases set forth herein, (iv) the holders of all Claims or Interests who vote, or are deemed, to reject the Plan but do not opt out of granting the releases set forth herein, and (v) all other holders of Claims and Interests to the maximum extent permitted by law*****,** in each case from any and all Claims, counterclaims, disputes, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action, Liens, remedies, losses, contributions, indemnities, costs, liabilities, attorneys' fees and expenses whatsoever, including any derivative claims, asserted or assertable on behalf of the Debtors or their Estates (including any Causes of Action arising under chapter 5 of the Bankruptcy Code), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, asserted or unasserted, accrued or unaccrued, existing or hereinafter arising, whether in law or equity, whether sounding in tort or contract, whether arising under federal or state statutory or common law, or any other applicable international, foreign, or domestic law, rule, statute, regulation, treaty, right, duty, requirement or otherwise, that such holders or their estates, affiliates, heirs, executors, administrators, successors, assigns, managers, accountants, attorneys, representatives, consultants, agents, and any other Persons or parties claiming under or through them would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any Claim or Interest or other Person, based on or relating to, or in any manner arising from, in whole or in part, the Debtors (as such entities existed prior to or after the Petition Date), their Estates, the Chapter 11 Cases, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements or interactions between any Debtor and any Released Party (including the exercise of any common law or contractual rights of setoff or recoupment by any Released Party at any time on or prior to the Effective Date), the Trust Formation Transactions, the restructuring of any Claim or Interest before or during the Chapter 11 Cases, the Disclosure Statement, the Plan and related agreements, instruments, and other documents, and the negotiation, formulation, preparation or implementation thereof, the solicitation of votes with respect to the Plan, or any other act or omission, other than Claims or Causes of Action arising out of, or related to, any act or omission of a Released Party that constitutes fraud, gross negligence or willful misconduct. For the avoidance of doubt, Claims or Causes of Action arising out of, or related to, any act or omission of a Released Party prior to the Effective Date that is later found to be a criminal act or to constitute fraud, gross negligence, or willful misconduct, including findings after the Effective Date, are not released pursuant to this Section 10.5(b) of the Plan.

Plan Section 10.5(b) (emphasis added).

19. The beneficiaries of the Third Party Releases are each a "Released Party," defined

as follows:

> ***Released Parties*** means, collectively, (i) the Debtors, (ii) the Creditors' Committee and its members, solely in their capacity as such, and (iii) with respect to each of the foregoing Persons in clauses (i) and (ii), such Persons' (a) predecessors, successors, permitted assigns, subsidiaries, and controlled affiliates, (b) officers and directors, principals, members, employees, financial advisors, attorneys, accountants, investment bankers, consultants, experts (for the avoidance of doubt, including but not limited to Nathan Associates, Inc. and its officers, directors, and employees), and other professionals; *provided*, *however*, that no such Person described in the foregoing clause (b) shall be a Released Party unless such Person was employed or engaged in such capacity on or after the Petition Date, or, in the case of any professional, was retained pursuant to sections 327 or 1102 of the Bankruptcy Code in these Chapter 11 Cases, and (c) respective heirs, executors, estates, and nominees, in each case solely in their capacity as such; *provided*, *however*, that no Person listed on the Non-Released Party Exhibit, to be filed as part of the Plan Supplement (no later than the Plan Supplement Filing Deadline) and as may be amended at the Confirmation Hearing pursuant to the process described in this "Released Parties" definition, shall be a Released Party.

Plan Section 1.1.

ARGUMENT

A. Third Party Releases Require Affirmative Consent

20. As set forth in above, the third party releases in the Plan will be given by the Debtors' shareholders, who are to receive no distribution under the Plan, have no right to vote on the Plan, and are deemed to reject the same. The only way that a shareholder can avoid being deemed to give the third party release is to return a form opting out of such releases by the voting deadline.

21. Some Courts in this District have determined that third-party releases of nondebtors should be allowed only to the extent the releasing parties have given affirmative consent. *See In re Emerge Energy Services, LP, 2019 Bankr. LEXIS 3717 at *53 (Bankr. D. Del. Dec. 5, 2019) (*"it cannot be said with certainty that those failing to return a ballot or Opt-Out Form did so intentionally to give the third-party release, and that is what the Court must find under the law to approve a third-party release absent the satisfaction of the *Continental*

standard"). *See also In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011). In *Washington Mutual*, the Court held that "any third party release is effective only with respect to those who *affirmatively* consent to it by voting in favor of the Plan and not opting out of the third party releases." *Id.* at 355 (emphasis added). The Court clarified that merely having an opt out mechanism is not enough, holding that an "opt out mechanism is not sufficient to support the third party releases . . . particularly with respect to parties who do not return a ballot *(or are not entitled to vote in the first place)*." *Id.* (emphasis added). *Failing to return a ballot is not a sufficient manifestation of consent to a third party release." Id.* (emphasis added), citing *In re Zenith Electronics Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999).

22. Other decisions from Courts in this District are in accord with *Emerge Energy* and *Washington Mutual. See In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) (holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," and that such release must be based on consent of the releasing party); *In re Exide Technologies*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) (approving releases which were binding only on those creditors and equity holders who accepted the terms of the plan); *In re Zenith Electronics Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (release provision had to be modified to permit third parties' release of non-debtors only for those creditors who voted in favor of the plan).

23. While the Court in *In re Indianapolis Downs, LLC*, 486 B. R. 286 (Bankr. D. Del. 2013) reached a different conclusion concerning the need for affirmative consent to third party releases, the plan in that case did not propose, as the present Plan does, that third party releases be given by parties who are deemed to reject the plan. *See id.* at 304-05. The Court in *In re Spansion, Inc.*, 426 B.R. 114 (Bankr. D. Del 2010), also reached a different conclusion with

respect to affirmative consent, but only as to releases given by unimpaired classes, who were "being paid in full." Id. at 144. In fact, in *Spansion*, the Court determined that non-consensual releases being deemed to be given by parties who were not receiving any distribution under the plan did not pass muster under applicable law. *See id*. at 145.

24. Under the holding of *Washington Mutual*, and the other cases cited above, the procedure where the interest holders must return an opt-out form in order to opt-out of the release provisions must be rejected. The shareholders "are not entitled to vote in the first place" (*Washington Mutual, Inc.,* 442 B.R. at 355), because they are deemed to reject the plan. And if "[f]ailing to return a ballot is not a sufficient manifestation of consent to a third party release" *(id.*), then failing to return an opt-out form cannot be a manifestation of such consent. Thus, the third party releases the Debtors seek to impose on the interest holders are not consensual.

25. Requiring affirmative consent for the public shareholders in these cases is especially important because the shareholders are not receiving any distribution under the Plan, and therefore no consideration for any releases. In addition, requiring an affirmative expression of consent helps to ensure there is true consent, rather than consent assumed by silence, which could be caused by factors such as a package being wrongly addressed or misdelivered, or other mail failures or delays.

26. Although perhaps not quite as egregious as requiring public shareholders who are deemed to reject a plan to return opt-out forms, the release provisions concerning the general unsecured creditors also fail to meet the requirements of affirmative consent. The Plan provides that holders of general unsecured claims who do not return a ballot with the opt-out box checked with be deemed to give a release. The fact that a particular creditor who had the right to vote on the plan did not return a ballot does not mean they have consented to give a release. Rather, their

silence could mean that the solicitation package never reached them. As with the public shareholders, the general unsecured creditors should not bear the risk of mail errors.

27. Section 10.5 of the Plan also indicates that the Debtors seek application of the third party release provision to all other holders of Claims and Interests "to the maximum extent permitted by law." It is unclear if this is intended to apply to those parties that have opted out of the release. To the extent the Debtors seek to reserve the right to argue that the release is binding on all holders of Claims and Interests, it is not clear how the Debtors can argue that parties can be bound to a release with respect to which such parties have clearly opted out.

28. Finally, as drafted, the Plan definitions of Released Parties and Exculpated Parties appear identical. As such, the application of both the release and exculpation provisions to such parties is duplicative and unnecessary. *See Washington Mutual, Inc.*, 442 B.R. at 350.

B. The Debtors Have Not Met the Standards for Non-Consensual Third Party Releases

29. The Disclosure Statement provides that the Debtors are proceeding on the basis that the proposed releases are consensual.[2] To the extent that the Debtors seek at the confirmation hearing to argue that the releases may also be approved on a non-consensual basis, the Court should not permit the Debtors to force non-consensual releases on either the general unsecured creditors or the shareholders, as the Debtors have not met the standards for approval of such non-consensual releases.

30. In *Continental*, 203 F.3d 203 (3d Cir. 2000), the Third Circuit surveyed cases

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[2] Section 9.2 of the Disclosure Statement states in pertinent part that, "[t]he Debtors believe the third party release set forth in this Section 9.2(b) and as set forth more fully in the Plan is standard and entirely consensual under the established case law in the United States Bankruptcy Court for the District of Delaware. *See, e.g., Indianapolis Downs,LLC,* 486 B.R. 286, 304–06 (Bankr. D. Del. 2013). The Debtors will be prepared to meet their burden to establish the basis for the releases, exculpations, and injunctions provided by the Plan as part of Confirmation of the Plan."

from various circuits as to when, if ever, a non-consensual third party release is permissible. The Court acknowledged that a number of Circuits do not allow such non-consensual releases under any circumstances. *See id*. at 212. Other Circuits, the Court found, "have adopted a more flexible approach, albeit in the context of extraordinary cases," such as mass tort cases. *See id*. at 212, *citing Securities and Exchange Commission v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992); *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 640, 649 (2d Cir. 1988). *See also, In re Metromedia Fiber Network, Inc.,* 416 F.3d 136, 141 (2d Cir. 2005)(third party release may be granted "only in rare cases").

31. The Third Circuit in *Continental Airlines* ultimately determined that the proposed releases in that case, which enjoined shareholder lawsuits against debtors' directors and officers, did "not pass muster under even the most flexible test for the validity of non-debtor releases." *Continental*, 203 F.3d at 214. Therefore, the Court determined that it "need not speculate on whether there are circumstances under which we might validate a non-consensual release that is both necessary and given in exchange for fair consideration." *Id*. at 214, n. 11. However, the Court did describe the "hallmarks of permissible non-consensual releases" to be "fairness, necessity to the reorganization, and special factual findings to support these conclusions." Id. at 214.

32. The Third Circuit recently reiterated its holding in *Continental,* stating that "[c]onsistent 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." *In re Millennium Lab Holdings II, LLC,* 2019 WL 6904684, *9 (3d Cir. Dec. 19, 2019).

33. In *In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001), the Court held that a clause in the plan which released claims of any creditors or equity holders against the senior lenders for any act or omission in connection with the bankruptcy cases and reorganization process required factual showings under *Continental* – that the releases were necessary for the reorganization and were given in exchange for fair consideration. *Id*. at 607. The Court elaborated that "necessity" under *Continental r*equires a showing: (a) that the success of the debtors' reorganization bears a relationship to the release of the non-consensual non-debtor parties and (b) that the non-debtor parties being released from liability have provided "a critical financial contribution to the debtors' plan" in exchange for the receipt of the release. *Id*. at 607. A financial contribution is considered "critical" if without the contribution, the debtors' plan would be infeasible. *Id.* Fairness of a release is determined by examining whether non-consenting non-debtors are receiving reasonable consideration in exchange for the release. *Id.* at 608. In most instances of a release provision in a plan, this will entail examining the proposed dividend that non-consenting creditors will receive under a plan with the releases compared to what they would receive under a plan without the releases. *See id.; see also In re Spansion, Inc*., 426 B.R. 114, 144 (Bankr. D. Del 2010)(applying same factors).

34. The *Genesis* Court found that the senior lenders had made a financial contribution to the plan, which allowed the debtors to make the 7.34% distribution to the unsecured creditors, who otherwise would be "out of the money." *Id*. at 608. Ultimately, though, the Court found that such contribution was not enough, because "even if the threshold *Continenta*l criteria of fairness and necessity for approval of non-consensual third-party releases were marginally satisfied by

these facts . . . . [the] financial restructuring plan under consideration here would not present the extraordinary circumstances required to meet even the most flexible test for third party releases." Id. (emphasis added).

35. In the present case, there is nothing in the record to indicate the presence of "extraordinary circumstances," or that that the high threshold necessary for approval of non-consensual third party releases has been met with respect to each of the non-debtor parties that would be the recipients of these non-consensual releases. This is a liquidating plan, so the releases are not necessary to a successful reorganization. There is also no evidence of a "critical financial contribution" to the Plan that was given by each of the Released Parties, which include the Debtors' officers, directors, and professionals, and the Creditors' Committee and its members.[3]

C. The SMT Group Has Not Demonstrated that It Made a Substantial Contribution

36. Pursuant to the Plan, in addition to distributions on account of their Claims, as part of their class treatment, holders of State Claims (Class 8(a)) and Municipality/Tribe Claims (Class 8(b)) ("Holders of SMT Claims") shall receive "(ii) payment of an Administrative Expense Claim for professional fees for counsel to holders of State Claims and Municipality/Tribe Claims in the amount of $800,000." Plan Section 4.8. The Disclosure Statement at page 10 indicates

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[3] The Third Circuit in *Continental,* and this Court in *Genesis* and *Washington Mutual,* found that the directors and the officers of the debtors in those cases did not satisfy the requirements necessary to entitle them to receive releases. *See Continental*, 203 F.3d at 215 ("[W]e have found no evidence that the non-debtor D & Os provided a critical financial contribution to the Continental Debtors' plan that was necessary to make the plan feasible in exchange for receiving a release of liability"); *Washington Mutual*, 442 B.R. at 354 (holding that, "there is no basis for granting third party releases of the Debtors' officers and directors, ...[as] [t]he only 'contribution' made by them was in the negotiation of the Global Settlement and the Plan, [which] activities are nothing more than what is required of directors and officers of debtors in possession (for which they have received compensation and will be exculpated); they are insufficient to warrant such broad releases of any claims third parties may have against them. . . . ."); *Genesis*, 266 B.R. at 606–07 ("[T]he officers, directors and employees have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of 'assets' to the reorganization.").

that pursuant to the Plan Settlement, among other things, "[c]ertain members of the SMT Group[4] will also receive an administrative Claim of $800,000 for their substantial contributions to these Chapter 11 Cases."[5]

37. Section 503(b)(3)(D) of the Bankruptcy Code provides for administrative expenses of the estate for the "actual, necessary expenses" incurred by a "creditor" or an "equity security holder... in making a substantial contribution in a case." Section 503(b)(4) provides for the allowance for the "reasonable compensation for professional services rendered by an attorney or an accountant if an entity who expense is allowable under" section 503(b)(3). These provisions are governed in this District by the Third Circuit's decision in *Lebron v. Mechem Financial, Inc.*, 27 F.3d 937 (3d Cir. 1994).

38. Approval of an $800,0000 administrative claim should be denied because the Holders of SMT Claims have not demonstrated that they made a substantial contribution in this case. The Holders of SMT Claims has not overcome the presumption in the Third Circuit's

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[4] Section 1.1 of the Plan defines "SMT Group Representatives" as "representatives of holders of: (i) State Claims; and (ii) Municipality/Tribe Claims under court-appointed leadership in the MDL who participated in the Mediation and who will take part in negotiations with the Debtors and the Creditors' Committee related to, among other things, governance of the Trusts and Distributions from the Trusts, in accordance with Sections 5.6 through 5.8 of this Plan."

[5] Section 5.7 (c) iv. of the Disclosure Statement describes the basis for the substantial contribution claim as follows:

> iv. Substantial Contribution Claim
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> States, municipalities (including cities, counties, and other political subdivisions), and Native American Tribes represent certain claims asserted against the Debtors as of the Petition Date. Collectively, the SMT Group Participants, along with the Debtors, the Creditors' Committee, eighty-three (83) municipalities who are not part of the MDL, various insurance carriers and third party payors, personal injury plaintiffs, hospitals, NAS Children claimants, and a class of ratepayer claimants, has devoted substantial time and energy to forging the resolution set forth in the Plan Settlement through, among other things, participation in the Mediations and in numerous negotiations. For those efforts, the SMT Group Participants required that the Debtors and Creditors' Committee agree, as part of the overall Plan Settlement, that the SMT Group Participants should receive an Allowed Administrative Expense Claim in the amount of $800,000 to pay for the fees and expenses of their advisors. The SMT Group Participants are prepared to satisfy the applicable standards under section 503 of the Bankruptcy Code for receiving such Administrative Expense Claim at the Confirmation Hearing as part of the compromise reflected in the Plan. The Debtors and the Creditors' Committee believe that the payment is justified as part of the compromise embodied in the Plan and as such, and as part of such compromise, is a fair exercise of the Debtors' business judgment.

Lebron decision that they acted in their own self-interest and they are unable to show that their actions were designed to benefit the estate.

39. Section 503(b)(3)(D) must be narrowly construed so that administrative expenses will be held to a minimum. *See In re Worldwide Direct, Inc.*, 334 B.R. 112, 122 (Bankr. D. Del. 2005) (quoting *In re Granite Partners*, 213 B.R. 440, 445 (Bankr. S.D.N.Y. 1997)). Section 503(b)(3)(D) has two purposes: (1) to encourage creditors to participate meaningfully in the reorganization process; and (2) to minimize fees and administrative expenses and thereby maximize creditor recoveries. *Lebron v. Mechem Financial Inc.*, 27 F.3d 937, 944 (3d Cir. 1994). A creditor makes a substantial contribution if its efforts provide an "actual and demonstrable benefit to the debtor's estate and the creditors." *Lebron v. Mechem Financial Inc.*, 927 F.3d at 943-44 (citation omitted) (*quoting In re Lister*, 846 F.2d 55, 57 (10th Cir. 1988)). *See also In re Worldwide Direct, Inc.*, 334 B.R. at 121.

39. While the term "substantial contribution" is not defined in the Bankruptcy Code, and the phrase "does not lend itself to a set of exacting criteria, 'a well-developed body of case law teaches that the sort of contribution that reaches the substantial threshold is exceedingly narrow.'" *In re KiOR, Inc*., 567 B.R. 451, 459 (D. Del. 2017), *citing In re RS Legacy Corp.,* 2016 WL 1084400 at *4 (Bankr. D. Del. Mar. 17, 2016). A benefit that the estate receives as an incident to a creditor's protecting its own interests is not a substantial contribution. *See Lebron*, 27 F.3d at 944 ("“substantial contribution" should be applied in a manner that excludes reimbursement in connection with activities of creditors and other interested parties which were designed primarily to serve their own interests and which, accordingly, would have been undertaken absent an expectation of reimbursement from the estate"). *See also In re Essential Therapeutics, Inc.*, 308 B.R. 170, 174 (Bankr. D. Del. 2004)("Inherent in substantial

contribution, however, is the requirement that the benefit received by the estate be more than incidental to the applicant's self-interest.")

40. Creditors are presumed to act in their own interest "until they satisfy the court that their efforts have transcended self-protection." *Lebron*, 27 F.3d at 944 (citations omitted). The activities that a Section 503(b)(3)(D) applicant has engaged in are "presumed to be incurred for the benefit of the engaging party and are reimbursable if, but only if, the services 'directly and materially contributed' to the reorganization." *Lebron v. Mechem Financial Inc.*, 27 F.3d at 943-44 (citation omitted).

41. When determining if a claimant has met its burden, courts consider whether the services provided (a) were only for the benefit of the claimant or were for the benefit of all parties in the case; (b) directly, significantly and demonstrably benefited the estate; and (c) were duplicative of the services provided by professionals for the creditors' committee, the committee itself, debtor and its attorneys, or other fiduciaries and their professionals. *See In re Worldwide Direct, Inc.*, 334 B.R. at 122 (citing *In re Buckhead America Corp.*, 161 B.R. at 15).

42. The Holders of SMT Claims must prove by a preponderance of the evidence that they made a substantial contribution. *See In re Buckhead America Corp.*, 161 B.R. 11, 15 (Bankr. D. Del. 1993). Extensive participation in a case is not enough to justify a substantial contribution award. *In re Worldwide Direct, Inc.*, 334 B.R. at 123 (citing *In re Granite Partners*, 213 B.R. at 445); *see also In re Summit Metals, Inc.*, 379 B.R. 40, 53 (Bankr. D. Del. 2007).

43. Extensive participation in a case, such as that of the Holders of SMT Claims, without more, does not justify a substantial contribution award. *See Summit Metals*, 379 B.R. 40, 53 (Bankr. D. Del. 2007). As a collective group, the Holders of SMT Claims hold the

largest unsecured claims in the case. The actions of the MDL Group (a subset of the Holders of SMT Claims) in filing a motion to convert and opposing the disclosure statement were all undertaken in order to protect the rights of the MDL Group and to increase any potential recovery. Later efforts of the MDL Group and the Holders of SMT Claims in participating in numerous negotiation and mediation sessions were self-motivated in order to obtain a higher recovery. Although there may have been a benefit to the remaining unsecured creditors, the Holders of SMT Claims have not overcome the presumption that they acted in their own self-interest, and have not provided evidence that their actions were designed to benefit others.

44. The Holders of SMT Claims have failed to overcome the presumption that they acted primarily in their own self-interest. The activities undertaken in the case by the Holders of SMT Claims were self-motivated and any benefit to the estate was incidental. In particular, the activities undertaken by Holders of SMT Claims do not rise to the level of substantial contribution that would justify the award of an administrative claim pursuant to 11 U.S.C. §503(b).

WHEREFORE, the U.S. Trustee requests that this Court issue an order denying confirmation of the Plan and/or granting such other relief as this Court deems appropriate, fair and just.

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 AND 9

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