UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	**Chapter 11**
INSYS THERAPEUTICS, INC., *et. al.*[1]	**Case No.: 19-11292 (KG)**
Debtors.	**(Jointly Administered)**
	Hearing Date: July 8, 2019 at 9:00 a.m. (ET) **Obj. Deadline: June 25, 2019 at 4:00 p.m. (ET)**
	Related to Docket No. 29

THE STATE OF FLORIDA'S OBJECTION TO DEBTORS' MOTION TO ESTIMATE CLAIMS [ECF NO. 29]

Creditor, the State of Florida, (the "State"), by and through its undersigned counsel, objects to 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* (the "Estimation Motion") [ECF No. 29][2], and states in support thereof as follows:

[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. ("Insys") (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] Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), the State does not consent to the entry of a final order by the Court in connection with the Estimation Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

SUMMARY OF THE ARGUMENT

The State respectfully submits that it is premature for the Court to even consider, much less grant, Debtors' novel request to estimate classes of claims in this case. Debtors have not yet filed schedules, and almost no proofs of claim been filed in this case to date. More importantly, Debtors have made no showing that they will be able to confirm a plan in this case; indeed, Debtors have thus far failed to even secure a stalking horse bidder for the sale of their assets.

The Debtors ask this Court and all of their many creditors, including sovereign governmental entities such as the State, to go through a truncated, procedurally backward, and ludicrously expensive estimation process. The sheer audacity of the proposal is only made worse by the fact that there is no way to know whether Debtors' remaining cash and assets will be sufficient to resolve even the administrative claims, which appear to be mounting quite rapidly.[3] The claims reconciliation process is a fundamental part of all chapter 11 cases. That Debtors must review, examine, and object to claims in this case, as debtors must in all bankruptcy cases, cannot serve as the basis for the blanket estimation procedures requested here.

Likewise, Debtors cannot meet their burden under section 502(c) that the estimation procedures are necessary to avoid undue delay. Rather, the Estimation Motion is a clear attempt by the Debtors to reduce their liabilities without affording any due process to claimants. Lastly, the Estimation Motion is procedurally improper as it attempts to subordinate claims without the filing of an adversary proceeding. Accordingly, the State respectfully requests that the Court summarily deny the Estimation Motion.

[3] Per Debtors' application to retain counsel, Debtors' counsel began the case with a pre-petition retainer of $8.4 million; on the petition date, that retainer had dwindled to less than $3.5 million.

BACKGROUND

The *Declaration of Andrew G. Long In Support of Debtor's Chapter 11 Petitions and First Day Relief* (the "Long Declaration") addresses the role of the Corporate Integrity Agreement with the Office of the Inspector General for the U.S. Department of Health and Human Services in hopefully deterring and preventing future misconduct by Insys. The Long Declaration also addresses some of the Debtors' conduct leading up to the Florida Lawsuit (as defined below) and the lawsuits filed by nine other states. However, the State respectfully submits that, before even considering some of the rather extraordinary relief that the Debtors seek in their Estimation Motion, the Court should first be aware of the actual depths of Insys's conduct in the State of Florida, and the damage suffered by the State and its citizens from Insys's illegal conduct, in order to understand the State's strenuous objection to the idea of giving its state court claims short-shrift through the proposed estimation process.

Insys manufactures Subsys, a highly-addictive, immediate-release fentanyl that is 50 to 100 times more potent than morphine.[4] Subsys binds to the brain's opioid receptors in the area of the brain that controls pain and emotions.[5] Long-term use of Subsys results in the body's adaptation to the opioid, diminishing sensitivity and making it difficult for users to feel pleasure from anything other than the drug, and leads to addiction in the user. Insys paid millions of dollars to doctors in Florida through sham "speaker programs" to convince them to prescribe more of its highly-addictive fentanyl product at higher dosage levels. Through several "incentive" and "bonus" programs, Insys exhorted its sales force to sell its highly addictive Fentanyl product to individuals in Florida who never should have received such a powerful and addictive drug. Insys did so in manners both bold and insidious.

[4] *See* https://www.drugabuse.gov/publications/drugfacts/fentanyl.
[5] Id.

Speaker Programs

Through its sales representatives, Insys identified physicians who either were, or had the predilection to become, high volume prescribers of Subsys. Once identified, Debtors implemented a series of physician speaker programs. Debtors paid handsome fees to physicians, and in turn promoted the speaker programs as opportunities for those physicians to conduct educational outreach to the medical community about breakthrough pain and how to treat it. In fact, the speaker programs were an artifice to simply place cash in the hands of the speaker physicians in a naked effort to incentivize those physicians to prescribe more of their addictive prescription drugs. In 2014 alone, Insys paid nearly $1 million to Florida doctors for their prescriptions of Subsys.

The speeches delivered by the paid physicians were often attended by no one other than the physician's own staff. Because the speeches delivered by these physicians had no legitimate educational function, the Insys sales representatives often went a step further and falsified the sign-in sheets for the speaker program events.

Other Doctor Incentives

Due to their highly addictive nature, ethical medical practice normally suggests that an individual's opioid dosage begins low and is then gradually adjusted or titrated if necessary to relieve the patient's symptoms. However, due to the financial incentives provided by Debtors' sales force, Insys encouraged doctors to unnecessarily titrate patients to higher dosages. The higher the dose, the more money for Insys and its sales representatives. For example, Insys had a "President's Club" for top-performing sales representatives. Often these sales representatives had half the number of physician clients as other Insys salespeople, but the patients of those physicians on much higher doses of Subsys.

Insys used its Internal Reimbursement Center ("IRC") to further its scheme. The Insys IRC would call insurance companies and get approval for a patient to receive Subsys, and the IRC would then email the sales representative. The sales representative could then go back to the doctor and inform him or her of the approval. Quite often the IRC would get approval for a higher strength of Subsys than what was originally prescribed, with the sales representative then telling the doctors about the approval in the hope that he or she would titrate upward the patient's Subsys strength.

Subsys had only been approved for opioid-tolerant patients with breakthrough cancer pain. Yet, Insys deliberately marketed this addictive product to high-volume opioid prescribers that Insys knew primarily treated non-cancer patients. Insys also engaged in an active campaign to ensure that physicians filled out forms indicating that a patient was opioid tolerant. A former Insys employee admitted that Insys employees constantly told sales reps to "check the box" on the opt-in form indicating that the patient was opioid tolerant so that insurance would cover the Subsys prescription. A former Insys employee estimated that only about 10% of Subsys prescriptions at a prominent pain clinic actually went to patients with a cancer diagnosis.

According to data from the Centers for Medicaid and Medicare Services, in 2015 more prescriptions for Subsys were written in Florida than any other state. Insys sold medically unjustifiable quantities of opioids in Florida, despite knowing that its opioid product was causing Florida patients to become addicted.

Insys's deceptive, unfair, and unconscionable actions led Florida prescribers to prescribe, and consumers to consume, addictive and dangerous opioid products they never should have received, directly contributing to the opioid epidemic in Florida. Moreover, Insys's deceptive, unfair, and unconscionable actions continue to harm the State and its citizens.

A. The State of Florida Lawsuit.

1. On May 15, 2018, Florida commenced a lawsuit in the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida (the "Florida Lawsuit") against Insys and various other defendants to hold these defendants accountable for having created and exacerbated a devastating opioid crisis that has caused thousands of Floridians to die from opioid overdoses, and many thousands more to suffer from opioid use disorders and related health conditions.

2. Moreover, such misconduct has caused grave societal injuries, including deaths, drug addiction, personal injury, child neglect, children separated from their parents and placed in foster care, babies born addicted to opioids, crime, poverty, property damages, unemployment, and lost productivity, as well as a multitude of economic injuries, including losses for medical treatment, rehabilitation costs, hospital stays, emergency room visits, emergency personnel costs, law enforcement costs, substance abuse costs, costs for displaced children, naloxone costs, medical examiner expenses, and lost tax revenues, among others.

3. Through the Florida Lawsuit, the State asserts claims against Insys under the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201 *et seq.* ("FDUTPA") and the Florida Racketeer Influenced and Corrupt Organization Act, Fla. Stat. §§ 895.01 *et seq.* ("Florida RICO"), as well as claims for public nuisance, negligence, gross negligence, and civil conspiracy (collectively, the "Florida Claims").

4. On account of the Florida Claims, the State has sought relief in the form of damages, disgorgement, restitution, civil penalties, injunctive relief, equitable relief, civil forfeiture, treble damages, penalties, abatement of nuisance, and attorneys' fees and costs against Insys. *Id.* As part of the injunctive relief request, the State has sought to enjoin Insys from directly, or indirectly through third parties, continuing to misrepresent or omit the relative risks and benefits

of opioids. The State has also requested the entry of an order abating the public nuisance and providing any injunctive relief appropriate under law. Finally, the State has requested that reasonable restrictions be imposed on the future activities or investments of Insys pursuant to the Florida RICO and FDUTPA provisions.

B. The Bankruptcy Court Proceedings.

5. On June 10, 2019, the Debtors each filed voluntary bankruptcy petitions under chapter 11 of the Bankruptcy Code.

6. Also, on June 10, 2019, Debtors filed the Estimation Motion, which seeks to estimate certain classes of claims under section 502(c) of the Bankruptcy Code pursuant to a very involved yet truncated discovery schedule. Additionally, the Estimation Motion seeks to subordinate certain claims against the estate, despite having not filed an adversary proceeding.

7. The Court has not set a bar date for the filing of proofs of claim.

8. Also on June 10, 2019, Debtors filed their *Motion of the Debtors for Entry of Orders (I)(A) Approving Bidding Procedures for Sale of Debtors' Assets, (B) Scheduling Auction for and Hearing to Approve Sale of Debtors' Assets, (C) Approving Form and Manner of Notice of Sale, Auction, and Sale Hearing, (D) Approving Assumption and Assignment Procedures, And (E) Granting Related Relief; and (II)(A) Approving Sale of Debtors' Assets Free and Clear of Liens, Claims, Interests, and Encumbrances, (B) Authorizing Assumption and Assignment of Executory Contracts and Unexpired Leases, And (C) Granting Related Relief* [ECF # 32] (the "Sale Motion"). The Sale Motion proposes bid procedures despite the absence of a stalking horse contract, and therefore no minimum price for the Debtors' assets.

9. As of the filing of this objection, only a few creditors have filed a proof of claim in this case.

LEGAL ANALYSIS

A. Debtors Have Not Established That Estimation of Claims Is Required to Avoid Undue Delay.

i. Debtors' request for estimation of claims is premature, at best.

10. The State first submits that the Court should summarily deny the Estimation Motion as premature. At this early stage in the bankruptcy case, the Debtors have not filed schedules, the Court has not set the deadline for the filing of proofs of claims, almost no claims have been filed against Debtors, no plan has been proposed by Debtors, and although the Debtors have sought approval of bid procedures in the Sale Motion, they have been unable to locate a stalking horse bidder. *See In re Corp. Res. Servs., Inc.*, 564 B.R. 196, 208 (Bankr. S.D.N.Y. 2017) (stating that it would be premature for Court to rule on estimation under section 502(c)(1) where Debtor was hopelessly insolvent and the prospect of a substantial recovery to unsecured creditors was remote.)

11. Without this information, the Court cannot properly evaluate the merits of the Estimation Motion. For instance, the number and dollar amount of claims eventually filed in these cases could greatly affect this Court's analysis regarding whether liquidation or estimation of claims is proper. Additionally, Debtors have not demonstrated that they will even have assets to distribute beyond administrative claims, let alone whether they will be able to confirm a plan.

12. At this time, Debtors have no idea how to best maximize their assets and make distributions to creditors and have been unable to secure even a stalking horse bidder. In the event that Debtors are unable to sell their assets through a 363 sale, or the proceeds from any eventual sale are insufficient to satisfy the administrative and priority claims, unsecured creditors are likely to receive no distribution and the Debtors will likely be administratively insolvent. In that case, this estimation process will have only worsened the financial condition of Debtors and created an unnecessary burden upon the estate and its creditors.

13. The State, as with many of the Debtors' creditors, has already suffered grave economic harm at the hand of the Debtors. Needlessly spending money on this process is adding insult to injury. Further, in the event that the sale of Debtors' assets is sufficient to even formulate a plan, Debtors have not shown that the categories of claims determined at this early stage will even correspond to the classification of claims under any such plan, further demonstrating that undertaking this novel and expensive process would be a monumental waste of precious resources.

14. Accordingly, this Court should deny the Estimation Motion as premature before even considering it on the merits.

ii. *Debtors fail to meet their burden under section 502(c).*

15. Debtors have failed to establish a basis under section 502(c) of the Bankruptcy Code to invoke a claim estimation process that would create an undue burden on claimants. Indeed, Debtors propose a multi-staged estimation process that will arbitrarily reduce valid claims against the estate without anything close to sufficient due process despite not even knowing whether there will be any assets available for unsecured creditors.

16. Section 502(c) of the Bankruptcy Code provides that:

> There shall be estimated for purpose of allowance under this section—(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or (2) any right to payment arising from a right to an equitable remedy for breach of performance.

11 U.S.C. § 502(c). Claims estimation is "a procedural device that is to be used when adjudication and liquidation of a claim would take an unreasonably long time to allow courts to quickly and flexibly estimate the amount of an as yet to be liquidated claim." *In re Mud King Prods.*, 514 B.R. 496, 510 (Bankr. S.D. Tex. 2014), *aff'd*, No. BR 13-32101, 2015 WL 862319 (S.D. Tex. Feb. 27, 2015) (quoting *In re Stone & Webster, Inc.*, 279 B.R. 748, 810 (Bankr. D. Del. 2002)).

17. Beyond "a baseline knowledge of what is involved with liquidating a claim … the party moving for estimation must show that the normal mode of liquidating the claim would create undue delay in the bankruptcy process." *In re Dow Corning Corp.*, 211 B.R. at 573. It is "incumbent upon the movant(s) to establish particulars as to why the delay which would be engendered by a typical liquidation would be undue in a particular instance." *Id.* at 574; *see also In re Marvin Johnson's Auto Serv. Inc.*, 192 B.R. 1008 (Bankr. N.D. Ala. 1996) (lifting the automatic stay and rejecting estimation, in part because debtor had presented no evidence that the administration of the case would otherwise be unduly delayed).

18. Debtors assert that estimation of claims is necessary, because otherwise "proposal and confirmation of a plan and distributions to creditors in these cases could be significantly delayed." Estimation Motion ¶ 34. Mere delay, however, is insufficient to support a requisite claims estimation process. *In re Dow Corning Corp.*, 211 B.R. 545, 563 (Bankr. E.D. Mich. 1997).

19. Rather, estimation is disfavored absent a showing of "undue" delay. *Id.* ("From the plain language of § 502(c), estimation does not become mandatory merely because liquidation may take longer and thereby delay 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 to estimate. For estimation to be mandatory, then, the delay associated with liquidation must be 'undue.'"); *see also In re RNI Wind Down Corp.*, 369 B.R. 174, 178 (Bankr. D. Del. 2007) ("Estimation is not required in this instance because there is no evidence in the record to establish that the fixing or liquidation of the claim would result in undue delay."); *O'Neill v. Continental Airlines, Inc. (In re Continental Airlines, Inc.)*, 981 F.2d 1450, 1461 (5th Cir. 1993) ("In order for the estimation process of § 502(c) to apply, . . . fixing the claim must entail undue delay in the administration of justice."); *In re Statewide Realty Co.*, 159 B.R. 719, 725 (Bankr.

D.N.J. 1993) (holding that debtor had failed to show undue delay and thus the claim would be arbitrated rather than estimated).

20. Debtors cannot satisfy their burden of establishing undue delay merely by making generalized and conclusory arguments such as those set forth in the Estimation Motion. *See In re Dow Corning Corp.*, 211 B.R. at 574 ("It is . . . incumbent upon the movant(s) to establish particulars as to why the delay which would be engendered by a typical liquidation would be undue in a particular instance.").

21. While "undue delay" is not defined in the Bankruptcy Code, something is "undue" if it is "unjustifiable." *In re Dow Corning Corp.*, 211 B.R. at 563 (citing Random House College Dictionary, at 1433 (rev. ed. 1980)). Here, nothing about this case indicates there is any urgency or that "undue" delay will occur absent claims estimation. Debtors cannot simply decide that estimation is necessary or preferable from their perspective but must instead establish that this bankruptcy case will be unduly delayed in the absence of any estimation of claims.

22. Debtors have failed to make anything close to the requisite showing. Instead, in conclusory fashion, Debtors generically state that, without estimation of claims, "proposal and confirmation of a plan and distributions to creditors in these cases could be significantly delayed." Estimation Motion ¶ 34. This is precisely the sort of "horse and cart" type of rationale that is so troubling to the State. Indeed, while Debtors contend there may (or may not) be a possible delay in the administration of this case, they do so without even knowing if there are any real assets to distribute beyond administrative claimants. Accordingly, Debtors have not met their burden for the extraordinary relief they have requested, and the Estimation Motion also fails for that reason.

23. Additionally, although the Debtors have not yet filed a plan, any plan filed in this case will likely be a "pot plan." The amount of the claims in this case would not be material to a

pot plan because whatever value the claims are determined to have, claimants will be sharing from the same asset pool. Accordingly, as long as the manner in which distributions will be made under the plan is consistent with the applicable provisions of the Bankruptcy Code, the specific amount of claims allowed is not even material for plan purposes. Thus, any objections to claims and/or estimation of claims can be done by a liquidating trustee following confirmation of the pot plan, to the extent that a sale eventually generates sufficient funds to even propose a plan.

iii. *The multi-stage estimation process proposed by Debtors will delay administration of this case and greatly increase the administrative costs.*

24. The estimation process proposed by Debtors will likely not end until at least the year 2020; will cost the estate and its creditors untold millions of dollars in attorneys' fees; but will not resolve a single claim against the estate. Despite these undisputable facts, Debtors still claim that the estimation of claims will somehow be beneficial to the estate.

25. Under their Estimation Motion, Debtors potentially face having to defend and take thousands of depositions, review and respond to thousands of expert reports, respond to thousands of requests for production, and attend what will likely be multiple weeks of hearings before the Court on these issues. Assuming the Debtors could even accomplish this feat, they cryptically state in the Estimation Motion that they may then likely seek to institute separate, and additional, estimation proceedings to estimate particular claims for allowance purposes and to estimate subordinated claims.

26. This unnecessary multi-staged estimation process is likely to take years and cost all parties involved millions of dollars. Without a single claim filed in this case, without any schedules being filed and without even a proposed plan in place, Debtors have unilaterally determined that estimation of claims is desirable, at least to them. However, based upon the estimation procedures that Debtors have proposed, it is likely that estimation of claims will provide no significant benefit

over a standard claims resolution process, while almost guaranteeing that claims will not be valued at their true amount. This approach cannot and does not meet the strict standards of section 502(c), and therefore, the Estimation Motion must be denied.

iv. *The proposed estimation process is unfair to creditors.*

27. While section 502(c) of the Bankruptcy Code permits this Court to estimate contingent or unliquidated claims in appropriate circumstances, any judicial discretion in this regard still has definite boundaries. Section 502(c) is designed "to promote a fair distribution to creditors through a realistic assessment of certain claims." *In re Enron Corp.,* No. 01-16034, 2006 WL 544463, at *3 (Bankr. S.D.N.Y. January 17, 2006) (citing *In re Continental Airlines,* 981 F.2d 1450, 1461 (5th Cir. 1993)). To that end, courts have held that, for claim estimation purposes, "claims are to be appraised on the basis of what would have been a fair resolution of the claims in the absence of bankruptcy." *Owens Corning v. Credit Suisse First Boston,* 322 B.R. 719, 722 (D. Del. 2005).

28. Furthermore, given the impact that estimation may have on a claimant's rights, courts must evaluate whether the procedures meet general due process requirements before determining whether the requested estimation procedures are appropriate. *See, e.g., In re Adelphia Bus. Solutions, Inc.,* 341 B.R. 415, 422-23 (Bankr. S.D.N.Y. 2003). Due process is not an inflexible standard but requires a balancing of interests and a recognition of the circumstances at issue. *See, e.g., In re Hoffinger Indus., Inc.,* 307 B.R. 112, 117 (Bankr. E.D. Ark. 2004); *see also Beatrice Co. v. Rusty Jones, Inc. (In re Rusty Jones, Inc.),* 153 B.R. 535, 536-539 (N.D. Ill. 1993).

29. "The concept of due process is fundamental to our system of laws in the United States." *In re Farmland Indus., Inc.*, 284 B.R. 111, 116-17 (Bankr. W.D. Mo. 2002). "There is no argument that the Due Process Clause applies to proceedings under the Bankruptcy Code."

Farmland Indus., 284 B.R. at 116 (*citing Bank of Marin v. England,* 385 U.S. 99, 102 (1966)). "The essential element of due process is the right to notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Shell Offshore, Inc. v. Director, OWCP,* 122 F.3d 312, 315 (5th Cir. 1997) (*quoting Matthews v. Eldridge,* 424 U.S. 319, 333 (1976)).

30. Here, the effect of the Debtors' requested estimation procedures is both unfair to creditors and contrary to the purpose of section 502(c). First, Debtors' proposed estimation schedule forces a truncated and unrealistic time schedule on claimants to investigate the value of over 1,000 claims. After the entry of the scheduling order, parties are provided a mere 24 days to submit discovery requests, 21 days to complete production, 14 days to complete oral examinations of fact witnesses, 14 days to depose expert witnesses following the service of rebuttal reports, and then, only 15 days to prepare for the hearing to estimate Debtors' claim liabilities.[6]

31. These timeframes would be considered highly aggressive in a normal contested matter, but here, these deadlines are completely unrealistic and unneeded. Debtors have had access to the claims information and the ability to analyze the data for months. There is no reason to force such a truncated schedule on claimants other than to put them at a disadvantage in this case.

32. It should be noted that discovery would begin under the proposed schedule despite Debtors not having filed any substantive objections to claims. Thus, the State, and other governmental or private creditors, will be required to guess or speculate about the basis of the Debtors' "dispute" when formulating their discovery requests or responding to the discovery requests of the Debtors, which could very well be irrelevant, overbroad or burdensome.

[6] The State also has numerous objections to the form of the proposed Protective Order parties would purportedly need to acknowledge to receive discovery from the Debtors. However, the State is unsure at this point in time if the State will request documents under its provisions. If the State decides to request documents from the Debtors, the State will work with Debtors to make the appropriate changes to ensure that any Protective Order complies with state laws concerning public records requests and the powers of the Attorneys General.

33. By proposing a schedule specifically designed to preclude claimants and their experts from properly evaluating the claim data, Debtors seek to deny claimants the right to be heard in a meaningful manner. *See, e.g., In re Dow Corning Corp.*, 211 B.R. 545, 563 (Bankr. E.D. Mich. 1997) ("To begin with, regardless of the estimation method selected, for the process to have any semblance of fairness it will necessarily involve hearings that would be quite lengthy and protracted. After all, the extremely contentious issues surrounding the tort claims are highly complex and their resolution will require the presentation of many witnesses, many pieces of evidence and extensive oral argument. Abbreviating the time parties have to present their cases at an estimation hearing would, in the Court's opinion, be ill-advised. Considering the magnitude of the claims involved and the absolute importance of rendering a fair and accurate decision, *the Court cannot countenance a valuation procedure that would place artificial time constraints on the parties' ability to properly present their cases*.") (emphasis added); *see also In re The Bible Speaks*, 65 B.R. 415, 427 (Bankr. D. Mass. 1986) (finding that when a claim is of particular importance to a reorganization plan, procedures approaching a complete trial are more appropriate than summary procedures).

34. Second, the practical effect of the Estimation Motion is that claims will be arbitrarily reduced, while impermissibly shifting the burden to the claimants. *See, e.g., In re RNI Wind Down Corp.*, 369 B.R. at 191 (holding that estimation is designed to "prevent the administration of the debtor's estate from being held hostage by the fixing or liquidation of an unliquidated or contingent claim. It is not a mechanism for reducing the amount of a debtor's liability."). Although the Debtors claim that the Estimation Motion does not seek to estimate any particular claim for allowance purposes, the estimation of claim categories will nonetheless cap Debtors' liability to claimants which will drive the amount of the "pot" shared by each category.

In the likely event that the categories of claims are estimated at an amount that is lower than the actual amount of claims, claimants in those reduced categories will be left not only to litigate the value of their individual claim but will also then have to further reduce their claim to fit into the estimated category.

35. It is improper, especially at this stage of the bankruptcy proceedings, to estimate the State's claim in such a summary fashion. *See, e.g., In re Mud King Prod., Inc.*, No. BR 13-32101, 2015 WL 862319, at *2 (S.D. Tex. Feb. 27, 2015) (conducting an extensive evidentiary hearing, for eight days, on debtor's motion to estimate claim).

36. As such, the potential harm to claimants weighs heavily in favor of denying the Estimation Motion.

B. <u>The Estimation Procedures Are An Unnecessary Hurdle Designed to Handicap Creditors.</u>

37. "Liquidation of a claim, in fact, will almost always be more time consuming than estimation." *In re Dow Corning Corp.*, 211 B.R. at 563. "Nonetheless, bankruptcy law's general rule is to liquidate, not to estimate." *Id.* To that end, section 502(a) of the Bankruptcy Code states:

> A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

11 U.S.C. § 502(a).

38. The Estimation Motion is not a claim objection, as section 502(a) requires. Instead, it is a weapon the Debtors are seeking to deploy in an improper effort to arbitrarily reduce the claims against the estate while denying creditors their basic rights under the Bankruptcy Code and due process.

39. Section 502(a) establishes a burden shifting scheme between a creditor and debtor, which is not controversial and has been outlined in detail by the Third Circuit. In *In re Allegheny Int'l, Inc.*, the Third Circuit Court of Appeals stated:

> Initially, the claimant must allege facts sufficient to support the claim. If the averments in his filed claim meet this standard of sufficiency, it is "prima facie" valid. In other words, a claim that alleges facts sufficient to support a legal liability to the claimant satisfies the claimant's initial obligation to go forward. The burden of going forward then shifts to the objector **to produce evidence sufficient to negate the prima facie validity of the filed claim**. It is often said that the objector must produce evidence equal in force to the prima facie case. In practice, the objector must produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence.

954 F.2d 167, 173 (3d Cir. 1992) (emphasis added and internal citations omitted).

40. Debtors propose to discard these burdens, and instead place the burden on claimants to prove up their claims.

41. Debtors, however. are not without other remedies if they wish to challenge claims. Pursuant to Bankruptcy Rule 3007, nothing prevents the Debtors from filing claim objections to the extent they dispute the amount of a claim. A claim objection under Bankruptcy Rule 3007(a) initiates a contested matter that is designed to ensure creditors actually receive due process. Without regard to due process, the Estimation Motion is designed by Debtors to instead unfairly reduce or eliminate a creditor's claim against the estate without ever having filed a substantive objection that challenges the validity of the claim.

42. Accordingly, the State respectfully submits that Court should deny the Estimation Motion.

C. The Debtors' Effort to Subordinate Claims Through the Estimation Motion is Procedurally Improper.

43. Even if Debtors had somehow met their burden to institute a claim estimation process (which they have not), the Estimation Motion would still have to be denied as a procedurally improper attempt to subordinate claims without an adversary proceeding. Under Bankruptcy Rule §7001(8), "a proceeding to subordinate any allowed claim must be brought as an adversary proceeding, unless subordination is provided by a chapter 11 plan." *In re Washington Mut., Inc.*, 462 B.R. 137, 145 (Bankr. D. Del. 2011).

44. Specifically, Rule 7001(8) states, in relevant part, "[t]he following are adversary proceedings … a proceeding to subordinate any allowed claim or interest, except when a … Chapter 11 … plan provides for subordination …" Fed. R. Bankr. P. §7001(8); *see also In re Protarga, Inc.*, No. 03-12564 (PJW), 2004 WL 1906145, at *3 (Bankr. D. Del. Aug. 25, 2004) ("Claims for equitable subordination must be brought as a separate adversary proceeding pursuant to Rule 7001(8) of the Federal Rules of Bankruptcy Procedure."); *In re Donson*, 434 B.R. 471, 474-75 (Bankr. S.D. Tex. 2010) (*sua sponte* denying claim objection on the grounds that the relief sought must be brought in an adversary proceeding under Federal Rule of Bankruptcy Procedure 7001).

45. Here, Debtors, through their Estimation Motion, impermissibly seek to "subordinate all claims seeking penalties … thus maximizing creditors' recoveries for actual and compensatory damages."

46. Accordingly, the Estimation Motion should be denied for this additional reason.

RESERVATION OF RIGHTS

The State is presently conducting discovery on the Estimation Motion and reserves the right to amend or supplement its objection based on additional information that becomes available.

WHEREFORE, the State respectfully requests that this Court enter an Order denying the Estimation Motion and awarding such further and other relief as this Court deems just and appropriate under the circumstances.

Respectfully submitted on June 25, 2019 by:

ASHLEY MOODY
Attorney General

/s/ Russell S. Kent
Patricia A. Conners (FBN #361275)
Chief Associate Deputy Attorney General
Trish.Conners@myfloridalegal.com
Russell S. Kent (FBN#20257)
Special Counsel for Litigation
Russell.Kent@myfloridalegal.com
Gregory S. Slemp (FBN #478865)
Senior Assistant Attorney General
Greg.Slemp@myfloridalegal.com
R. Scott Palmer (FBN #220353)
Chief of Complex Enforcement
Scott.Palmer@myfloridalegal.com
The Capitol, PL-01
Tallahassee, Florida 32399-1050
Tel: (850) 414-3300

Christopher A. Jones, Esq.
WHITEFORD, TAYLOR & PRESTON LLP
3190 Fairview Park Drive, Suite 800
Falls Church, Virginia 22042-4510
Tel: (703) 280 9260
cajones@wtplaw.com

AGENTIS PLLC

/s/ Robert P. Charbonneau
Robert P. Charbonneau (admitted *pro hac vice*)
Florida Bar Number 968234
rpc@agentislaw.com
Jacqueline Calderín (admitted *pro hac vice*)
Florida Bar Number 134414
jc@agentislaw.com
Jesse R. Cloyd (*pro hac vice* pending)
Florida Bar Number 58388
jrc@agentislaw.com
55 Alhambra Plaza, Suite 800
Coral Gables, Florida 33134
Tel: (305) 722-2002

---and---

WHITEFORD, TAYLOR & PRESTON LLC

/s/ Richard W. Riley
Richard W. Riley (DE #4052)
The Renaissance Centre, Suite 500
405 North King Street
Wilmington, Delaware 19801-3700
Tel: (302) 357-3265
rriley@wtplaw.com

Counsel for the State of Florida