

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

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**In re** : **Chapter 11**  
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**INSYS THERAPEUTICS, INC., et al.,** : **Case No. 19-11292 (KG)**  
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**Debtors.**<sup>1</sup> : **Joint Administration Requested**  
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**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**

Insys Therapeutics, Inc. (“**Insys**”) and its affiliated debtors in the above-captioned chapter 11 cases (the “**Chapter 11 Cases**”), as debtors and debtors in possession (collectively, the “**Debtors**”), respectfully represent as follows in support of this motion (the “**Motion**”):

**Preliminary Statement**

1. The Debtors commenced these chapter 11 cases with the simple of goal of resolving their mounting and varied unliquidated litigation claims in a fair and efficient process and providing the highest possible recovery to all of their creditors. The Debtors submit that a three-step strategy best accomplishes this goal by: (i) maximizing the value of their enterprise through pursuing a sale of their assets and pursuing affirmative causes of action; (ii) preserving funds by seeking a stay of burdensome and asset-consuming litigation; and (iii) further preserving funds by limiting their time in chapter 11 through estimation of categories of claims

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

to facilitate confirmation of a plan and sooner distributions to creditors. The first prong of the strategy is aimed at increasing the cash value of the Debtors' assets. By contrast, the second and third prongs will preserve as much of that value as possible to pay claimants, rather than using estate assets to fund unnecessary chapter 11 and other legal costs. To these ends, along with this Motion, the Debtors are contemporaneously filing (i) a motion to establish procedures to sell substantially all of their assets, (ii) a Complaint and Motion for Preliminary Injunction to stay certain, arguably, police power actions, and (iii) a motion to establish a deadline and procedures for filing proofs of claim (the "**Bar Date Motion**").

2. In combination, this Motion and the Bar Date Motion target the third component of the Debtors' overall strategy: implementing a fair and efficient process that enables the Debtors (and their creditors) to fix aggregate amounts of particular categories of claims on an expedited basis. The proposed process will enable the Debtors to propose a confirmable chapter 11 plan and make distributions to creditors sooner than any other option available to the Debtors. Although the Debtors resolved certain litigation claims relating to their prescription opioid SUBSYS® ("**Subsys**") prepetition, most notably the civil and criminal claims of the United States,<sup>2</sup> the relief sought in this Motion is critical because the sheer numbers and types of litigation claims filed against them made prepetition resolution of all the claims impossible.

3. The Debtors seek to use the chapter 11 cases to reach consensus with key groups of their creditors. Without an efficient claims resolution process to address the multitude of other claims, however, it will be challenging to bring such large numbers of diverse creditors

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<sup>2</sup> In addition, the Debtors were successful prepetition in resolving claims of the Humana, Illinois, Massachusetts, New Hampshire, Oregon, and three personal injury plaintiffs.

to the negotiating table. Waiting for approximately 1,000 individual cases, many of which are still in their nascent stages, or have yet to be filed, to be resolved will impede the Debtors' ability to formulate, confirm, and implement a plan and could drain the Debtors' estates of tens of millions of dollars – materially reducing the value of these estates and creditor recoveries. The alternative to the relief sought in this Motion is to have the Debtors' Chapter 11 Cases become a protracted affair, with all of the attendant costs, instead of preserving funds for creditors. That alternative is not good for any stakeholders. Estimation is, therefore, both necessary and appropriate to avoid wasteful delay in the administration of the Debtors' estates and to maximize recoveries for all claimants.

4. This Motion seeks relief in two stages. The first is an order establishing procedures for the Court to estimate certain categories of claims. The Debtors have retained their own claims estimation expert and will be proposing their own estimates of various categories of claims, but they invite their creditor groups to participate in the process. The Debtors understand that it is likely that each creditor group will seek to increase the size of its claim amount while perhaps decreasing the size of others' claims. The Debtors' only agenda in this regard is to set up a fair and transparent process to ensure that the proportionate distribution of their limited assets among different creditor groups is equitable. Through the various mechanisms provided herein, including document production (to provide access to the Debtors' information), a discovery schedule, and the protective order, the Debtors seek to ensure that every creditor that wishes to participate in the process can do so and all creditors' due process rights are preserved.

5. The second order the Debtors will seek – following discovery and briefing – is a Court order estimating different categories of claims to enable the Debtors to confirm a

plan and make distributions to creditors. Importantly, the Debtors are not seeking through this Motion to determine the allowed amount of any particular Claim or the allocation of value as among creditors in any particular category – the Debtors will propose such allocation at a later date after discussions with creditors. The estimates being sought are simply categories of claims, similar to the estimation of liabilities in asbestos and other mass tort chapter 11 cases.

6. As noted, there are two choices here – the first is to use up a significant portion of the Debtors’ assets to litigate each claim individually – that is a “perfect process” but with disastrous results that could lead to zero recoveries for all litigants. The second choice is to use the efficient mechanisms contemplated by the Bankruptcy Code to estimate claims (with all parties having an opportunity to participate) and give *all* creditors a greater recovery within a better timeframe. The Debtors submit that everyone is better off if the second choice is adopted and request that this Court enter an order estimating the categories of claims as set forth herein.

#### **Relief Requested**

7. By this Motion, pursuant to sections 105(a) and 502(c) of title 11 of the United States Code (the “**Bankruptcy Code**”), the Debtors request that the Court approve procedures for estimation and estimate the Debtors’ liability with respect to approximately 1,000 claims for actual and compensatory damages asserted by, among others, cities and municipalities, states’ attorneys general, personal injury plaintiffs, and insurance providers related to, among other things, the marketing and sale of Subsys (collectively and including similar claims that may be filed on or before the applicable bar date, the “**Subsys Claims**,” and each person or entity asserting such a claim, a “**Subsys Claimant**”). Specifically, the Debtors request that the Court (1) approve the proposed timeline set forth herein for discovery and an estimation proceeding before this Court in advance of plan confirmation, (2) approve the

proposed protective order governing the use of sensitive and confidential information produced in connection with the estimation process, (3) estimate the actual and compensatory damages subsumed in each of the Claim Categories (defined below) for purposes of plan allocation and setting claim distribution reserves, and (4) subordinate certain penalty claims.

8. The Debtors are not seeking herein, but may seek in a separate motion, to estimate any particular claim for allowance purposes. The Debtors are also not seeking, but may seek in a separate or amended motion, to estimate claims subordinated to those for actual and compensatory damages, including punitive damage and other penalty-type claims related to the Claims Categories. As referenced above, while the Debtors are not seeking to estimate the amount of liability with respect to such Claims, the Debtors are requesting the Court to find that these types of Claims are properly subordinated to all general unsecured claims, such as those for actual and compensatory damages.

9. A proposed form of order granting the Debtors' request for a discovery schedule and an estimation proceeding before this Court in advance of plan confirmation is annexed hereto as **Exhibit A** (the "**Proposed Scheduling Order**"). A proposed form for the related Notice of Estimation Proceedings is annexed hereto as **Exhibit B** (the "**Notice of Estimation Procedures**"). The Debtors will file a proposed order estimating the claims in advance of the estimation hearing.

10. The Debtors also request that the Court enter a protective order, in the form annexed hereto as **Exhibit C** (the "**Proposed Protective Order**"). The Debtors will provide access to a Document Production (defined below) with certain pleadings, settlements, and documents already produced by Insys in connection with various investigations and actions to accelerate discovery and otherwise aid parties in analyzing potential liability in the Claim

Categories. The Proposed Protective Order is necessary to comply with the Health Insurance Portability and Accountability Act of 1996 (“**HIPAA**”) and to preserve the confidentiality of other sensitive information.

### **Jurisdiction**

11. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

12. 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 Debtors consent to the entry of a final order by the Court in connection with this 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.

### **Background**

13. On the date hereof (the “**Petition Date**”), the Debtors each commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or statutory committee of creditors has been appointed in these Chapter 11 Cases.

14. Contemporaneously herewith, the Debtors have filed a motion requesting joint administration of their Chapter 11 Cases pursuant to Bankruptcy Rule 1015(b).

15. Additional information regarding the circumstances leading to the commencement of these Chapter 11 Cases, the Debtors' businesses and capital structure is set forth in the declaration of Andrew G. Long, the Debtors' Chief Executive Officer, filed on the Petition Date, in support of the Debtors' chapter 11 petitions and related first day relief (the "**First-Day Declaration**"). Support for this Motion is provided in an additional declaration of Mr. Long filed contemporaneously herewith (the "**Long Declaration**," and together with the First-Day Declaration, the "**Long Declarations**").<sup>3</sup>

### Subsys Claims

16. Starting in 2012, the Debtors marketed and sold Subsys, a prescription sublingual fentanyl spray indicated for the management of breakthrough pain in cancer patients 18 years of age and older who are already receiving and who are tolerant to around-the-clock opioid therapy for their underlying persistent cancer pain. The Debtors are currently defendants in approximately 1,000 lawsuits related to the marketing and sale of Subsys. Specifically, certain states' attorneys general, certain municipalities, personal injury plaintiffs, and insurance providers have asserted claims against Insys arising out of the marketing and sale of Subsys. The Long Declarations describe the background facts underlying most of the Subsys Claims. Below is a description of the categories of Subsys Claims the Debtors are seeking to estimate in this Motion:

17. State AG Claims. Several states' attorneys general have conducted and are conducting investigations related to the Debtors' sale and marketing of Subys (the "**State AG Investigations**"). The states' attorneys general's claims (including similar claims that may be

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<sup>3</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Long Declaration.

filed on or before the applicable bar date, the “**State AG Claims**”) are, currently, eleven<sup>4</sup> pending actions brought by states’ attorneys general or other state governmental units charged with public health and safety enforcement, against Insys related to its marketing and sale of Subsys. The State AG Claims principally allege violations of state consumer protection laws, state false claims acts, deceptive acts and practices, and fraud. Several states including Florida, Rhode Island, New Mexico, and Kentucky have also asserted public nuisance claims similar to those asserted by Municipalities (defined below) in those states. For purposes of this Motion, the category of State AG Claims includes all pending and threatened litigation and all other Claims (as defined in the Bankruptcy Code) of the States and Territories of the United States of America related to the Debtors’ marketing and sale of Subsys.

18. Municipality Claims. Various cities, counties, and Native American tribes<sup>5</sup> (the “**Municipalities**”) have also filed litigation against Insys for public nuisance, negligence, and fraud related to Insys’s marketing and sale of Subsys (including similar claims that may be filed on or before the applicable bar date, the “**Municipality Claims**”). These litigations typically include Insys as one of numerous other co-defendants involved in the marketing and distribution of opioid medications. There are approximately 1,000 pending Municipality Claims, with approximately 800 pending transfer to, or already consolidated into, the multi-district litigation in the Northern District of Ohio (the “**Federal MDL Claims**”) and approximately 200 in various state and federal courts throughout the country (the “**State Municipality Claims**”). Nearly all of the cases in the MDL are currently stayed while a few

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<sup>4</sup> There are ten pending actions brought by States Attorneys General, and, in Minnesota, a second action brought as an administrative proceeding by the Minnesota Board of Pharmacy.

<sup>5</sup> Native American tribes are being grouped with municipalities because they assert similar causes of action.

cases have been selected to proceed. Specifically, the MDL Court has ordered two litigation tracks of five total cases for accelerated discovery, motion practice, and trials, the first of which is scheduled to begin on October 21, 2019. Case Management Order No. 8 [Docket No. 1306], *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (Jan. 29, 2019). Track One is comprised of three cases brought by plaintiff municipalities located in the Northern District of Ohio, two of which are consolidated and scheduled for trial. Insys is named in those cases along with approximately 23 Defendant Families.<sup>6</sup> Track 2 includes claims of Cabell County Commission, West Virginia and City of Huntington, West Virginia.<sup>7</sup> Order [Docket No. 1218], *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (Dec. 31, 2018). In addition, approximately 260 Local Government Actions against Insys that have not been transferred to the MDL<sup>8</sup> are pending in state and federal courts throughout the country. The majority of these cases are concentrated in state courts in Arizona, Connecticut, Massachusetts, New York, Oklahoma, Pennsylvania, South Carolina, and Texas. These cases are in various stages of motion practice and discovery.<sup>9</sup> Significantly, whereas Insys entered the prescription opioid market in 2012, and reached a peak in 2015 of less than 0.03% of nationwide opioid prescriptions, many of the allegations directed at other, larger manufacturer defendants relate to a “push to expand prescription opioid use [that] began in the late 1990s,” which allegedly involved specific categories of misrepresentations (e.g., the risk of addiction from chronic opioid therapy

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<sup>6</sup> “Defendant Families” are groups of related corporate entity defendants.

<sup>7</sup> Debtors have not, as of the filing of the Motion, been named as a defendant in the Track Two MDL case brought by the City of Huntington, West Virginia.

<sup>8</sup> Including approximately 50 cases for which an application has been made to transfer the action to the MDL.

<sup>9</sup> The Debtors have also filed an adversary complaint and preliminary injunction motion pursuant to 11 U.S.C. § 105(a) to stay the currently active Federal MDL Claims and State Municipality Claims.

is low; opioid withdrawal can be avoided by tapering) intended to mislead physicians, patients, and the public at large about the risks and benefits of opioids. *See, e.g.*, Third Amended Complaint and Jury Demand, *The County of Summit, Ohio, et al. v. Purdue Pharma, L.P., et al.*, Case No. 17-md-2804 (MDL No. 2804) [Docket No. 1466] ¶¶ 4, 172-173. Plaintiffs' claims against Insys are generally for public nuisance, negligence, consumer and/or common law fraud, and some complaints also lump Insys in with the other defendants for RICO violations and civil conspiracy.

19. Personal Injury Claims. There are currently approximately 30 personal injury lawsuits, including those that seek class action status, alleging a variety of claims including, negligent misrepresentation, failure to warn, and wrongful death, loss of consortium, negligence, and fraud concerning Insys's marketing and sale of Subsys (including similar claims that may be filed on or before the Bar Date, the "**Personal Injury Claims**").

20. Insurance Claims. Finally, there are currently approximately seven pending claims brought by, or on behalf of,<sup>10</sup> insurance companies and self-funded health care plans (together, the "**Private Insurers**") asserting claims sounding in insurance fraud and deceptive business practices (including similar claims that may be filed on or before the Bar Date the, "**Private Insurer Claims**" and, together with the State AG Claims, the Municipality Claims, and the Personal Injury Claims, the "**Claims Categories**"). The Private Insurer Claims relate to Subsys prescriptions that the Private Insurers allege were improperly covered, or reimbursed, by the Private Insurers.

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<sup>10</sup> One of these suits is brought on behalf of Medicare Advantage Organizations, Independent Practices Associations, Management Service Organizations, Health Maintenance Organizations, and other downstream Medicare entities that had assigned their claims to plaintiffs. This case assert RICO and common law fraud claims related to alleged overpayments by the assignors.

21. In anticipation of the relief being sought in this Motion, the Debtors, through Weil, Gotshal & Manges LLP, have retained Nathan Associates to estimate the Debtors' liability for the Subsys Claims. Nathan Associates is well known in its fields of expertise, which include litigation and expert services like valuation of damages claims. Nathan Associates has extensive experience advising companies facing mass tort and environmental litigation in a wide array of product, toxic tort, environmental and exposure claims including those arising from the pharmaceutical industry.

22. The relief sought herein does not include estimation of all litigation filed against Insys, and Insys reserves the right to amend this Motion to estimate other, if any, material categories of claims. Moreover, the Debtors may seek to estimate, settle, or otherwise determine one or more other claims against them via a separate motion or in the claims reconciliation process.

**The Court Should Estimate the Claims Categories and  
Approve the Proposed Estimation Procedures**

23. As indicated above, the Debtors are hopeful that the parties, through good-faith negotiations, bolstered by chapter 11 being a catalyst for settlement, can reach a consensus with respect to the Subsys Claims. The Debtors expect that the scheduling of a definitive timetable, as contemplated by this Motion, will provide a constructive framework for potential negotiations. Given the large number of pending claims in certain of the Claims Categories, however, there is no certainty that all can be resolved within a timeframe that allows for the efficient administration of the Debtors' bankruptcy cases. Accordingly, to avoid undue delay in the Debtors' plan process and ensure a better and quicker recovery to their creditors, estimation

of the liabilities for purposes of plan allocation and setting claim distribution reserves is of paramount importance.

**A. The Court Should Estimate the Claims Categories**

24. Section 502(c) of the Bankruptcy Code provides that the Court “shall” estimate “any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case.” 11 U.S.C. § 502(c). “Estimation helps the court ‘avoid the need to await the resolution of outside lawsuits to determine issues of liability or amount owed by means of anticipating and estimating the likely outcome of these actions.’” *In re Fed.-Mogul Glob., Inc.*, 330 B.R. 133, 154 (D. Del. 2005) (quoting *Matter of Ford*, 967 F.2d 1047, 1053 (5th Cir. 1992)); *see also In re Lionel L.L.C.*, No. 04-17324, 2007 WL 2261539, at \*2 (Bankr. S.D.N.Y. Aug. 3, 2007) (noting that, without estimation, lengthy proceedings result in “delayed distributions, which in turn, greatly devalue the claims of all creditors as they cannot use the assets until they receive them” (citation omitted)); *In re Adelpia Bus. Sols., Inc.*, 341 B.R. 415, 422 (Bankr. S.D.N.Y. 2003) (“Estimation . . . provides a means for a bankruptcy court to achieve reorganization, and/or distributions on claims, without awaiting the results of [potentially protracted] legal proceedings.”) (citing *In re Continental Airlines, Inc.*, 981 F.2d 1450, 1461 (5th Cir. 1993)).

25. Indeed, “the Code requires estimation of all contingent or unliquidated claims which unduly delay the administration of the case.” *In re Nat’l Gypsum Co.*, 139 B.R. 397, 405 (N.D. Tex. 1992) (internal quotations omitted); *see also In re RNI Wind Down Corp.*, 369 B.R. 174, 191 (Bankr. D. Del. 2007) (“Estimation by the Court is mandatory, provided that the movant establishes that fixing or liquidation of the claim would unduly delay the administration of the case.”).

26. Estimation is proper for a number of various purposes related to the administration of a debtor's estate. *See In re Chemtura Corp.*, 448 B.R. 635, 649 (Bankr. S.D.N.Y. 2011) ("Claims estimation under Section 502(c)(1), which most commonly is used with respect to prepetition claims, can be used for a variety of purposes, including determining voting rights on a reorganization plan, gauging plan feasibility, determining the likely aggregate amount of a related series of claims, setting claim distribution reserves, or (though this is less commonly wise) allowing claims."); *see also In re Accredited Home Lenders Holding Co.*, No. 09-11516 (MFW) (Bankr. D. Del. May 31, 2011) [D.I. 2784] (granting motion to establish reserves).

27. Specifically, estimation for the purposes proposed by the Debtors (plan allocations and setting claim distribution reserves) is proper. *See In re Armstrong World Indus., Inc.*, 348 B.R. 111, 124 (D. Del. 2006) (using estimation to determine if a plan favored one class of unsecured creditors over another); *see also In re Hercules Offshore, Inc.*, No. 16-11385 (KJC) (Bankr. D. Del. Nov. 14, 2016) [D.I. 483] (establishing aggregate claims reserve of \$47 million based on estimated disputed claims); *In re Newpage Corp.*, No. 11-12804 (KG) (Bankr. D. Del. Feb. 19, 2013) [D.I. 3166] (establishing aggregate claims reserve of \$150 million based on estimated disputed claims).

28. It is crucial for the Debtors' plan process that the Claims Categories be estimated by the Court. As stated above, there are approximately 1,000 known Subsys Claims pending against the Debtors. Given the volume of claims, litigating each of them would unduly delay administration of the Debtors' estate, potentially by years, if it were necessary to reduce all of them to a final judgment. Estimation is therefore necessary because it would be difficult to formulate a confirmable plan with a thousand – or more – unliquidated claims. *See, e.g., In re*

*Fed.-Mogul Glob.*, 330 B.R. at 154; *see also In re N. Am. Health Care, Inc.*, 544 B.R. 684, 689–91 (C.D. Cal. 2016) (estimating claims in the aggregate for purposes of voting and plan confirmation).

29. In summary, estimation will allow the Debtors to establish the aggregate liability for each Claims Category to facilitate formulation of a plan of reorganization that does not unfairly allocate plan distributions to one class to the detriment of another – an important step in the path toward exit from chapter 11. Accordingly, the Court should estimate the Claims Categories following the appropriate estimation procedures.

**B. The Court Should Approve the Proposed Estimation Procedures**

30. Streamlined estimation proceedings are appropriate in these cases to avoid delay and ensure a transparent process for all parties to participate. Claim estimation procedures have been adopted by courts in this district and others. *In re CMTSU Liquidation, Inc. (f/k/a CIBER, Inc.)*, Case No. 17-10772 (BLS) (Bankr. D. Del. Sep. 29, 2017) [D.I. 668] (approving claims estimation procedures); *In re VeraSun Energy Corp.*, Case No. 08-12606 (BLS) (Bankr. D. Del. Nov. 19, 2009) [D.I. 2028] (approving expedited claims estimation procedures); *In re Motors Liquidation Co.*, Case No. 09-50026 (REG) (Bankr. S.D.N.Y. Dec. 15, 2010) [D.I. 8121] (authorizing a schedule for estimation proceedings).

31. The estimation procedures described below are designed to provide sufficient notice and an opportunity to participate to all parties that wish to do so, while also prioritizing efficiency. First, the Scheduling Notice will be served widely to provide all parties information and the option to participate in the estimation process. Second, subject to each Participating Party's acknowledgement of the Protective Order, the Debtors will provide access

to certain documents produced by Insys in connection with various investigations and actions, as well as pleadings or settlements, to assist claimants in evaluating the Debtors' proposed estimates. In fact, the majority of the parties in the Claims Categories have had access to discovery materials for approximately nine months before these Chapter 11 Cases were commenced.

32. Lastly, the proposed estimation procedures will allow all participating parties to have an opportunity to obtain additional discovery, present expert testimony, file pre-trial briefs, and participate in a hearing before the Court. This process will allow the parties to provide "sufficient evidence on which to base a reasonable estimate" for the claims. *Bittner v. Borne Chem. Co.*, 691 F.2d 134, 135 (3d Cir. 1982) (affirming estimation based on hearing and cautioning that procedures like arbitration and trials "usually will run counter to the efficient administration" of the estate).

33. In detail, the Debtors propose the following procedures and schedule for the Claims Categories estimation proceeding (the "**Estimation Procedures**"):

(a) The Debtors shall serve their report, including expert analysis, as applicable, including good faith estimates of the Debtors' general unsecured liability in the Claims Categories, based on information available as of the date of entry of the Proposed Scheduling Order, within five days after the entry of the Proposed Scheduling Order; *provided, however*, that the Debtors may serve an amended report updating the estimate for any Claims Category based on then filed proofs of claim and any other new information within ten days after the General Bar Date<sup>11</sup> or thereafter as necessary;

(b) Any party-in-interest that wishes to submit evidence in connection with a hearing on this Estimation Motion shall (1) file a Notice of Estimation Participating Party in the form attached hereto as "**Exhibit D**," within ten days

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<sup>11</sup> As defined in the *Motion of Debtors Pursuant to 11 U.S.C. §§ 502(b)(9) And 105(a), Fed. R. Bankr. P. 2002, 3003(c)(3), 5005, and 9007, and Local Rules 2002-1(e), 3001-1, and 3003-1 for Authority to (I) Establish Deadlines for Filing Proofs of Claim, (II) Establish the Form and Manner of Notice Thereof, and (III) Approve Procedures for Providing Notice of Bar Date and Other Important Deadlines.*

after entry of the Proposed Scheduling Order (any party that files such a notice, a “**Participating Party**”), and (2) identify its expert or indicate that it will not offer expert testimony in a notice served on the Debtors and each other Participating Party within 21 days after the entry of the Proposed Scheduling Order;

(c) Following receipt of an executed Notice of Estimation Participating Party which includes an acknowledgment of the Protective Order, the Debtors will give such Participating Party access to certain documents produced by Insys in connection with various investigations and actions, as well as pleadings or settlements, in the form previously produced, most of which are in standard single-page tiff format with unique page identifiers and either extracted or OCR text (the “**Document Production**”).

(d) All fact discovery requests shall be served within 24 days after entry of the Proposed Scheduling Order; *provided, however*, that the document requests shall be limited to requests for categories of documents that are not already available in the Document Production;

(e) All responses and objections to requests for written discovery and those for the production of documents and other materials, and production of such documents and other materials, shall be served on the Debtors and the party making such fact discovery request (if not the Debtor) within 21 days of such request, and all documents produced will be added to the Document Production and made available to all Participating Parties;

(f) All fact depositions shall be completed within 14 days of service of the responses and production described in (e) above;

(g) Within 15 days of the later of the General Bar Date or the completion of the fact depositions described in (f) above, the Participating Parties that provided timely notice of their intent to produce expert testimony shall serve expert reports regarding the estimated amount of the Debtors’ liability for one or more of the Claims Categories;

(h) The Debtors shall serve expert rebuttal reports, if any, within 14 days of service of the expert reports in (g) above;

(i) Each party shall make its expert available to be deposed, with any such depositions to be completed within 14 days of service of rebuttal reports;

(j) The Debtors and any Participating Party agree to seek emergency hearings, subject in their entirety to the Court’s availability, before the Court pursuant to Rule 9013-1(f) of the Local Rules to resolve all discovery disputes arising from this Proposed Scheduling Order.

(k) Subject to the Court's availability, a hearing will be held to estimate the Debtors' aggregate liability for Subsys Claims in each Claim Category (the "**Estimation Hearing**") within approximately 15 days of the completion date for expert depositions in paragraph (i) above;

(l) The parties shall exchange copies of all exhibits to be offered at the Estimation Hearing seven business days prior to commencement of the Estimation Hearing; the parties will prepare a joint exhibit list (highlighting any open objections to admissibility of such exhibits); and the Debtors will provide copies of the exhibits and the joint exhibit list to the Court by 4:00 p.m. (Eastern Time) five business days prior to the commencement of the Estimation Hearing;

(m) Any pre-trial briefs, including forms of Proposed Estimation Order, shall be filed with the Court by 4:00 p.m. (Eastern Time) four business days prior to the commencement of the Estimation Hearing; such briefs will refer to the exhibit number used in the joint exhibit list submitted to the Court and the parties will work to establish and use a common case and exhibit citation method for convenience of the Court.

34. As set forth in detail above, absent the relief requested herein, the proposal and confirmation of a plan and distributions to creditors in these cases could be significantly delayed. While it is the Debtors' hope that the parties will continue to negotiate through the commencement of the estimation proceeding and reach settlements prior thereto, the Debtors respectfully request that the Court approve the Proposed Scheduling Order and the Proposed Scheduling Notice.

**The Court Should Approve the Proposed Protective Order**

35. The Court should also approve the entry of the Proposed Protective Order because doing so would protect individuals from disclosure of sensitive medical information classified as confidential by HIPAA that may be produced in connection with the Estimation Proceeding.

36. A protective order is appropriate where the party seeking protection shows "good cause." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994). Good cause

exists when “disclosure will cause a clearly defined and serious injury.” *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995). Relevant considerations for evaluating the existence of good cause include “(1) the interest in privacy of the party seeking protection; (2) whether the information is being sought for a legitimate purpose or an improper purpose; (3) the prevention of embarrassment, and whether that embarrassment would be particularly serious; (4) whether the information sought is important to public health and safety; (5) whether sharing of the information among litigants would promote fairness and efficiency; (6) whether the party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.” *Arnold v. Pennsylvania, Dep’t of Transp.*, 477 F.3d 105, 108 (3d Cir. 2007). These factors are not, however, mandatory or exhaustive and the court may weigh competing considerations. *Glenmede*, 56 F.3d at 483.

37. The Third Circuit has “recognized the important privacy interest in one’s medical records.” *Everett v. Nort*, 547 F. App’x 117, 122 n.9 (3d Cir. 2013) (granting motion to file medical records under seal). Consequently, courts in the Third Circuit routinely find that the need to protect medical records, which HIPAA classifies as confidential, satisfies the good cause standard. *See, e.g., In re Benicar® (Olmesartan) Prod. Liab. Litig.*, No. 15-2606 (RBK/JS), 2018 WL 4375219, at \*2 (D.N.J. Sept. 13, 2018) (“Defendants argue correctly the general right of the public to know does not defeat the [HIPAA]-required confidentiality of Exhibit A because Congress has determined a non-exigent disclosure of a citizen’s PHI creates a serious and substantial breach of privacy.”); *Bertolotti v. AutoZone, Inc.*, 132 F. Supp. 3d 590, 609 (D.N.J. 2015) (“[P]ublic disclosure of an individual’s medical history and personal identifying numbers has been held to be a clearly defined and serious injury sufficient to support sealing of medical

records.”); *Burtner v. Pennsylvania State Police*, No. 13-891, 2013 WL 5936427, at \*2 (W.D. Pa. Nov. 5, 2013) (granting motion to seal with respect to medical and mental health records).

38. The Proposed Protective Order is necessary because the materials in the Document Production may contain medical information protected by HIPAA. The Court should therefore enter the Proposed Protective Order to ensure that this information is protected from disclosure. Each Participating Party will be required to acknowledge the Protective Order before gaining access to the Document Production.

#### **The Court Should Subordinate Certain Penalty Claims**

39. Finally, the Court should subordinate all claims seeking penalties, consistent with existing precedent, thus maximizing creditors’ recoveries for actual and compensatory damages.

40. Within the Claims Categories, certain claimants seek penalties like fines or punitive damages (the “**Penalty Claims**”). For example, some of the State AG Claims and many of the Municipality Claims assert claims under state consumer protection statutes, such as for unfair or deceptive business practices, which allow recovery of statutory fines or penalties. Other claimants seek injunctive relief, restitution or disgorgement, or treble, punitive, or exemplary damages.

41. Pursuant to 11 U.S.C. § 726(a)(4) “any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages,” are subordinated to general unsecured creditors in Chapter 7. Section 726(a)(4) is applicable to Chapter 11 cases through § 1129(a)(7). *See Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723–24 (D. Del. 2005) (“[I]f punitive damages are recoverable at all, they must be accorded a lower priority than claims for compensatory damages (§ 726(a)(4) in Chapter 7 cases, applicable here pursuant to

§ 1129(a)(7).”); *see also In re Motors Liquidation Co.*, 571 B.R. 565, 576 (Bankr. S.D.N.Y. 2017) (“The Bankruptcy Code provides that general unsecured creditors, including those who file late claims, must be paid in full before any claim for punitive damages may be paid. 11 U.S.C. § 726(a)(3)-(4). While section 726(a) applies to cases under chapter 7 of the Bankruptcy Code, the ‘best interest of creditors’ test mandates that claimants in a chapter 11 case must receive at least as much as they would receive in a chapter 7 case.”), *aff’d in relevant part*, 2018 WL 2416567, at \*15 (S.D.N.Y. May 29, 2018); *In re New York Med. Grp., P.C.*, 265 B.R. 408, 416 n.5 (Bankr. S.D.N.Y. 2001) (“Like tax penalty claims, punitive damage claims are subordinated to general unsecured claims in a chapter 7 liquidation, see 11 U.S.C. § 726(a)(4), and hence, fare differently under the ‘best interests of creditors’ test. This difference may justify the separate classification of punitive damage claims, or if classified with unsecured claims, their subordination to the payment of the unsecured claims.” (citation omitted)).

42. Indeed, in the *TK Holdings Inc.* chapter 11 case, Chief Judge Brendan L. Shannon, in confirming the debtors’ chapter 11 plan, held that the plan properly subordinated the claims of various municipalities seeking injunctive relief, restitution, disgorgement, penalties, and fines for violation of consumer protection statutes, overruling the objections of the municipalities that argued otherwise. *See In re TK Holdings Inc.*, Case No. 17-11375 (BLS) (Bankr. D. Del. Feb. 21, 2018) [D.I. 2120].

43. Therefore, the Court should prioritize actual and compensatory damages by subordinating all claims seeking penalties to all general unsecured claims.

#### **Notice**

44. Notice of this Motion will be provided to (a) the Office of the United States Trustee for the District of Delaware (Attn: Jane M. Leamy); (b) the holders of the thirty

(30) largest unsecured claims against the Debtors on a consolidated basis; (c) the Securities and Exchange Commission; (d) the Internal Revenue Service; (e) the United States Attorney's Office for the District of Delaware; (f) the Department of Justice; (g) Litigation Parties on the Debtors' Consolidated Credit Matrix; (h) all States' attorneys general; and (i) any other party that requested notice pursuant to Bankruptcy Rule 2002 (the "**Notice Parties**"). Based on the urgency of the circumstances surrounding this Motion and the nature of the relief requested herein, the Debtors respectfully submit that no further notice is required.

45. No previous request for the relief sought herein has been made by the Debtors to this or any other court.

WHEREFORE the Debtors respectfully request entry of the Proposed Scheduling Order including approving the Proposed Scheduling Notice, Proposed Protective Order, and the to-be-filed order estimating Claims Categories, granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: June 10, 2019  
Wilmington, Delaware

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