**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF DELAWARE**

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| Future Claimants' Representative, et al.,<br><br>Petitioners,<br>v.<br><br>Boy Scouts of America and Delaware BSA, LLC,[1]<br><br>Respondents. | Civil Action No. 21-00392-RGA<br><br>Bankruptcy Case No. 20-10343 (LSS) |

**CERTAIN INSURERS' OPPOSITION TO MOTION OF THE COALITION, TCC AND FCR FOR WITHDRAWAL OF THE REFERENCE OF PROCEEDINGS INVOLVING THE ESTIMATION OF PERSONAL INJURY CLAIMS**

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[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Boy Scouts of America (6300) and Delaware BSA, LLC (4311). The Debtors' mailing address is 1325 West Walnut Hill Lane, Irving, Texas 75038.

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The undersigned insurance carriers (collectively, "**Certain Insurers**"), hereby oppose the *Motion of the Future Claimants' Representative, the Official Committee of Tort Claimants, and the Coalition of Abused Scouts for Justice for Entry of an Order, Pursuant to 28 U.S.C. § 157(d) and Bankruptcy Rule 5011(a), Withdrawing the Reference of Proceedings Involving the Estimation of Personal Injury Claims*, filed on March 17, 2021 [Bankr. D.I. 2399; D.I. 1] (the "**Motion**").[2]

## Preliminary Statement

1. The Motion, filed by three representatives of tort claimants in the Debtors' bankruptcy cases ("**Movants**"), asks this Court to withdraw the reference to consider a motion that Movants filed in bankruptcy court to "estimate" the Debtors' aggregate liability, by year, for nearly 85,000 "Abuse Claims" asserted in the bankruptcy case. Movants say the estimation is a "non-core" proceeding that the bankruptcy court cannot decide. They are wrong.

2. Movants do not seek an estimation of any Abuse Claim "for purposes of distribution," the only form of estimation that title 28 of the United States Code (the "**Judicial Code**") says is not a "core" proceeding that a bankruptcy court can handle (subject to the normal standards of appeal). 28 U.S.C. § 157(b)(2)(B). As the words of the statute make clear and as numerous cases have held, this narrow exception applies only where a party, to avoid undue delay in the administration of the bankruptcy case, seeks to estimate an individual claim, for purposes of determining the distribution to be paid on that claim. Movants concede that is *not* what they are asking this Court to do. Rather, the Motion asserts that individual Abuse Claims will not be liquidated in the estimation proceeding but, instead, will be liquidated one by one, for distribution purposes, pursuant to "trust distribution procedures" under a yet-to-be-confirmed

[2] Capitalized terms not defined herein have the meanings ascribed to such terms in the Motion.

plan of reorganization or through adjudication in the tort system. The Court should deny the Motion for this reason alone; the supposed "estimation" Movants seek is a "core" proceeding that the bankruptcy court can and should decide.

3. Movants' underlying estimation motion is as meritless as their request that this Court withdraw the reference. Movants' purpose in seeking to estimate the Debtors' aggregate liability has nothing to do with the limited purpose for estimation under Section 502 of the Bankruptcy Code, which is authorized only when a particular claim is unliquidated and its liquidation in the normal course would "unduly delay the administration of the [bankruptcy] case." 11 U.S.C. § 502(c). Movants do not want an estimation of any particular Abuse Claim whose liquidation is hindering the progress of the case. Rather, Movants want the Court to estimate the Debtors' *total* liability for all Abuse Claims, *by policy year*, without actually estimating any single claim, because Movants want to argue in a subsequent insurance-coverage lawsuit that such an estimation amounts to an adjudication of the Debtors' liability in each policy year for all Abuse Claims. They will then contend that the insurers with policies applicable to that year must cover that estimated amount notwithstanding the fact that no individual claim against the Debtors was actually resolved by the estimation. That argument disregards the limited nature of bankruptcy "estimations," which Movants hope will be lost on a state court, unfamiliar with the nuances of bankruptcy law, in a later coverage action. It also turns insurance principles and due process on their heads, because insurance policies obligate insurers to indemnify an insured only for specific claims the insured is legally obligated to pay, not to indemnify an insured for an "estimation" of aggregate liability untethered to any individual claim. And an aggregate estimation, even if broken down by year, would say nothing about whether a particular claimant was actually abused, when any such abuse took place, or the

amount the claimant is entitled to recover on account of his claim, critical information needed to apply the terms of each carrier's insurance policy.

4. Indeed, Movants want the Court to "estimate" the Debtors' aggregate liability for the Abuse Claims precisely in hopes that they never have to prove up the validity of any individual Abuse Claim in any court. Hartford and Century have filed motions that are currently pending before the Bankruptcy Court in the Debtors' bankruptcy cases seeking discovery pursuant to Federal Rule of Bankruptcy Procedure 2004 to examine the validity of individual Abuse Claims. But the Coalition, one of the Movants, has vigorously opposed that discovery. It and the other Movants evidently hope to derail any examination of the merits of individual Abuse Claims by proposing an alternative "estimation" proceeding in which this Court (or the bankruptcy court) would be asked to estimate the Debtors' aggregate liability by policy year and Movants would be allowed to cherry-pick a purportedly "representative sample" of claimants from whom discovery would be taken. Movants' goal is obvious: to limit discovery to a short list of claims, of their choosing, to tilt the playing field in their favor and obtain an "estimation" of the Debtors' aggregate liability for the Abuse Claims, which Movants will then seek to use in subsequent coverage litigation in the hope that they will thereby never have to establish the merits of any individual Abuse Claim.

5. But all of this is for another day. The only issue presented now by the Motion is where the debate over Movants' request for estimation should take place—in this Court, or in the bankruptcy court. On that issue, the answer is straightforward: the bankruptcy court. The estimation proceeding proposed by Movants is a core bankruptcy proceeding, not a non-core proceeding to estimate claims one by one for purposes of distribution. This Court should deny

the Motion and let the bankruptcy court, which has been closely managing the Debtors' bankruptcy cases for more than a year, decide the estimation motion.

## Argument

### I. THE COURT SHOULD DENY THE MOTION TO WITHDRAW THE REFERENCE

#### A. The Estimation Motion Is A Core Matter That Can Be Decided By The Bankruptcy Court

6. Movants' argument for withdrawal of the reference turns on the proposition that the estimation motion is a non-core proceeding under 28 U.S.C. § 157(b)(2)(B), and that it would therefore be more efficient for this Court to hear the estimation motion in the first instance, rather than to have the bankruptcy court submit proposed findings and of fact and conclusions of law to this Court, subject to *de novo* review (*id.* §157(c)(1)). That argument fails because the premise is false: under the statute's express terms, the estimation motion is a core proceeding, and the motion is therefore one that the bankruptcy court has full authority to hear and determine. *Id.* § 157(b)(1). It would accordingly be far more efficient for the bankruptcy court, which has been presiding over the Debtors' Chapter 11 bankruptcy cases for more than a year, to decide Movants' estimation motion and determine whether any estimation is appropriate. Indeed, Movants have already noticed their estimation motion for hearing in the bankruptcy court, and Certain Insurers have filed today an opposition to the motion (and the Debtors have informed the bankruptcy court they intend to do so as well).[3]

7. Section 157 of the Judicial Code provides that "[c]ore proceedings include … *estimation of claims* … for the purposes of confirming a plan under chapter 11." 28 U.S.C. § 157(b)(2)(B) (emphasis added). Ignoring that general rule altogether—the Motion fails even to

[3] For the convenience of this Court, attached as Exhibit 1 is the Notice of Hearing in the bankruptcy court on Movants' estimation motion, filed by Movants, and attached as Exhibit 2 is the opposition to the estimation motion filed by Certain Insurers, also in the bankruptcy court.

mention it—Movants base their argument on a narrow exception, which provides that core proceedings do not include the "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate *for purposes of distribution* in a case under title 11." *Id.* (emphasis added).

8. That exception does not apply here. As its plain language makes clear, the exception applies only to the liquidation or estimation of a particular personal injury claim "for purposes of distribution"—i.e., to fix the amount of an individual personal injury claim for purposes of determining what share of the bankruptcy estate will be distributed, or paid, on that particular claim. *See, e.g.*, *In re G-I Holdings, Inc.*, 295 B.R. 211, 218-220 & n.5 (D.N.J. 2003) (explaining that the exception does not apply to an estimation of a debtor's aggregate tort liability, but rather only to proceedings "to estimate the value of *individual* [personal injury] claims" in a manner that "results in an effective *liquidation* of those claims" (emphasis added)); *In re G-I Holdings, Inc.*, 323 B.R. 583, 597, 611 (Bankr. D.N.J. 2005) (concluding that the exception applies only where movant seeks to "estimate each individual claim against [the debtor] one by one" "with the intended goal of liquidating contingent or unliquidated personal injury tort … claims against the estate *for distributional purposes*" (emphasis added)).

9. Movants admit that this is *not* the purpose of their estimation motion. Movants instead seek an estimation of BSA's *aggregate liability* for some 85,000 Abuse Claims that have been filed in the bankruptcy proceedings, not an estimate of any specific Abuse Claim. Indeed, Movants stress that the estimation will *not* liquidate any individual Abuse Claim. That determination, Movants explain, will be reserved for separate, and mostly non-judicial, proceedings—which Movants contemplate will occur long *after* a plan has been confirmed—

pursuant to "trust distribution procedures" that would govern the liquidation and payment of distributions on individual Abuse Claims submitted to the trust for payment.

10. The Motion thus states:

> "Estimation of aggregate liability is *not* intended to, and should *not*, determine the liquidated amount of a particular individual claim. The plan contemplates that such individual amounts will be determined through a yet unfiled set of trust distribution procedures (the 'TDP') or through release of actions into the tort system for adjudication as permitted by the TDP."

Mot. at 4 n.3 (emphasis added). The estimation motion similarly states:

> "Estimation of aggregate liability will *not* determine the liquidated amount of any particular individual claim. The plan contemplated by the Movants will likely provide that such individual amounts will be determined through trust distribution procedures (the 'TDP') or through release of actions into the tort system for adjudication as permitted by the TDP."

Estimation Mot., D.I. 1-2, at 1 n.3 (emphasis added).

11. By Movants' own admission, then, the estimation motion will not fix the amount of any individual Abuse Claim for purposes of determining any individual claimant's right to receive a distribution from the Debtors' bankruptcy estate. The estimation is therefore not "for purposes of distribution" and accordingly falls outside the narrow "non-core" exception in section 157(b)(2)(B) of the Judicial Code.

12. If this proposed estimation serves any legitimate purpose at all (and it does not, for the reasons discussed below and in greater detail in the opposition Certain Insurers are filing in the bankruptcy court to the estimation motion), it is as an "estimation of claims … for the *purposes of confirming a [chapter 11] plan*," which the statute expressly designates as a "core" proceeding. 28 U.S.C. § 157(b)(2)(B) (emphasis added). The Motion itself admits that the estimation motion is purportedly "for purposes of measuring the proposed plan's *satisfaction of certain confirmation requirements*." Mot. at 9 (emphasis added). The estimation motion likewise asserts that "[e]stimation of the Abuse Claims is … critical to determining whether the

Proposed Plan (or any other plan) *satisfies the Bankruptcy Code's confirmation requirements*." *See* Estimation Mot. at 13 (emphasis added); *see also id.* at 7 (the "estimation is designed to resolve issues that are *conditions precedent to any plan*" (emphasis added)). The motion further contends that the estimation is necessary to evaluate whether any plan proposed in the case will comply with various of the Code's requirements for confirming a plan.[4]

13. As numerous courts have held, *that* sort of estimation—which does not fix the distribution to be paid on any individual claim, but rather purportedly seeks to measure the debtor's aggregate liabilities for purposes of determining whether a plan satisfies the Bankruptcy Code's requirements for plan confirmation—is precisely the sort of estimation "for purposes of confirming a plan" that is a core proceeding under section 157(b)(2)(B). *See, e.g.*, *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1012 (4th Cir. 1986) ("[T]he statute denies authority to the bankruptcy court to 'estimate' contingent claims only if the purpose is to make a 'distribution' of the assets of the debtor; the statute does not … deny to the bankruptcy court the authority … to 'estimate' the contingent 'personal injury' claims for purposes of determining the feasibility of a reorganization [plan]. … [E]stimation of the debtors' potential personal injury tort liabilities as an incident of the development of a plan of reorganization are core proceedings within the bankruptcy court's jurisdiction[.]"); *In re G-I Holdings, Inc.*, 295 B.R. at 218-220 & n.5 (denying motion to withdraw the reference and explaining that where—as here—movants sought a two-step process in which the court would "estimat[e] aggregate liability for purposes of plan confirmation … and later liquidat[e] the claims," the estimation motion was "a core proceeding

[4] *See, e.g.*, *id.* at 13 (citing section 1129(a)(7)'s requirement that a Chapter 11 plan of reorganization provide dissenting creditors at least as much as they would receive in a Chapter 7 liquidation); *id.* (citing section 1129(a)(11)'s requirement that a Chapter 11 plan be feasible); *id.* (citing section 1129(b)(1)'s requirement that a Chapter 11 plan be fair and equitable); *id.* at 14 ("estimation will allow the Court to evaluate whether the plan is fair and equitable with respect to the treatment of Abuse Claims as compared to other general unsecured claims").

that should be determined by the Bankruptcy Court" "because [the motion] is seeking a determination of [the debtor's] total asbestos liability and not a method to liquidate claims"); *accord In re N. Am. Health Care, Inc.*, 544 B.R. 684, 690-691 (Bankr. C.D. Cal. 2016); *In re Farley, Inc.*, 146 B.R. 748, 753 (Bankr. N.D. Ill. 1992); *In re Poole Funeral Chapel, Inc.*, 63 B.R. 527, 532-533 (Bankr. N.D. Ala. 1986); *In re Johns-Manville Corp.*, 45 B.R. 827, 830 (S.D.N.Y. 1984); *In re UNR Indus., Inc.*, 45 B.R. 322, 326 (N.D. Ill. 1984); *see also* 1 *Collier on Bankruptcy* ¶ 3.06 ("to determine whether the feasibility and the other confirmation standards have been satisfied, it may be necessary for those [personal injury] claims to be estimated"; "[i]n such a case, the estimation, which is an 'estimation in bulk,' so to speak, because no single [personal injury] claim is being estimated, is accomplished by the bankruptcy judge").[5]

14. Movants nonetheless assert that an estimation of the Debtors' aggregate liability for Abuse Claims is for "purposes of distribution" on the theory that estimating the Debtors' total tort liability would set a maximum limit on the amount contributed to the trust. This is so, Movants say, "[b]ecause creditors cannot be paid more than in full." Mot. at 4, 8-9.

15. That argument is the height of cynicism. Movants are surely not concerned that holders of Abuse Claims may be paid too much, and they certainly are not seeking to protect the Debtors from paying more than they should. To the contrary, at a recent status conference in bankruptcy court, counsel for the Movant Tort Claimants Committee (**"TCC"**) made it clear that the Committee is indifferent to whether the Debtors survive and is concerned only with the

[5] *See also, e.g.*, Order Estimating the Maximum Amount of Certain Contingent, Unliquidated, and Disputed Claims at 2, *In re TK Holdings Inc.*, No. 17-11375 (Bankr. D. Del. Feb. 26, 2018), Dkt. No. 2180 (estimating tort claims "for purposes of determining … Reserves … under the Plan," and "not for purposes of Allowance," as a core proceeding); *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 74, 97 (Bankr. W.D.N.C. 2014) (estimating asbestos claims "for the purpose of formulating a plan" as a core proceeding); *In re Eagle-Picher Indus., Inc.*, 189 B.R. 681, 682 (Bankr. S.D. Ohio 1995) (estimating asbestos claims for "purposes of [determining] … a proper allocation of plan funding … between the unsecured creditors and the [asbestos] PI Trust created by the plan" and "not [to] decide liability or assign a permanently fixed value for such claims" as a core proceeding).

recovery that holders of Abuse Claims can obtain.[6] And the TCC plainly does not believe that the Debtors are in any danger of "overpaying": The Debtors' balance sheet records assets of approximately $1 billion; the TCC asserts that the Abuse Claims exceed $100 billion.[7]

16. Movants are thus not seeking an estimation of the Abuse Claims to set a "cap" on the Debtors' and Local Councils' contributions to a trust. Indeed, as set forth more fully in Certain Insurers' response to the estimation motion, Movants do not seek an estimation for any proper purpose at all. Instead, Movants seek an estimation by this Court that they can then parade in state court in subsequent coverage litigation as a supposed adjudication by the Court of the Debtors' aggregate liability, by policy year, for the Abuse Claims, without having the validity of a single Abuse Claim vetted by any court.

17. Movants are following a well-worn playbook in which plaintiffs' lawyers have sought to misuse bankruptcy court "estimations" in subsequent coverage litigation in other courts *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, 38 Cal. Rptr. 3d 716 (Ct. App. 2006), is a prime example. There, the debtor and asbestos claimants negotiated a Chapter 11 plan that allowed present and future asbestos claims in an aggregate value determined according to the plan's claim resolution procedures. *See id.* at 722-724. The plan included purported "insurance neutrality" language, and claimants' counsel represented to the bankruptcy court at the plan-confirmation hearing that the plan would have no effect on any coverage litigation. But, once the bankruptcy court had confirmed the plan, the plaintiffs reneged on their representation and

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[6] *See* Tr. Omnibus Hearing at 20-21 (Bankr. D. Del. Mar. 17, 2021), attached as Exhibit 3 hereto ("Tr. Mar. 17 Hearing") (Mr. Stang, counsel for TCC: "the tort claimants committee is not concerned about whether the Boy Scouts … exists post-confirmation. Their concern is a reasonable compensation.").

[7] *See* The Official Committee of Tort Claimants' Objection to Debtors' Third Motion for Entry of an Order Extending the Debtors' Exclusive Periods to File a Chapter 11 Plan and Solicit Acceptances Thereof at 2, *In re Boy Scouts of Am.*, No. 20-10343 (Bankr. D. Del. Apr. 1, 2021), Dkt. No. 2506; Disclosure Statement for the Second Amended Chapter 11 Plan Of Reorganization For Boy Scouts Of America And Delaware BSA, LLC, *In re Boy Scouts of Am.*, No. 20-10343 (Bankr. D. Del. Apr. 13, 2021), Dkt. No. 2594, Ex. C at 12.

argued in a subsequent state-court coverage action that the plan had been a "final adjudication that established [the debtor's] liability to asbestos claimants and therefore obligated [insurers] to pay the full ALV [allowed liquidated value of the asbestos claims] established by the bankruptcy court." *Id.* at 726. Remarkably, the state trial court agreed. *Id.* at 726-727. Fortunately, a state appellate court saw through the plaintiffs' abusive tactics and reversed the trial court's judgment. *Id.* at 732-746.

18. It is clear that Movants are seeking to follow the same script here, hoping that they can misuse an "estimation" to prejudice insurers in state-court coverage litigation, as in *Fuller-Austin*. Movants request an estimation of the Debtors' aggregate liability *by year*. Because different insurers issued policies for different years in which the Boy Scouts operated, Movants want an estimate of the Debtors' total liability by year to try to use that estimate in subsequent coverage litigation against particular carriers that issued policies for that year. Indeed, Movants admit as much, asserting in their estimation motion that "a year-by-year estimation—of the sort we propose—will permit the Abuse Claim liability to be matched to the appropriate insurer(s) and policy(ies) of the BSA and/or the local councils," which will purportedly "resolv[e] ancillary disputes with and among the insurers about who is liable for what" and "solv[e] for such coverage disputes." Estimation Mot. at 16. Such an estimate by year would, of course, be wholly unnecessary to avoid an "overpayment" of any Abuse Claim under a plan of reorganization or otherwise for any bankruptcy law purpose.

19. In short, Movants have filed their estimation motion for purposes having nothing to do with those for which the Bankruptcy Code permits estimation. Here, however, all that matters is that Movants do not seek an estimation of any individual Abuse Claim "for purposes of distribution" to the holder of that claim in bankruptcy, the only sort of estimation that the

Judicial Code indicates is non-core and may not be decided by the bankruptcy court. There is no reason this Court should withdraw the reference.

20. The few cases Movants cite are of no help to them. In *In re Dow Corning Corp.*, 211 B.R. 545 (Bankr. E.D. Mich. 1997), the court *denied* motions for estimation of the debtor's aggregate product liability, concluding that the estimation was not required under Bankruptcy Code section 502(c), nor necessary for plan confirmation purposes. *Id.* at 562-569. The passage Movants cite (Motion at 9) was both dicta and inapposite. The debtor in *Dow* was solvent and was purporting to pay all tort claims in full; yet, it sought to obtain an estimation of its aggregate tort liability to justify limiting its contribution to the trust at a "capped" amount of $2 billion, with a discharge from all further liability. *See id.* at 566-567. On those facts, the court noted that it was "conceivable" that if the estimation turned out to be too low—and the actual amount of tort claims exceeded the $2 billion put in the trust—the estimation could turn out to be for "purposes of distribution," since the estimation would have limited the trust to $2 billion and thereby artificially cut off the claimants' rights to payment in full from a solvent debtor. *Id.* at 569-570. Even if that analysis could be reconciled with the statute's text—a question the court did not decide, given its denial of estimation on other grounds—it has no application here. As discussed above, Movants' estimation motion has nothing to do with figuring out where to set any purported "cap" on the Debtors' and local councils' (or any insurer's) potential contributions to the trust, and Movants certainly do not concede that the Debtors are solvent.

21. *PG&E* is even farther afield. *PG&E*, like *Dow*, involved a solvent debtor that sought to use the estimation process to cap its tort liability at less than its financial resources permitted it to pay. But, even under these extraordinary facts, the bankruptcy court in *PG&E* did *not* hold that the estimation was a non-core proceeding "for purposes of distribution" under

section 157(b)(2)(B). Instead, and contrary to what the Motion (at 13) suggests, the bankruptcy court expressly declined to decide whether the estimation was a "core" proceeding "for purposes of confirmation," on the one hand, or a "non-core" proceeding "for purposes of distribution," on the other. The bankruptcy court simply recommended that the district court withdraw the reference so that the district court could decide that question in the first instance.[8] The district court adopted the recommendation and withdrew the reference in a short two-page order, without deciding those questions either.[9] Indeed, it ultimately terminated the proceeding without conducting any estimation at all.[10] None of this has any bearing in this case in which the Debtors have not filed any motion to cap their liability in the bankruptcy proceedings at less than they are able to pay.

22. In short, Movants' estimation motion is a "core" proceeding under § 157(b)(2)(B) and falls outside the limited "non-core" exception for an estimation "for purposes of distribution." As such, the bankruptcy court can conduct the requested estimation, and the reference need not be withdrawn.

**B. The Estimation Motion Does Not Involve The Trial Of Any Personal Injury Claim**

23. Movants' only other argument in support of their motion to withdraw the reference fails for similar reasons. Movants argue that the Court should withdraw the reference because the bankruptcy court lacks the authority to try the Abuse Claims under 28 U.S.C. § 157(b)(5), which provides that the "district court shall order that personal injury tort and

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[8] *Recommendation for Withdrawal of Reference of Proceeding in Part* at 4-5, 7, *In re PG&E Corp.*, No. 19-30088-DM (Bankr. N.D. Cal. Aug. 21, 2019), Dkt. No. 3648.

[9] *Order Adopting Recommendation for Withdrawal of Reference of Proceeding in Part; Order of Assignment* at 1-2, *In re PG&E Corp.*, No. 3:19-cv-05257-JD (N.D. Cal. Aug. 22, 2019), Dkt. No. 2.

[10] *Order Terminating Estimation Proceedings* at 3-4, *In re PG&E Corp.*, No. 3:19-cv-05257-JD (N.D. Cal. June 9, 2020), Dkt. No. 387.

wrongful death claims shall be tried in the district court." Hence, they say, the estimation motion must proceed in this Court. *See* Mot. at 14-15.

24. That argument fails because Movants' estimation motion does not ask that any court "try" any Abuse Claim. As discussed, Movants admit that their requested "[e]stimation of aggregate liability is *not* intended to … determine the liquidated amount of a particular individual claim." Mot. at 4 n.3 (emphasis added). Rather, according to Movants, "such individual amounts will be determined through a yet unfiled set of trust distribution procedures (the 'TDP') or through release of actions into the tort system for adjudication as permitted by the TDP." *Id.* It is in those proceedings, such as an "action[] in[] the tort system" to "adjudicat[e]" "the liquidated amount of a particular individual claim," *id.*, where any such Abuse Claim will be "tried"—not in the proceedings to estimate the Debtors' aggregate liability at issue here. Under these circumstances, Section 157(b)(5) does not apply.

25. Section 157(b)(5) provides, in full, that:

> "The district court shall order that personal injury tort and wrongful death claims shall be *tried* in the district court in which the bankruptcy case is pending, *or in the district court in the district in which the claim arose*, as determined by the district court in which the bankruptcy case is pending."

28 U.S.C. § 157(b)(5) (emphasis added). As that language makes plain, section 157(b)(5) addresses the *trial* of an individual *claim* to determine the debtor's liability for that claim and/or the amount of such claim, not an *estimation* of the debtor's *aggregate liability* for all personal injury claims, by policy year, alleged against it.

26. To begin with, although Congress used the term "estimation" in other subparts of the same section (i.e., section 157(b)(2)(B)), it did not use that term in section 157(b)(5). Instead, it used the term "tried." That term is most naturally read to refer to the *trial* of a particular personal injury claim, not a process for arriving at an "estimate" of a debtor's overall

tort liability. *See, e.g., The Law Dictionary Featuring Black's Law Dictionary Free Online Legal Dictionary 2d ed.* (defining "tried" as "the term that means having had a trial heard by a court"), *available at https://thelawdictionary.org/tried.*

27. Moreover, section 157(b)(5) provides that the claim may be tried in the district court where the bankruptcy case is pending *or* in the "district court in the district in which *the claim* arose." Section 157(b)(5) thus makes clear that its focus is on the forum or venue in which an *individual* personal injury claim—"*the* claim"—will be tried, not the forum or venue in which an estimation of all claims in the aggregate will take place.

28. Section 157(b)(5) cannot mean what Movants claim. Because a motion to estimate a Chapter 11 debtor's aggregate liability for all personal injury claims asserted against it will almost always involve claims that arose in multiple districts—here, in most, if not all, districts in the country—the statute's command that the trial may occur in the district in which the claim arose would be incomprehensible if it required a trial of the sort of aggregate claims estimation Movants request: Which district out of the multiple districts at issue is "*the* district court in the district in which the claim arose" to which the estimation motion should be referred? Or, under Movants' view, does the statute instead contemplate that the estimation motion could somehow be sliced up and referred to each of the districts in which various claims arose? The Motion offers no answers.

29. Moreover, if Movants' reading of the statute were correct, section 157(b)(5) would provide not merely that the estimation motion could not be heard by the *bankruptcy court*, but also that the motion would not necessarily be heard even by the *district court* in the district in which the bankruptcy case is pending. Rather, under Movants' reading, Congress supposedly determined that it would be appropriate to send such an estimation motion out of the district in

which the bankruptcy case is pending—which is the district court that has jurisdiction over the bankruptcy case under 28 U.S.C. § 1334(a)-(b)—to another district where "the claim arose." The result would be that an estimation motion like the one involved here—which Movants claim is necessary "for purposes of measuring the proposed plan's satisfaction of certain confirmation requirements" and is closely intertwined with the Debtors' Chapter 11 plan-confirmation proceedings (Motion at 9)—would be decided by a court that has no jurisdiction over the bankruptcy case and no connection to the bankruptcy proceedings whatsoever, other than the happenstance that the facts giving rise to a personal injury claim against the debtor arose in that district. That cannot possibly be what Congress intended.

30. To the contrary, courts have read section 157(b)(5) in accordance with its plain language to mean that it comes into play only when an individual personal injury claim is ready to be tried by a court. In that circumstance, the statute provides that the trial *of that specific claim* should be held in a district court—either where the bankruptcy case is pending or where the claim arose—rather than in the bankruptcy court. *See, e.g.*, *A.H. Robins*, 788 F.2d at 1012-1013 (explaining that section 157(b)(5) gives personal-injury claimants the right "to have a jury trial of their claim in the district court"); *In re Johns-Manville Corp.*, 45 B.R. 823, 825 (S.D.N.Y. 1984) ("Pursuant to [section 157(b)(5)], trial of personal injury … claims … must be held in the district courts" and "the forum for trial shall be" either "the district court in which the bankruptcy case is pending or in which the claim arose"; "[t]he section makes clear that trials to resolve such claims cannot be held in the bankruptcy court."); 1 *Collier on Bankruptcy* ¶ 3.06[3] ("Section 157(b)(5) provides that the venue of the [personal-injury claim] trial is to be determined by the district court," which "has the options of trying the case itself or directing that the trial occur in the district court for the district in which the claim arose."). Among other things, that statutory

scheme preserves any right a personal-injury claimant may have to a jury trial. *Cf.* 28 U.S.C. § 157(e) (bankruptcy court may conduct a jury trial only with the express consent of the parties); *id.* § 1411(a) (providing that "title 11 [the Bankruptcy Code] do[es] not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim"); *G-I Holdings Corp.*, 323 B.R. at 614 ("Section 157(b)(5) guarantees that when a personal injury or wrongful death claimant is entitled to a jury trial, the trial will be conducted by the district court." (citing *In re Dow Corning Corp.*, 215 B.R. 346, 360 (Bankr. E.D. Mich. 1997))).

31. By contrast, where, as here, a party neither invokes a right to trial by jury nor seeks to commence any trial on a particular personal-injury claim, but instead seeks "estimations of the debtors' potential personal injury tort liabilities as an incident of the development of a plan of reorganization," the estimation "proceedings are within the bankruptcy court's jurisdiction and … such estimations are not foreclosed by Section 157(b)(5)." *A.H. Robins*, 788 F.2d at 1012.

32. Movants nevertheless argue that the estimation proceeding may "bear the hallmarks of a 'trial.'" *See* Mot. at 14. That is pure sophistry. Any "trial" would concern an estimation of the Debtors' aggregate liability, not a trial of the Debtors' liability to any particular claimant on an Abuse Claim falling within the scope of section 157(b)(5). Bankruptcy courts hold trials all the time, issuing final orders subject to the normal standards of appeal on core matters. For example, most contested plan confirmation proceedings entail the presentation of evidence, including live witnesses and cross-examination.[11] If Movants' estimation motion has any legal basis (and it does not), the bankruptcy court can hold a trial on it.

[11] *See, e.g.*, *In re VIVUS, Inc.*, No. 20-11779 (Bankr. D. Del. Aug. 27, 2020), Dkt. No. 226 (transcript of plan-confirmation hearing involving the presentation of evidence including witness testimony); *In re Nuverra Envtl. Sols., Inc.*, No. 17-10949 (Bankr. D. Del. Jul. 24, 2017), Dkt. No. 362 (same).

**C. The Bankruptcy Court Is Best Suited To Decide The Estimation Motion**

33. Because the estimation motion is a "core proceeding" under section 157(b)(2)(B), and because it will not involve the trial of any individual Abuse Claim within the meaning of section 157(b)(5), the bankruptcy court has full authority to hear and determine the estimation motion. Accordingly, the only question this Court needs to decide is which forum—the bankruptcy court or this Court—should decide the estimation motion. The answer is clear: the bankruptcy court.

34. Movants do not even argue that withdrawal of the reference to this Court would be appropriate, as a discretionary matter, if, as is the case here, their estimation motion is a core proceeding in which the bankruptcy court can issue final orders—and for good reason. Even if the estimation motion were a "non-core" proceeding (which it is not), it would still be far more efficient to have the bankruptcy court preside over the estimation proceeding. The bankruptcy court has been presiding over the Debtors' bankruptcy cases for more than a year. Judge Silverstein has conducted many lengthy hearings; decided numerous motions following extensive briefing, evidentiary hearings, and argument involving dozens of parties in interest, thousands of filings on the bankruptcy docket, and multiple related adversary proceedings; and ordered the appointment of three mediators, including former Bankruptcy Judge Kevin Carey, to conduct a mediation process that has been ongoing for months (and remains so) in pursuit of a global resolution and consensual Chapter 11 plan. Judge Silverstein has become familiar with the basic underlying facts and the parties and has been actively managing the Chapter 11 cases since their filing. This Court, of course, has not.

35. The estimation motion is not a discrete matter that can be readily separated from the overall Chapter 11 proceedings. Movants themselves declare that the estimation motion is closely intertwined with the disclosure statement and plan-confirmation proceedings pending in

the bankruptcy court. And at a recent status conference in the bankruptcy court, which Judge Silverstein scheduled to assess the best path forward for those bankruptcy proceedings, she commented on the interconnections between those proceedings and the estimation motion.

36. Noting that she had already read the estimation motion—although it had been filed less than 24 hours before the hearing—Judge Silverstein asked counsel for the Movant Future Claims Representative, in response to his assertion that this Court should hear the estimation motion, "[h]ow does that fit into a timetable that the BSA believes is necessary to make sure we have a continuing Boy Scouts?" Tr. Mar. 17 Hearing at 29. As counsel for the Debtors explained, the case has cost the Debtors, a non-profit organization, nearly $100 million in professional fees and is running around $10 million per month given "the litigious environment," posing "liquidity concerns" that underscore "the importance of the debtors' timeline" for "a summer 2021 confirmation deadline." *Id.* at 12-15. Moreover, the estimation motion proposed a 111-day discovery and litigation schedule that "conveniently expires right at the debtor's statutory exclusivity period," when the Debtors would lose their exclusive right to propose a Chapter 11 plan (11 U.S.C. § 1121). *See id.* at 46 (Ms. Lauria, counsel for the Debtors).

37. In light of all of this, Judge Silverstein stated that "what concerns me … is a timeframe with [what] the District Court that has on its plate," including the "possibilities of return to criminal trials," and that "[w]e're $100 million into fees in this case, … a staggering number." Tr. Mar. 17 Hearing at 30, 49. Judge Silverstein also noted that the estimation motion was "intertwined" with other matters pending before her. *Id.* at 55. For example, while the estimation motion proposes a limited process for taking discovery from a sample of Abuse Claims selected by Movants (*see* Estimation Motion at 18-19), Hartford and Century had

previously filed their own motions under Bankruptcy Rule 2004 to take discovery of a sample of Abuse Claims not cherry-picked by Movants for purposes of testing the validity of the claims.[12] Commenting on Hartford's and Century's discovery motions, which remain pending before the bankruptcy court, Judge Silverstein explained that "my inclination was to permit certain of the discovery to go forward," but that "I'm going to hold off" until "I know whether or not I'm handling the estimation motion," because "all of these issues are intertwined" and that she would seek to "coordinate all of this" if she were "handling it." Tr. Mar. 17 Hearing at 51-52, 55. Movants hope to avoid any discovery by Hartford and Century into the validity of individual Abuse Claims by substituting their own "aggregate liability" estimation proceeding that would permit Movants to cherry-pick which claims are scrutinized—and they have brought this Motion to withdraw the reference out of fear that tactic will not succeed before the judge who is directly managing, and thus most intimately familiar with, the bankruptcy proceedings.

38. Simply put, it makes no sense for this Court to withdraw the reference for the estimation motion. The Debtors' bankruptcy cases involve a complex Chapter 11 reorganization, which Judge Silverstein has been closely managing. She is in the best position to determine whether Movants' estimation motion satisfies the legal requirements under Section 502(c) of the Bankruptcy Code and how to manage and coordinate all the proceedings in the Chapter 11 case. *See G-I Holdings, Inc.*, 295 B.R. at 219-220 (denying motion to withdraw reference of estimation motion; "[j]udicial economy is . . . better served by having the Bankruptcy Court retain jurisdiction of the estimation motion").[13]

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[12] *See Hartford and Century's Motion for an Order (I) Authorizing Certain Rule 2004 Discovery and (II) Granting Leave from Local Rule 3007-1(f) to Permit the Filing of Substantive Omnibus Objections* [D.I. 1972]; *Insurers' Motion for an Order Authorizing Rule 2004 Discovery of Certain Proofs of Claim* [D.I. 1975].

[13] Movants' reliance (Motion at 10) on *G-I Holdings* is misplaced. The district court there *denied* the motion to withdraw the reference for the estimation motion. The passage that Movants cite concerned the court's decision to withdraw the reference of a *different* proceeding having nothing to do with estimation, but rather the adjudication of state-law successor-liability claims against a non-debtor. *G-I Holdings*, 295 B.R. at 217-218.

39. Movants argue that good "cause" exists to withdraw the reference under 28 U.S.C. § 157(d), urging that withdrawal is supported by the factors the Third Circuit has identified for permissive withdrawal, which seek to facilitate judicial economy, reduce forum shopping, and promote uniformity in the administration of bankruptcy proceedings. *See* Mot. at 9-14 (citing *In re Pruitt*, 910 F.2d 1160, 1168 (3d Cir. 1990)). But that argument is based on Movants' flawed premise that the estimation motion is a non-core proceeding that this Court must decide, and hence that it would be better for the Court to withdraw the reference to avoid duplication of effort in two forums. Of course, to the extent possible, it would be more efficient to have everything decided in one forum, subject to the normal rules for appeals. But since the estimation motion is a core proceeding that the bankruptcy court has full authority to decide subject to those rules for appeal, those considerations of judicial economy and uniformity in administration weigh strongly *against* withdrawing the reference. And the goal of reducing forum shopping likewise cuts in the same direction. As discussed above, the Motion is a transparent effort at forum shopping, motivated by Movants' evident concern that the bankruptcy court will recognize their *Fuller-Austin* strategy to prejudice the insurers for what it is and deny their estimation motion.

## Conclusion

Certain Insurers respectfully request that the Court deny the Motion and enter such other relief as the Court deems proper.

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# EXHIBIT 1

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

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|---|---|
| In re:<br><br>BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC,[1]<br><br>Debtors. | Chapter 11<br><br>Case No. 20-10343 (LSS)<br><br>Jointly Administered<br><br>**Re: Docket No. 2391** |

**Objection Deadline: April 15, 2021, at 4:00 p.m. (ET)**
**Hearing Date: May 19, 2021 at 10:00 a.m. (ET)**[2]

**NOTICE OF HEARING ON MOTION OF THE FUTURE CLAIMANTS' REPRESENTATIVE, THE OFFICIAL COMMITTEE OF TORT CLAIMANTS, AND THE COALITION OF ABUSED SCOUTS FOR JUSTICE FOR ENTRY OF AN ORDER, PURSUANT TO 11 U.S.C. §§ 105(a) AND 502(c), (I) AUTHORIZING AN ESTIMATION OF CURRENT AND FUTURE ABUSE CLAIMS AND (II) ESTABLISHING PROCEDURES AND SCHEDULE FOR ESTIMATION PROCEEDINGS**

**PLEASE TAKE NOTICE** that on March 16, 2021, James L. Patton, Jr., the Future Claimants' Representative (the "FCR"), the Official Committee of Tort Claimants (the "TCC"), and the Coalition of Abused Scouts for Justice (the "Coalition") (collectively, the "Movants"), in the above-captioned cases, filed the *Motion of the Future Claimants' Representative, the Official Committee of Tort Claimants, and the Coalition of Abused Scouts for Justice for Entry of an Order, Pursuant to 11 U.S.C. §§ 105(a) and 502(c), (I) Authorizing an Estimation of Current and Future Abuse Claims and (II) Establishing Procedures and Schedule for Estimation Proceedings* (the "Motion") [Docket No. 2391] with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801 (the "Bankruptcy Court").

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Boy Scouts of America (6300) and Delaware BSA, LLC (4311). The Debtors' mailing address is 1325 West Walnut Hill Lane, Irving, Texas 75038.

[2] The Movants have filed a motion to withdraw the reference of the Motion to United States District Court for the District of Delaware.

Through the Motion,[3] the Movants seek the entry of an order pursuant to sections 105(a) and 502(c) of title 11 of the United States Code (the "Bankruptcy Code"), (i) authorizing the estimation for purposes of plan distribution and setting claim distribution reserves of the aggregate amounts[4] of current and future Abuse Claims against the Boy Scouts of America ("BSA"), by type of abuse, by local council, by chartered sponsoring organization, and on a year-by-year basis; and (ii) establishing the procedures and schedule for those estimation proceedings, which are described in the Motion. Approximately 84,000 survivors asserted Abuse Claims by filing proofs of claim before the Bar Date. The Debtors' Proposed Plan contemplates that Abuse Claims will be channeled to and resolved through a trust, which will be funded by the Debtors and other parties, including local councils and chartered organizations. But the Debtors assert that they can make only a limited cash contribution to that trust; the key asset funding the trust will be the Debtors' and local councils' considerable insurance assets. Because the insurance assets are essential to a full funding of the trust, it would not suffice merely to agree on the Debtors' aggregate liability to the abuse survivors (if the parties could even do that much). Rather, that aggregate liability, determined using a valuation scale by type of abuse, would then need to be allocated by local council and on a year-by-year and category-of-abuse basis, so that it could be matched to the appropriate insurer(s) and policy(ies). It is plainly impracticable to liquidate some 84,000 Abuse Claims before confirming a plan. Yet, absent a consensual resolution, a plan simply cannot be confirmed unless and until a value is placed on the Abuse Claims. The Movants (three groups that collectively represent the interests of all abuse survivors) cannot support the confirmation of a plan unless it provides clear

[3] Capitalized terms not otherwise defined herein shall have the same meanings set forth in the Motion.

[4] Estimation of aggregate liability will not determine the liquidated amount of any particular individual claim. The plan contemplated by the Movants will likely provide that such individual amounts will be determined through trust distribution procedures (the "TDP") or through release of actions into the tort system for adjudication as permitted by the TDP.

guidance as to how survivors will be paid and adequate consideration is available to satisfy the BSA's aggregate liability. Estimation pursuant to the Motion will provide that guidance.

**PLEASE TAKE FURTHER NOTICE** that any response or objection to the relief requested in the Motion must be filed with the Bankruptcy Court on or before **April 15, 2021 at 4:00 p.m. prevailing Eastern Time**.

**PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER APPROVAL OF THE MOTION WILL BE SCHEDULED FOR MAY 19, 2021 AT 10:00 A.M. (E.T.).** Copies of the Motion are available for review and download free of charge on the website maintained by the Debtors' Claims, Noticing and Solicitation Agent, Omni Agent Solutions, at https://omniagentsolutions.com/BSA. Copies of the Motion are also available upon request by emailing bsasurvivors@pszjlaw.com. You may also access these materials for a fee via PACER at http://www.deb.uscourts.gov/.

**PLEASE TAKE FURTHER NOTICE** that at the same time, you must also serve a copy of the response or objection upon: (i) the Office of the United States Trustee for the District of Delaware: United States Trustee, J. Caleb Boggs Federal Building, 844 North King Street, Suite 2207, Lockbox #35, Wilmington, DE 19801 (Attn: David L. Buchbinder, Esq. (david.l.buchbinder @usdoj.gov) and Hannah Mufson McCollum, Esq. (hannah.mccollum@usdoj.gov)); and (ii) the undersigned counsel for the Movants.

**PLEASE TAKE FURTHER NOTICE THAT IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.**

Dated: March 29, 2020
Wilmington, Delaware

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# EXHIBIT 2

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

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| In re:<br><br>BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC,[1]<br><br>Debtors. | Chapter 11<br><br>Case No. 20-10343 (LSS)<br><br>(Jointly Administered) |

**OPPOSITION OF CERTAIN INSURERS**
**TO MOTION OF THE COALITION, TCC AND FCR**
**TO ESTIMATE CURRENT AND FUTURE ABUSE CLAIMS**

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[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Boy Scouts of America (6300) and Delaware BSA, LLC (4311). The Debtors' mailing address is 1325 West Walnut Hill Lane, Irving, Texas 75038.

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The undersigned insurance carriers (collectively, "**Certain Insurers**"), hereby oppose the *Motion of the Future Claimants' Representative, the Official Committee of Tort Claimants, and the Coalition of Abused Scouts for Justice for Entry of an Order, Pursuant to 11 U.S.C. §§ 105(a) and 502(c), (I) Authorizing an Estimation of Current and Future Abuse Claims and (II) Establishing Procedures and Schedule for Estimation Proceedings*, filed on March 16, 2021 [D.I. 2391] (the **"Motion"**).[2]

## PRELIMINARY STATEMENT

1. The Motion seeks extraordinary relief, contrary to the terms of the Bankruptcy Code, for purposes having nothing to do with the Debtors' reorganization and everything to do with insurance coverage. Having only recently opposed Hartford's and Century's (and other insurers') requests for discovery into a limited number of Abuse Claims, the FCR, TCC and Coalition ("**Movants**") now contend that the Court should attempt to estimate *every one of those 85,000 or more Abuse Claims* and somehow reach a determination as to what all those claims are worth separately with respect to each policy year. And they contend that this Court should attempt to estimate Abuse Claims alleged not only against the Debtors, but also all Abuse Claims alleged against hundreds or thousands of non-debtors, including more than 250 local councils and potentially thousands of additional chartered organizations that sponsored individual scout units.

2. Although Movants invoke Section 502(c) of the Bankruptcy Code, the "estimation" they seek has no basis in that provision. The Motion does not ask this Court to estimate any individual "claim"; the proposed "estimation" is not "for purpose of allowance" of any claim; and the Motion does not suggest that any claim must be estimated now to avoid

[2] Capitalized terms not defined herein have the meanings ascribed to such terms in the Motion.

"undu[e] delay [in] the administration of the case." 11 U.S.C. § 502(c). To the contrary, Movants contend that individual Abuse Claims should be liquidated post-confirmation pursuant to trust distribution procedures without any review by this Court or any other court. The Motion does not satisfy any, let alone all, of the requirements for an estimation under Section 502(c). For that reason alone, it should be denied.

3. But the Motion should also be understood for what it is. Rather than seeking an estimation of one or more individual Abuse Claims for "allowance" under Section 502(c) or any other purpose consistent with bankruptcy law, Movants want this Court to "estimate" the Debtors' aggregate liability and that of the non-debtor local councils and sponsoring organizations precisely in hopes that they never have to prove up in any court the validity of any of the 85,000 or so Abuse Claims, first filed during these bankruptcy cases, that were generated by the massive advertising efforts of for-profit claims aggregators. Adopting the playbook of plaintiffs' lawyers in other cases who have likewise sought to misuse bankruptcy court "estimations," Movants hope to obtain an "estimation" from this Court that they can later parade before a non-bankruptcy court, unfamiliar with the nuances of bankruptcy law, in subsequent coverage litigation as a supposed adjudication by this Court of the Debtors' liability for Abuse Claims corresponding to particular carriers' insurance coverage. The Motion thus requests that this Court "estimate" the liability on *an annual basis* so that, in Movants' own words, "the Abuse Claim[s can] to be matched to the appropriate insurer(s) and policy(ies) of the BSA and/or the local councils," thereby supposedly eliminating any "coverage disputes." Mot. at 16. Simply put, Movants seek an "estimation" not for bankruptcy purposes at all, but rather for insurance coverage purposes—in particular, to deny the insurers their right under their policies to defend each Abuse Claim on the merits. For this reason, too, the Motion should be denied.

4. The entirely one-sided procedures Movants propose provide yet a third reason why this Court should deny the Motion. Movants propose to force parties that "opt in" to the estimation—on pain of forfeiting any right to have input into the process—to agree to a highly circumscribed discovery process that would afford those parties literally no say in which Abuse Claimants are deposed and in which *all* of the 85,000 Abuse Claims would nevertheless somehow be assessed in less than three months. Movants' goal is obvious: to limit discovery to a short list of claimants, of their choosing, in order to tilt the playing field decisively in their favor. The Motion is not merely contrary to bankruptcy law; it is contrary to any notion of due process.

5. Of course, there are some legitimate Abuse Claims, and they need to be liquidated and paid. But the Motion is not designed to separate the good claims from the bad ones, let alone to do so in a manner that respects the legal rights of the carriers and other parties in interest. It will have precisely the opposite effect, shielding invalid Abuse Claims from scrutiny and preventing insurers asked to pay those claims from ever testing their merits in a court of law on an individualized basis. As the insurers' Rule 2004 motions demonstrated, many of the newly asserted Abuse Claims in this case were generated through litigation funding and a media blitz, promising limited review and a multi-billion-dollar trust fund. Such publicity by its nature attracts invalid or inflated claims, as was shown just last week with regard to claims made against the trust established to compensate victims of the Larry Nassar scandal that affected Michigan State and the U.S. Gymnastics program. *See* Kara Berg, *First of Seven Pleads Guilty to Stealing Money From MSU Fund Set Up to Aid Nassar Victims*, LANSING ST. J. (Apr. 6, 2021).[3] The likelihood of invalid claims is, if anything, even greater here, where claimants have

[3] *Available at* https://www.lansingstatejournal.com/story/news/2021/04/06/msu-larry-nassar-healing-fund-fraud-guilty-plea-michigan-state/4748822001/

alleged abuse from years or decades ago for the first time following plaintiffs' lawyers' blandishments of six- and seven-figure recoveries from a bankruptcy trust.

6. If the validity of those Claims is to be assessed in a manner that is potentially going to be binding on any insurers, then the insurers must be afforded real discovery, on a claim-by-claim basis, and a fair process, consistent with their contractual and other legal rights. A procedurally fair estimation process would take many months, if not years. The Motion should be denied.

## ARGUMENT

### I. THE COURT SHOULD DENY THE MOTION

#### A. There Is No Basis To Estimate The Abuse Claims Under Section 502(c) Of The Bankruptcy Code

7. The Movants base their motion on Section 502(c) of the Bankruptcy Code, claiming that estimation is "mandatory" under that provision. *See* Mot. at 10-11. To the contrary, none of Section 502(c)'s requirements for estimation is met here.

8. Section 502(c) provides:

> There shall be estimated *for purpose of allowance under this section* … 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) (emphasis added). Like all statutes, the Bankruptcy Code must be construed to mean what its plain language says. *See, e.g.*, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (when construing the Bankruptcy Code, "where … the statute's language is plain, the sole function of the courts is to enforce it according to its terms") (internal quotation marks omitted). Under the plain language of Section 502(c), the Court may estimate a claim only if three requirements are met.

9. First, Section 502(c) provides for the estimation only of a "contingent or unliquidated *claim*." A Section 502(c) estimation thus must determine the amount of an individual claim or group of related claims, not a debtor's aggregate liability for all mass-tort claims alleged against it. *See, e.g.*, *Bittner v. Borne Chem. Co.*, 691 F.2d 134, 135-137 (3d Cir. 1982) (affirming order estimating the allowed amount of a single unliquidated tort claim). That point is even clearer given the statute's additional requirement that the estimation must be "for purpose of allowance." Claims are not allowed *en masse*, but individually. *See* 11 U.S.C. § 502(b).

10. Second, the estimation must be "for purpose of allowance under this section." That is, the estimation's purpose must be to determine whether a particular claim is allowed under Section 502 (for distribution or plan voting purposes), and if so, the allowed amount of that claim. *Cf.* 11 U.S.C. § 502(e)(2) (referring to claims "allowed under subsection (a), (b), *or (c)* of this section") (emphasis added); *accord id.* § 502(f)-(i). As this Court has explained, because "section 502(c) … requires that the court estimate [an unliquidated claim] 'for purpose of allowance under this section,'" "estimation under section 502(c) results in allowing a claim for purposes of the entire case, and is no different than a claim allowed under section 502(a) or (b)." *In re Pac. Sunwear of Cal., Inc.*, No. 16-10882, 2016 WL 4250681, at *3 (Bankr. D. Del. Aug. 8, 2016) (Silverstein, J.); *see also In re Federal-Mogul Glob., Inc.*, 330 B.R. 133, 154 (D. Del. 2005) ("Section 502(c) only speaks of estimating claims for the purpose of allowance."); *In re Stone Hedge Props.*, 191 B.R. 59, 63-64 (Bankr. M.D. Pa. 1995) ("estimation … under 11 U.S.C. § 502(c) … appears to confine itself to 'contingent or unliquidated' claims for distribution purposes"); *In re Interco Inc.*, 137 B.R. 993, 998 (Bankr. E.D. Mo. 1992) ("A bankruptcy court is to estimate any contingent or unliquidated claims for the purpose of

*allowance* in a bankruptcy case. … An allowed claim … is a claim that may share in the assets of the bankruptcy estate." (emphasis in original; citing Section 502(c))).

11. Third, Section 502(c) permits the estimation of a contingent or unliquidated claim only if "the fixing or liquidation" of the claim through the normal claims-allowance process under Section 502(a)-(b) of the Bankruptcy Code (or in the tort system) "would unduly delay the administration of the case." *See, e.g.*, *Kool, Mann, Coffee & Co. v. Coffey*, 300 F.3d 340, 347 n.4, 357 (3d Cir. 2002) (affirming denial of Section 502(c) estimation of creditor's claim because adjudicating the claim's allowance under Section 502(b) would not delay the case). "Something is 'undue' if it is 'unjustifiable.' Inquiry into whether liquidating the tort claims would be unjust, due to any case delay that may result therefrom, dictates that the Court perform a kind of cost-benefit analysis by considering the time, costs and benefits associated with both estimation and liquidation." *In re Dow Corning Corp.*, 211 B.R. 545, 563 (Bankr. E.D. Mich. 1997) (citation omitted). When "there is no reason to believe that estimation would result in a faster distribution of proceeds to tort claimants," the court should not order estimation under Section 502(c). *Id.* at 565.

12. By Movants' own admission, *none* of those three requirements is met here. As the Motion states:

> Estimation of aggregate liability will *not* determine the liquidated amount of any particular individual claim. The plan contemplated by the Movants will likely provide that such individual amounts will be determined through trust distribution procedures (the "TDP") or through release of actions into the tort system for adjudication as permitted by the TDP.

Mot. at 1 n.3 (emphasis added).

13. Thus, Movants are not asking the Court to estimate the amount of any individual "claim," as Section 502(c) provides, but rather to estimate the Debtors' (and many non-debtors') aggregate liability for tens of thousands of Abuse Claims. Nor are Movants asking the Court to

estimate any individual Abuse Claim "for purpose of allowance under [Section 502]." To the contrary, they do not want this Court (or any other) to consider the bona fides of any Abuse Claim; they assert that the allowance and liquidation of individual Abuse Claims should occur entirely outside any judicial scrutiny, pursuant to a separate post-confirmation process governed by trust distribution procedures ("**TDP**") no doubt to be administered by a plaintiff-friendly "trustee." And Movants' contention that the allowance and liquidation of individual Abuse Claims can occur after confirmation of a plan pursuant to the TDP is a concession that there is no need to liquidate the Abuse Claims now, through an estimation proceeding, to avoid unduly delaying the case. On the contrary, the Debtors' bankruptcy cases will be unduly delayed if they were paused to conduct an estimation, only to have individual Abuse Claims liquidated after confirmation.

14. Because the Motion fails to satisfy *any* of the three requirements for estimation, it must be denied. *Dow Corning* is instructive. There, as here, the movants argued that an estimation of the debtor's aggregate mass-tort liability was necessary to determine whether a plan was feasible and to help bridge the parties' differences over a plan that faced significant opposition. *See Dow*, 211 B.R. at 554-556, 562. But the bankruptcy court denied the estimation motions. It explained that "bankruptcy law's general rule is to liquidate, not to estimate," and that "[t]here are good reasons to liquidate" rather than "estimate" unliquidated claims because of "the very real concern that the estimates may prove to be inaccurate." *Id.* at 563. Thus, estimation is permitted under Section 502(c) only if "the party moving for estimation … show[s] that the normal mode of liquidating the claim would create undue delay in the bankruptcy process." *Id.* at 573. The court concluded that the movants had failed to show any "undue" delay because—just as in this case—"individual tort claims would … be liquidated" after "a plan

of reorganization [is] confirmed" pursuant to a "post-confirmation liquidation [process for the] tort claims." *Id.* at 565-566, 574. And the court observed that the notion that an estimation would facilitate consensus around a plan was fanciful: "[N]o matter what answer this Court were to give as its estimate of the value of all tort claims, there is almost no likelihood that the estimate would prove accurate"; "[t]herefore, parties in interest will derive no comfort from the results of a lengthy and complex estimation war." *Id.* at 567.[4] Thus, far from avoiding "undue delay," a lengthy pre-confirmation estimation battle "would only lengthen the time to distribution since funds would not be disbursed until claims are liquidated post-confirmation." *Id.* at 565.

15. The same is true here. There is simply no basis under Section 502(c) to conduct an "estimation" of the Abuse Claims that does not seek to estimate the amount of any individual "claim" (but, rather, the Debtors' and non-debtors' "aggregate liability"); that is not for the "purpose of allowance" of any particular Abuse Claim; and that is unnecessary to avoid any "undue delay" in the case, given that Movants themselves contemplate that individual Abuse Claims will be liquidated post-confirmation outside the bankruptcy process.

### B. There Is No Other Legitimate Bankruptcy Purpose For An "Estimation" Of The Abuse Claims

16. The proposed "estimation" is not only inconsistent with Section 502(c), but it also fails to serve any proper bankruptcy purpose at all. To be sure, bankruptcy courts have, on occasion, "estimated" a debtor's liabilities in contexts other than claims allowance under Section 502, such as to resolve an objection to confirmation of a plan or to support a settlement. But

[4] The Debtors' own efforts to hazard an estimate of the Abuse Claims, based on several months of work by their consultant, Bates White LLC, has produced only a range with amounts that are billions of dollars apart on the low and high ends. *See Disclosure Statement for the Second Amended Chapter 11 Plan Of Reorganization For Boy Scouts Of America And Delaware BSA, LLC* [D.I. 2594] ("**Disclosure Statement**"), at 23, 60-63. It is far-fetched, to say the least, that an estimation conducted in only a couple of months' time—as Movants' propose—will produce anything definitive.

while those decisions may use the term "estimation," and may sometimes even cite to Section 502(c), they do not involve a true estimation under Section 502(c), which only authorizes estimation of individual claims for the purpose of their allowance. Rather, estimations of a debtor's aggregate liability are typically done for the limited purpose of determining whether a proposed plan of reorganization meets the Bankruptcy Code's requirements for confirmation (or a settlement meets the business judgment standards or standards of reasonableness under bankruptcy law), without making any binding estimate for purposes of determining the allowed amount of any particular claim, much less any determination that purports to bind any insurer or other third party as to the amount of the debtor's liability in the aggregate (let alone by policy year).

17. For example, in the *Armstrong* asbestos bankruptcy case, the court estimated the debtor's asbestos liability to resolve an objection to confirmation of the debtor's plan by the debtor's commercial creditors. *See In re Armstrong World Indus., Inc.*, 348 B.R. 111, 119-124 (D. Del. 2006). Those creditors, who had voted to reject the plan, objected under 11 U.S.C. § 1129(b) that it unfairly discriminated against them, and therefore could not be crammed down on them, because, in their view, the plan allocated a disproportionately high share of the estate's assets to the asbestos claimants. The court denied that objection, concluding that the plan proponents had met their burden to show that the plan's division of assets was fair, by showing that a "reasonable approximation" of the debtor's liability for present and "future" asbestos claims was at least $3.1 billion. *See id.* Sections 105(a) and 1129 of the Bankruptcy Code provided the court with authority to make that sort of limited "estimation." *See* 11 U.S.C. §§ 105(a), 1129. Indeed, while the court referred to section 502(c), it emphasized that it merely looked to "estimation principles" developed under that provision for guidance. *Id.* at 122-124.

And it stressed that it was not purporting to make any binding estimation of liability: it "need not choose an exact number for [the debtor's] liability in order to confirm or deny confirmation of the Plan," since a "reasonable prediction" of rough magnitude was sufficient for that purpose, even if that prediction was merely an "approximation," "not [a] search for mathematical precision, nor ultimate certainty." *Id.* at 124, 134, 136.[5]

18. Here, in contrast, Movants do not identify any legitimate bankruptcy purpose for their proposed "estimation" that withstands scrutiny. Movants claim that they need the Court to estimate the aggregate amount of Abuse Claims so that Abuse Claimants will know how much a trust created under a plan is likely to pay them. Mot. at 12-13. But knowing that would require not just an estimate of the aggregate Abuse Claims against the trust, but also a determination of the amount of the trust's assets, including disputed insurance recoveries (and a host of other things, such as the amount of the claims that fall into the Debtors' and non-debtors' self-insured retentions and uninsured periods). But none of that can be determined except in insurance-coverage litigation. In any event, plans are often confirmed even though creditors do not know

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[5] *See also Federal-Mogul*, 330 B.R. at 136-137, 154-155 (estimating present and future asbestos personal-injury claims "for the limited purposes of plan formulation" to resolve dispute over plan's division of assets between asbestos property-damage claimants and asbestos personal-injury claimants); *In re G-I Holdings, Inc.*, 323 B.R. 583, 623-626 (Bankr. D.N.J. 2005) (outlining proposed estimation of present and future asbestos claims to resolve dispute between debtor, which asserted it was solvent if invalid claims were disallowed, and asbestos claimants, who asserted debtor was insolvent and should establish a trust under 11 U.S.C. § 524(g) to pay present and future asbestos claims).

Courts that have undertaken "estimations" have not always clearly distinguished between the estimation of an individual claim under Section 502(c) for the purpose of claims allowance and an "estimation" of aggregate liability made in furtherance of some other bankruptcy purpose. In many cases, the parties did not raise or contest the issue, but simply assumed that Section 502(c) applied. *See, e.g.*, *Federal-Mogul*, 330 B.R. at 154-155 ("undisputed" that estimation under Section 502(c) was required); *In re Specialty Prods. Holding Corp.*, No. 10-11780, 2013 WL 2177694, at *1 (Bankr. D. Del. May 20, 2013) (referencing Section 502(c) in single sentence with no further analysis); *G-I Holdings*, 323 B.R. at 598-599 ("the parties … agree that an estimation of [the debtor's] asbestos liability is required"). In other cases, courts have cited Section 502(c) but recognized that estimations conducted for the limited "purpose of formulating a plan of reorganization" are authorized under separate provisions of the Code. *See, e.g.*, *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 74, 87 (Bankr. W.D.N.C. 2014) ("[T]he court determined to estimate the aggregate amount of Garlock's asbestos liability for the purpose of formulating a plan of reorganization, pursuant to 11 U.S.C. §§ 502(a) & 105(a)."). And like *Armstrong*, these courts have noted that such "estimations" are not binding determinations of liability, since "an estimation by definition, is an approximation" made "for the limited purposes of plan formulation," and therefore "it is important that we not pretend to have achieved mathematical accuracy." *Federal-Mogul*, 330 B.R. at 154-156.

their likely recoveries. That can occur because the creditors' claims are largely unliquidated as of confirmation and the extent to which they will ultimately be allowed is unknown, or because the value of the assets that will be available to pay claims is unknown—for example, where the principal estate assets are unliquidated litigation claims against third parties with uncertain recoveries.[6] Movants have likewise established no need for the Court to estimate, by policy year, the Abuse Claims in this case to confirm a plan.

19. By the same token, Movants have demonstrated no need for the Court to "estimate" the Abuse Claims to provide "adequate information" about such a plan in a disclosure statement under 11 U.S.C. § 1125. "There is no requirement in case law or statute that a disclosure statement estimate the value of specific unliquidated tort claims." *In re A.H. Robins Co.*, 880 F.2d 694, 697 (4th Cir. 1989). Courts have accordingly approved disclosure statements, including in the mass-tort context, that did not include any estimate of the mass-tort claims or claimants' likely recoveries from the trust. [7]

20. Movants also contend that the Court must estimate the Abuse Claims to resolve potential objections to confirmation of a plan. Mot. at 13-15. But this case is unlike a case such as *Armstrong*, in which creditors had voted to reject the debtors' plan and objected to its confirmation. The Debtors here have not yet solicited votes on any plan, and no objections to

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[6] *See, e.g.*, Disclosure Statement Regarding the First Amended Joint Plan of Reorganization of Tronox Incorporated, et al. Pursuant to Chapter 11 of the Bankruptcy Code at 11, *In re Tronox Inc.*, No. 09-10156-MEW (Bankr. S.D.N.Y Sept. 24, 2010), Dkt. No. 2159.

[7] *See, e.g.*, Order (I) Approving Proposed Disclosure Statement For Debtors' And Shareholder Proponents' Joint Chapter 11 Plan Of Reorganization; (II) Approving Form And Manner Of Notice Of Hearing On Proposed Disclosure Statement; (III) Establishing And Approving Plan Solicitation And Voting Procedures; (IV) Approving Forms Of Ballots, Solicitation Packages, And Related Notices; And (V) Granting Related Relief, *In re PG&E Corp.*, No. 19-30088-DM (Bankr. N.D. Cal. Mar. 17, 2020), Dkt. No. 6340; Disclosure Statement For Debtors' And Shareholder Proponents' Joint Chapter 11 Plan Of Reorganization at 24, *In re PG&E Corp.*, No. 19-30088-DM (Bankr. N.D. Cal. Mar. 17, 2020), Dkt. No. 6353 (disclosing that 83,000 fire-victim claims had been filed, mostly in "unknown" amounts, and that "[a]s a result, it is not currently possible to predict what any specific claimant will be paid or a percentage recovery on such Claim any specific claimant should expect out of the approximately $13.5 billion in total consideration that will be transferred to the Fire Victim Trust under the Plan").

confirmation have been filed. Indeed, the Court has not yet approved a disclosure statement, much less set deadlines for creditors to vote to accept or reject the plan or file objections to confirmation. Although Movants suggest that the Abuse Claimants will vote to reject the plan and object to its confirmation, it remains to be seen whether any of that will occur once the newly amended plan that the Debtors filed on April 13, or any further amended plan, is submitted to creditors for consideration. It is premature, at the very least, to commence now the expensive and time-consuming estimation proceeding Movants seek—in a case that has already cost the estate $100 million in professional fees—to address hypothetical plan-confirmation issues that may never arise. *See Dow*, 211 B.R. at 572-573 (denying motion to estimate debtor's mass-tort liability, which claimants argued was necessary to resolve their potential objections to the plan, concluding the court "should wait to see whether that occurs before embarking upon a long and complex estimation").

21. In any event, the Court would not need to "estimate" the aggregate amount of Abuse Claims to resolve any of the potential plan-confirmation objections that Movants identify. An "estimation" is not needed to determine whether the plan is feasible under 11 U.S.C. § 1129(a)(11). Mot. at 13. The current plan provides that the Debtors' liability for the Abuse Claims will be channeled to the trust and liquidated under a TDP; that various assets will be contributed to the trust, including cash, property, and potential causes of action against insurers for coverage; and that the Abuse Claims, in whatever amounts those Claims may ultimately be allowed, will be paid a pro rata share of whatever amounts are realized from the trust's assets.[8] The plan includes no provision obligating the Debtors, after confirmation, to contribute any additional funding to the trust. As long as the Debtors can afford to make their initial (and only)

[8] *See Second Amended Chapter 11 Plan Of Reorganization For Boy Scouts Of America And Delaware BSA, LLC* [D.I. 2592] ("**Plan**"), at Art. III.B.8, Art. Art. IV, V.M & Ex. A (trust distribution procedures).

contribution to the trust, it does not matter how large or small the aggregate Abuse Claims prove to be. *See Dow*, 211 B.R. at 568-569 (denying estimation of mass-tort claims because estimation was not necessary to determine whether plan was feasible; no matter how large the debtor's liability was, the plan was feasible because debtor had financial ability to make its one-time, capped, contribution to trust).

22. Nor is it evident that an estimation of the Abuse Claims will be needed to evaluate whether the plan unfairly discriminates against the Abuse Claimants, as compared to other unsecured creditors, under 11 U.S.C. § 1129(b)(1). Mot. at 4, 13-14. That issue will never arise if the class of Abuse Claims votes to accept the plan, since the unfair discrimination test applies only to impaired classes that have rejected the plan. *See* 11 U.S.C. § 1129(b)(1). And even if the issue arises, the general unsecured claims are relatively small, estimated by the Debtors to total only $26.5 million to $33.5 million, and thus even if some portion of the funds allocated under the plan to pay those claims ($25 million) were re-allocated to the Trust for pro rata distribution among the Abuse Claims, the Abuse Claimants would be unlikely to fare meaningfully better.[9]

23. An estimation of the Abuse Claims also is not necessary to determine whether the plan satisfies the "best interests of creditors" test. Mot. at 4, 13, 15. That issue, too, will arise only if one or more Abuse Claimants vote to reject whatever plan is ultimately submitted to them for acceptance. *See* 11 U.S.C. § 1129(a)(7)(A). And in any event, the "best interests" test compares a rejecting creditor's recovery under the plan with its recovery in a hypothetical liquidation of the debtor under chapter 7 of the Bankruptcy Code. *See id.* If their validity is assessed fairly, the Abuse Claims—whatever they are—should be the same in both a reorganization and a liquidation. The only thing that should potentially change is the *assets* that

[9] *See* Disclosure Statement at 22; Plan Art. III.B.6 (treatment of general unsecured claims).

are available to pay those claims under the plan, versus the assets that would be available in a liquidation. Thus, any comparison under Section 1129(a)(7) of potential recoveries under a plan to recoveries in a liquidation will turn on the relative amount of assets that are available under those two scenarios, not on the amount of the Abuse Claims.

24. Finally, an estimation of the Abuse Claims against the Debtors is also unlikely to be necessary to resolve potential objections by Abuse Claimants to a channeling injunction. This issue also may not arise, either because the plan on which votes are ultimately solicited does not contain such a channeling injunction, or because Abuse Claimants accept the plan by the required vote. *See In re Exide Techs.*, 303 B.R. 48, 74 (Bankr. D. Del. 2003). And, even if an evaluation of the contribution to be made by the local councils or other third parties is required, that evaluation would not be an estimation under Section 502(c). Asking the Court to evaluate the Abuse Claimants' potential state-law claims against *non-debtors* for those non-debtors' own liability for the Abuse Claims has nothing to do with estimating any creditor's "claim" against the *debtor* "for purposes of allowance under … section [502]" of the Bankruptcy Code, which is all that Section 502(c) permits.[10]

25. In the end, the only thing that Movants' proposed "estimation" would accomplish is to multiply the expense and length of these bankruptcy cases—precisely the opposite of

[10] Movants' cases are inapposite. Those cases either (1) concern different issues not presented here, like estimations done to resolve pending plan objections, *see supra* pp.9-10; (2) simply restate the statutory requirements for estimation under Section 502(c); or (3) are otherwise distinguishable. For example, many of the "estimation" decisions that Movants cite did not, in fact, conduct an estimation at all. *See, e.g.*, *Order Terminating Estimation Proceedings* at 3-4, *In re PG&E Corp.*, No. 3:19-cv-05257-JD (N.D. Cal. June 9, 2020), Dkt. No. 387 (terminating estimation proceeding without conducting any estimation of mass-tort wildfire claims at all); *In re Roman Catholic Archbishop of Portland in Or.*, 339 B.R. 215, 223-224 (Bankr. D. Or. 2006) (court did not conduct any estimation of mass-tort sexual-abuse claims and deferred consideration of estimation for later proceedings); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1011-1012 (4th Cir. 1986) (court affirmed order transferring venue of certain tort lawsuits, not an estimation of mass-tort personal-injury claims, and merely noted in dicta, in accordance with Section 502(c)'s plain language, that estimation is appropriate where it is done "for purpose of *allowance* if failure to do so 'would unduly delay the administration of the case'" (emphasis added)).

Section 502(c)'s purpose of avoiding "undue delay." Movants assert that estimation will facilitate a consensual resolution of these bankruptcy cases, contending that the primary reason mediation has been unsuccessful is that the parties—the Debtors and insurers, on the one hand, and Movants on the other—disagree about the validity and amount of the Abuse Claims. Mot. ¶¶ 2-3. They add that estimation will "test … insurers' contention that not all proofs of claim are valid." *Id.* ¶ 9. But Movants' proposed estimation procedures are designed to do precisely the opposite. Among other things, those procedures would limit discovery to a sample of Abuse Claims *selected by Movants*, while the insurers would be denied any right to object or to take discovery from any other claimant. The result would be an "estimation" of aggregate liability in which no one would have any faith. The parties would be no closer to consensus. The "estimation" Movants seek would simply delay these bankruptcy proceedings and add to the more than $100 million in professional fees that the Debtors' estates have incurred in these cases.

### C. The Motion Is An Improper Attempt To Prejudice Insurers In State-Court Coverage Litigation

26. That Movants are unable to identify any legitimate bankruptcy purpose for the "estimation" they request is not surprising. Movants do not seek an estimation for the purpose of allowance under Section 502(c) or for any plan-confirmation purpose under Section 1129. Rather, Movants' actual objective is to obtain an order that they will then parade in state court in subsequent insurance-coverage litigation as a supposed adjudication by this Court of the Debtors' aggregate liability and that of the non-debtor local councils and sponsoring organizations, by policy year, for the Abuse Claims—even though no court will have vetted the validity of a single Abuse Claim.

27. Movants are following a well-worn playbook in which plaintiffs' lawyers have sought to misuse bankruptcy court "estimations" in subsequent coverage litigation in other

courts. *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, 135 Cal. Rptr. 3d 716 (Ct. App. 2006), is a prime example. There, the debtor and asbestos claimants negotiated a Chapter 11 plan that allowed present and future asbestos claims in an aggregate amount determined according to the plan's claim-resolution procedures. *See id.* at 722-724. The plan included purported "insurance neutrality" language, and claimants' counsel represented to the Delaware bankruptcy court at the plan-confirmation hearing that the plan would have no effect on any coverage litigation. But, once the bankruptcy court had confirmed the plan, the plaintiffs reneged on their representation and argued in a subsequent coverage action in California state court that the plan was a "final adjudication that established [the debtor's] liability to asbestos claimants and therefore obligated [insurers] to pay the full ALV [allowed liquidated value of the asbestos claims] established by the bankruptcy court." *Id.* at 726. Remarkably, the state trial court agreed. *Id.* at 726-727. Fortunately, a state appellate court saw through the plaintiffs' tactics and reversed the trial court's judgment. *Id.* at 731-746. The court explained: "While calculating the aggregate value of present and potential future claims is helpful and often necessary in other contexts, no authority exists for utilizing such a valuation to affix an insurer's indemnity obligations. To the contrary, cases addressing the concept of aggregation in the bankruptcy context repeatedly reaffirm its limited scope and purpose. … [A]sbestos claim estimation … is not to determine liability and … does not reflect the amount that will be paid to the asbestos claimants" but instead, "consistent with the limited role of bankruptcy claim estimation," only … assists in formulating a reorganization plan." *Id.* at 742-744.

28. It is clear that Movants are seeking to follow the same script here, hoping that they can misuse an "estimation" to avoid the need ever to prove the validity of any Abuse Claim and to prejudice insurers in state-court coverage litigation, as in *Fuller-Austin*. That is the reason

Movants are requesting an estimation of the Debtors' aggregate liability *by year*. Mot. at 16. Because different insurers issued policies for different years in which the Boy Scouts operated, Movants want an estimate of the Boy Scouts' total liability by year to try to use that estimate in subsequent coverage litigation against particular carriers that issued policies for that year. Indeed, Movants admit as much, asserting that "a year-by-year estimation—of the sort we propose—will permit the Abuse Claim liability to be matched to the appropriate insurer(s) and policy(ies) of the BSA and/or the local councils," which will purportedly "resolv[e] ancillary disputes with and among the insurers about who is liable for what" and "solv[e] for such coverage disputes." Mot. at 16. Such an estimate by year would be wholly unnecessary if Movants' real objective were to assess the allowability of any Abuse Claim, to determine whether a plan was feasible, or any other legitimate bankruptcy purpose.

29. That Movants invoke Section 502(c), a provision focused on the "allowance" of creditor claims in bankruptcy, as the basis for their Motion is rich with irony. Movants do not want to allow this Court, or any other, to consider whether any of the 85,000 Abuse Claims, first filed after for-profit claims aggregators engaged in their massive advertising effort in these bankruptcy cases, are valid. Instead, they want this Court to "estimate" the Boy Scout's aggregate liability in the hope that such an "estimation" will *prevent* any court from ever scrutinizing the allowability of any individual Abuse Claim.

30. In short, Movants seek an estimation that not only fails to satisfy any of Section 502(c)'s requirements but is at war with its statutory purpose, serves no other legitimate bankruptcy objective, and, instead, is designed to prejudice the insurers in future, state-law coverage litigation by preventing any court from scrutinizing any Abuse Claim. The Motion should be denied.

**D. The "Estimation" Procedures Are Improper**

31. Even if the Motion had any merit, the proposed "estimation" procedures would need to be substantially revised. There is no semblance of fairness or due process in what is proposed.

32. For example, the proposed procedures would require parties in interest either to agree to be bound as a "party" to the proceeding or be barred from presenting any evidence. Mot. Ex. A (Proposed Order) ¶ 3(a) & Ex. B. That is a transparent attempt to set up an argument by Movants in subsequent coverage litigation that the insurers were parties to the "estimation" and therefore should be bound by this Court's supposed adjudication of the Debtors' liability. The proposed procedures also would require the insurers to produce information showing all amounts paid to settle or satisfy sexual-abuse claims. *Id.* Ex. A (Proposed Order) ¶ 3(c). Those settlements are subject to confidentiality agreements and have little relevance—historical settlements of different claims in the past say nothing about the validity or amount of the claims that are currently alleged against the Boy Scouts—and would serve only to skew purported claim values upwards, since thoroughly vetted, more meritorious claims are often settled while less meritorious ones are typically dismissed without payment or settled for a nominal amount.[11] Worse, the "estimation" procedures would limit discovery solely to a purportedly "representative sample of claimants" cherry-picked by the Movants, while the insurers would be denied any right to object to Movants' sample or to propose their own sample. *Id.* ¶ 3(d). And, under Movants' proposed procedures, all fact and expert discovery would be completed in barely two

[11] The least meritorious claims may not have been asserted at all outside of these Chapter 11 Cases, which have combined (i) a massive advertising effort by plaintiffs' counsel and (ii) the suggestion by plaintiffs' counsel that every Abuse Claim will be liquidated without any judicial scrutiny thereof pursuant to a TDP.

months, with all trial motions, motions in limine and the like completed within a few weeks after that. *Id.* ¶ 3(d)-(j).

33. All of these procedures are plainly designed to rig the "estimation" proceeding against the insurers. Discovery is limited to a sample of claimants hand-picked by the Movants to generate a predetermined result. The procedures do not allow other parties in interest, including the insurers, to object to the Movants' sample or to propose their own sample of claimants. Similarly, the estimation motion is rife with improper provisions, including the requirements that the insurers file notices as "participating parties" that Movants can tout in coverage court as the insurers' supposed agreement to be "bound" by the estimation and that the insurers produce confidential and irrelevant information on historical settlements. And, if there is to be a comprehensive estimation, there needs to be real due process with a realistic time frame, not the truncated process and schedule that Movants propose. *See Dow*, 211 B.R. at 563 ("[R]egardless 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. … 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."); *Garlock*, 504 B.R. at 74 (issuing estimation decision more than a year and a half after ordering estimation and noting the proceeding took 17 trial days); Case Management Order for Estimation of the Debtor's Liability for Mesothelioma Claims, *In re Bestwall LLC*, No. 17-31795 (Bankr. W.D.N.C. Mar. 31, 2021), Dkt. No. 1685 (estimation schedule exceeding one year).

34. Finally, any order must include provisions making clear that any "estimation" of the Debtor's aggregate liability for the Abuse Claims is not a finding or adjudication by the

Court of the Debtors' liability for any individual Abuse Claim and that the so-called "estimate" is not "binding" on any insurer or a determination of any issue bearing on any insurer's coverage liability.[12] An "estimation" of the Debtors' "aggregate liability" for Abuse Claims, which does not vet a single individual Abuse Claim, could not determine any issue of insurance coverage. Hartford's policies, for example, generally obligate it to indemnify the insured only for specific claims that the insured "shall become legally obligated to pay," not to indemnify the insured for an "estimation" of "aggregate liability" untethered to any individual Abuse Claim.[13] An aggregate-liability estimation, even if broken down by year, would say nothing about whether or when a particular claimant was abused or the amount the claimant is entitled to recover on account of his claim, critical information needed to apply the terms of each insurer's insurance policy.

35. Such an "estimation" would certainly not be an "adjudication" of the Debtors' liability for any individual Abuse Claim. *See, e.g.*, *Kool, Mann, Coffee*, 300 F.3d at 348 ("an Estimation Hearing has no legal effect other than establishing the approximate amount of the claim that will be recognized in a reorganization"); *Armstrong*, 348 B.R. at 124, 134, 136 (aggregate-liability estimation is merely an "approximation" and "prediction of the amount of liability [the debtor] will face," "not [a] search for mathematical precision, nor ultimate certainty"); *Federal-Mogul*, 330 B.R. at 154-156 ("an estimation by definition, is an approximation," made "for the limited purposes of plan formulation"; "it is important that we not

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[12] *See In re A.P.I., Inc.*, 331 B.R. 828, 846-47 (Bankr. D. Minn. 2005), *aff'd*, 2006 WL 1473004 (D. Minn. 2006) (holding that, at the plan confirmation stage, "at bare minimum this Court has the power to deny preclusive effect to the ostensible determinations that are to be made" by post-confirmation trust of asbestos claims "via the estimation of claims").

[13] *See* Complaint ¶¶ 91-97, *Hartford Accident and Indemnity Co. v. Boy Scouts of Am.*, Adv. Proc. No. 20-50601-LSS, D.I. 1 (Bankr. D. Del. May 15, 2020). Other insurers' policies are similar. For example, many of AIG's policies contain comparable language, obliging AIG to indemnify the insured for "the ultimate net loss excess of the retained limit as hereinafter defined, which the Insured shall become legally obligated to pay as damages by reason of the liability imposed upon the Insured by law…."

pretend to have achieved mathematical accuracy"); *Roman Catholic Archbishop*, 339 B.R. at 224 (concluding estimation for plan-confirmation purposes can use "less exacting" methodologies because the "consequences" of "an erroneous estimation is much less serious"); *Dow*, 211 B.R. at 562-563 & n.16 (noting "very real concern that the estimates may prove to be inaccurate" and that the use of aggregate-liability estimations in the mass-tort context "rests on the shaky foundation that judges can accurately estimate the results of a series of extremely speculative problems"); *In re Bicoastal Corp.*, 122 B.R. 771, 774-775 (Bankr. M.D. Fla. 1990) ("[O]ne must draw a distinction between the estimation process of a claim and the adjudication process of the same. There is no question that the estimation of claims in bankruptcy does not establish a binding legal determination of the ultimate validity of a claim nor a binding determination of any issues.").

## CONCLUSION

Certain Insurers respectfully request that the Court deny the Motion and enter such other relief as the Court deems proper.

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# EXHIBIT 3

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

| | | |
|---|---|---|
| IN RE: | . | Chapter 11 |
| | . | |
| BOY SCOUTS OF AMERICA and DELAWARE BSA, LLC, | . | Case No. 20-10343 (LSS) |
| | . | |
| Debtors. | . | |
| BOY SCOUTS OF AMERICA, | . | Adv. Pro. No. 20-50527 |
| | . | |
| Plaintiff, | . | |
| | . | |
| v. | . | Courtroom No. 2 |
| | . | 824 Market Street |
| A.A., *et al.*, | . | Wilmington, Delaware 19801 |
| | . | |
| Defendants. | . | March 17, 2021 |
| . . . . . | . | 9:00 A.M. |

TRANSCRIPT OF TELEPHONIC OMNIBUS HEARING
BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

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MATTERS GOING FORWARD:

2. Debtors' Second Omnibus (Substantive) Objection to Certain (I) Cross-Debtor Duplicate Claims, (II) Substantive Duplicate Claims, (III) No Liability Claim, (IV) Misclassified Claims, and (V) Reduce and Allow Claims (Non-Abuse Claims) (D.I. 2020, Filed 2/3/21)

**Schedule 1: Supplemental Revisions Needed**

**Schedule 2: Supplemental Revisions Needed**

**Schedule 3: Objection Sustained**

**Schedule 4: Objection Sustained**

**Schedule 5: Objection Sustained**

MATTERS GOING FORWARD AS A STATUS CONFERENCE:

6. Amended Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC (D.I. 2293, Filed 3/1/21)

7. [SEALED] Hartford and Century's Motion for an Order (I) Authorizing Certain Rule 2004 Discovery and (II) Granting Leave from Local Rule 3007-1(f) to Permit the Filing of Substantive Omnibus Objections (D.I. 1971, Filed 1/22/21)

8. [SEALED] Insurers' Motion for an Order Authorizing Rule 2004 Discovery of Certain Proofs of Claims (D.I. 1974, Filed 1/22/21)

ADVERSARY PROCEEDING:

*Boy Scouts of America v. AA, et al.; Adv. Pro. No. 20-50527 (LSS)*

1. The BSA's Motion to Extend Preliminary Injunction Pursuant to 11 U.S.C. §§ 105(a) and 362 (D.I. 144, filed 2/22/21)

**Ruling: Approved/Order Entered**

(Proceedings commenced at 9:09 a.m.)

THE COURT: Good morning. This is Judge Silverstein. We're here in the Boy Scouts of America case; Case No. 20-50527.

Let me remind everyone to make sure your computers are muted when you are not addressing the court.

I will turn it over to Mr. Abbott.

(No verbal response)

THE COURT: Can parties hear me?

UNIDENTIFIED SPEAKER: Yes, Your Honor.

THE COURT: Okay. Thank you.

Mr. Abbott?

MR. ABBOTT: Thank you. Derek Abbott here of Morris Nichols on behalf of the debtors, Your Honor.

We have a modestly long agenda today so we will try to get through it quickly, Your Honor.

In accordance with the second amended agenda that was filed -- and I want to make sure that Your Honor has it.

THE COURT: I do.

MR. ABBOTT: Thank you, Your Honor.

Item one, orders have been entered. We are good there.

Number two, Your Honor, is, I believe, the second omnibus claims objection. There were certifications filed, but we understand the court may have some questions about the

matters raised in that objection.

So we're at the court's pleasure. I believe Mr. Linder will be responding to the court on these issues. So we are happy to respond as appropriate.

THE COURT: Okay.

MR. LINDER: Good morning, Your Honor. Matt Linder of White & Case.

Can you hear me okay?

THE COURT: Yes.

MR. LINDER: As Mr. Abbott mentioned, the second omnibus substantive claims objection it relates to approximately sixty non-abuse claims. In particular, we are seeking to expunge certain duplicate claims and no liability claims to reclassify certain claims that were inappropriately asserted as having priority under the bankruptcy code, and to reduce and allow certain claims in revised amounts.

Your Honor, we had a few informal comments that we received from counterparties to fund the claimants. We were able to resolve those without any further filings. Those were noted in the certification of counsel filed at Docket No. 2315. We did not receive any formal responses, but we're happy to address your questions.

THE COURT: Okay. Thank you.

Yes. I have reviewed the second omnibus objection and -- I'm sorry, I'm getting feedback. Am I the only one?

MS. BATTS: Your Honor, this is Cacia. I will go ahead and contact Rob and let him know that you are --

THE COURT: Thank you.

MS. BATTS: You're welcome.

THE COURT: The -- we've reviewed the objections and I have questions with respect to Schedule 1, Schedule 2, and Schedule 3 generally.

With respect to Schedule 1 it labels these cross-debtor duplicate claims and by definition if they're cross-debtor they're not duplicative. Okay. These persons or entities have asserted a claim against two different debtors, often on the same day. So it's clear they intended to assert claims against two different debtors. So they're not duplicative. So why should I disallow them as duplicative?

MR. LINDER: I'm happy to address that, Your Honor. Delaware BSA is the other debtor in this case, and Delaware BSA is a non-operating company that is not party to other contracts, it's not entered into any guarantees other than being a co-obligor on Boy Scouts of America's prepetition funded indebtedness.

Certain of the claims, for example, certain liability, rather, under the Boy Scouts restoration plan which is a prepetition retirement plan. For example, Delaware BSA has no connection to that plan. So your comments are well taken in that they are not duplicates asserted at two

different debtors. The basis for our objection was that Delaware admits they have no liability on account of these claims.

THE COURT: But that wasn't the basis of your objection. The basis of your objection is that they're duplicative.

MR. LINDER: We'd be happy, Your Honor, to go back and clarify the objection. It's really a no liability basis for the objection. We can substantiate that with a supplemental declaration if you would like.

THE COURT: Okay. You need to do that and you need to serve that on the claimants. Then we will take this up again at another hearing.

I have similar questions on Schedule 2. Substantive duplicate claims. Some of them appear to be claims against different debtors. Some of the claims appear to have been purchased, perhaps. But I don't know if -- I'm not sure that I know the basis of objecting to these claims. They are not purely duplicative. In fact, they are different on their face.

MR. LINDER: I think generally, Your Honor, we -- rather than being able to address these in a non-substantive fashion on the basis that they're true duplicates and that they are exact matches you are correct, for example, there are a couple of vendor claims that has been filed, on one part, by

the actual counterparties and contract, and on one hand, as we noted, by a third-party who may have purchased the claims.

We're happy to go back and take a look. And to the extent that it's not clear in the objection that we filed we're happy to revise it to further substantiate the objections.

THE COURT: Okay. I think you need to do that and also address, as with the first schedule, the claims that are against different debtors.

MR. LINDER: Understood, Your Honor.

THE COURT: With respect to Schedule 3 I was generally okay with that except I have a question with respect to two of the claims where the reason for disallowance, among other things, is that the debtors do not believe these two invoices are valid. What does that mean? You think they made them up?

MR. LINDER: Your Honor, we did take a look in preparation for this hearing. What that means is that we -- the debtors searched its files, its accounts, payable systems, its records, and although it provided services to that counterparty, the invoice that is asserted as to the debtors and the future claim there is no record of those services ever having been provided.

THE COURT: Okay. So that is a substantive objection that we have no liability for this because we didn't

get the services. Okay. That one is close enough. I will accept that.

I did not have any questions on Schedules 4 or 5. So I will sustain the objection as to Schedules 3, 4 and 5.

Mr. Linder, you will supplement with respect to Schedules 1 and 2.

MR. LINDER: Thank you, Your Honor. We will bifurcate the order and we will submit the claims under certification of counsel that you are sustaining the objections and then we will do as you requested with respect to the balance of the claims.

Thank you very much.

THE COURT: Thank you.

MR. ABBOTT: Thank you, Your Honor.

Items three through five on the agenda are the 2019 matters that the court previously heard and indicated that it would not be addressing today.

So that moves us along to number six on the agenda, Your Honor which is the debtors' plan as to which the court requested a status conference. I am going to cede the podium to Ms. Lauria who will address the court on that. I believe there are some others who also, obviously, want to be heard on that issue.

Maybe, perhaps, if the court has specific questions that they'd like us to address we can prime the pump so to

speak.

THE COURT: Well, I do. I want to take five minutes because I am getting significant feedback in the courtroom and see if we can get this cleared up. So let's take five minutes.

MR. ABBOTT: Thank you.

(Recess taken at 9:20 a.m.)

(Proceedings resumed at 9:33 a.m.)

THE COURT: Okay. May apologies. Hopefully we have this fixed.

Can you all hear me?

(No verbal response)

THE COURT: Okay.

MR. ABBOTT: Yes, Your Honor.

THE COURT: Okay. Thank you.

Let's start with the status conference. I had requested a status conference to have a discussion about whether there's a realistic timeframe for confirmation or what the realistic timeframe is for confirmation given where we currently are.

Debtors have filed a plan. I have reviewed it. I noted that the debtors inserted a confirmation date of July 26th which was not vetted with Chambers. And I don't know -- and that date, by the way, is not available, but the question I really have is where are we. I wanted to know whether the

debtors were planning estimation procedures, when I can expect TDP's; all of the things one would expect a Judge would have questions about when asked for confirmation dates and when there is currently a disclosure statement hearing scheduled next month.

I have seen the flurry of paper. I have read the flurry of paper. And I would like to have some discussion. If we were in the courtroom I might have it in Chambers, but we're not. So we are going to have it on the docket.

Ms. Lauria?

MR. LAURIA: Thank you, Your Honor. Again, for the record, Jessica Lauria, White & Case, on behalf of the Boy Scouts of America.

Why don't I start, Your Honor, with where we're at and then turn to the importance of the debtors' timeline, and in particular a summer 2021 confirmation timeline.

I am sure Your Honor saw that in addition to the plan and disclosure statement, and solicitation procedures motion we also filed, on behalf of the mediators, the first mediator's report. I think the fact that they used the term first was no accident. That was intentional. And it suggests that there are additional mediator reports to come.

In fact, if I could, I want to quote the tail-end of that mediator report which says,

"The mediators are confident that the mediation

will foster additional constructive discussions between and among the debtors and other mediation parties. Accordingly, the mediators do not consider the mediation to be closed."

That was a mere two weeks ago. And we agree with the mediators. In fact, we have had mediation sessions since that mediator report was filed. And we have also had mediation -- we have a group mediation session scheduled for the end of the month.

Now we are, Your Honor, keenly aware that we are not there yet. We also saw the flurry of pleadings, plan response pleadings, that have been filed to date both by survivor constituencies as well as the insurers. And like, I think, the sentiments that were expressed in those filings the debtors are also frustrated that we're not there yet.

I will say, Your Honor, that we're particularly frustrated that because of the impact of COVID we have been unable to have in-person face to face mediation sessions. It's frustrating, I know, just even from a courtroom experience. Well that has been extremely frustrating from a mediation experience. And that has made our bankruptcy mediation, which as you will recall kicked off in the middle of COVID, extraordinarily challenging. And I don't think that is putting it mildly.

We didn't file a responsive pleading to those pleadings. I am not here today to air our grievances with

other mediation parties and what has happened in the mediation. I think suffice it to say the debtors are committed to continuing to work with the mediation parties. We're working with the mediation -- excuse me, with the mediators on global resolution.

As I mentioned, we have sessions scheduled regularly, literally daily, and we believe this is going to culminate in group mediation sessions at the end of March, early April.

As you will hear about later today in the hearing we now have consensus around an extension of the preliminary injunction. That gives us the breathing spell, we think, to continue the mediation. Your Honor, we know we have a lot of wood to chop. I don't think it's the entire forest, as some people in this case would have you believe, but we know we have a lot of wood to chop. We have got a process to resolve that and we need -- from the debtors' perspective we need to let that process play out.

In terms of timing I'm going to start with confirmation timing because I know that is where you started. Our apologies, Your Honor, for putting the date in the documents. From our perspective it is important that we maintain an emergence by the end of summer 2021 for a lot of reasons. We kick-off recruiting, in earnest, in the fall.

The debtors need to put this bankruptcy matter

behind them. We have talked in the past about liquidity concerns, financial concerns with the bankruptcy case. Suffice it to say, the case has cost the debtors tens of millions of dollars, upwards of $100 million. With the litigious environment that we are finding ourselves, the case is running around $10 million a month from an estate cost perspective.

If this litigation, between, frankly, the plaintiffs on the one hand and the insurers on the others with the debtors stuck in the middle, continues to escalate that number is only going to go up. And we think that that is just entirely inappropriate for a non-profit debtor whose revenue is generated by donations, and children attending, you know, youth serving camps. We just don't think that is appropriate for the size of this case or the nature of this debtor. So we are trying to cabin-in those costs also on the timeline. That is why we are looking at a summer emergence.

We would like that hearing to be fully consensual. We have got the mediation set-up, we think, to do that. We recognize it probably won't and we will probably need multiple days of Your Honor's time. That doesn't mean we won't have consensus with some parties, but it may be that there are parties, even as we get to the end of the summer, that aren't entirely happy with where we have ended up. We will see when we get there.

In terms of Your Honor specifically asked about estimation. We understand that last night the TCC, the FCR and, I believe it was joined by the coalition as well, filed a motion to estimate claims. That is scheduled to be heard, I believe, at the April 15th hearing.

As Your Honor noted, that April 15th hearing is currently scheduled as our disclosure statement hearing. I think given the fact that we have mediation later this month, late this month, into early April holding that date is going to be very difficult for a disclosure statement hearing. We fully acknowledge that, but we want to stay within the overall timeline.

So if the date needs to move for the disclosure statement we understand that, but we would ask that it not be moved by much because I think we've got momentum in the mediation right now. We think we should continue to take advantage of that and see where we are at the end of these sessions that are at the end of the month.

THE COURT: Okay.

MR. MASON: Your Honor, Richard Mason for the ad hoc committee. I'd be happy to speak for the ad hoc committee if -- I apologize, I didn't mean to interject on Ms. Lauria, I Ms. Lauria is done for the moment.

MS. LAURIA: I am unless Your Honor has any further questions for me.

THE COURT: Not right now.

Mr. Mason?

MR. MASON: Yes. Thank you, Your Honor. Good morning. Again, Richard Mason of Wachtell, Lipton, Rosen & Katz for the ad hoc committee of local councils.

Just as a very brief reminder, Your Honor, the ad hoc committee consists of eight local councils drawn from across the country. We are all volunteers as (indiscernible) chair and my firm is pleased to represent the committee *pro bono*. We reflect a variety of the 253 local councils that deliver the scouting product on the grounds, Your Honor, to over a million youth today.

The ad hoc committee, importantly, for purposes of the mediation, consists of councils with higher numbers of claims against them and those with lower numbers, councils in plaintiff friendly states with open windows, and those in states where the statute of limitations has long since expired and is very unlikely to be revived, frankly, including because of state and constitutional provisions, and councils with relatively higher net worth, and those towards the lower end of the financial scale.

Despite that variety, Your Honor, we have a common goal to achieve, if we can, a solution that compensates victims of abuse claims and preserves scouting for the young men and women it serves. We are a mediation party, the ad hoc

committee is, and we believe that we have been engaged productively with other mediation parties including the BSA, the coalition and others.

Recently we have worked very well with the TCC and the coalition on the proposed extension of the preliminary injunction. That is a matter that you will hear from my colleague, Mr. Celentino, and others later in the agenda.

Your Honor, to be clear, no individual council is a mediation party. Over the past year the ad hoc committee has been engaged intensively with local councils both to keep them informed about the BSA bankruptcy and particularly recently to see, frankly, what the art of the possible is with regard to local councils aggregate contribution to a global settlement.

Now because the numbers are covered by the mediation confidentiality, Your Honor, I am not intending to discuss on the record the amount that we think we can circle from the local councils based on our own analysis and thousands of hours, frankly, we spent with them. But I just want Your Honor to know that the local councils are fully engaged through the ad hoc committee's efforts to achieve a resolution on a timely basis.

I would agree with Ms. Lauria's comments about the need for speed in the matter to achieve a resolution of one as soon as possible and, frankly, we all look forward to the continuing mediation that, from our perspective, has and

should be intensifying.

I do want to say a brief word, Your Honor, about the TCC's status report if I might. Frankly, I read it very briefly last night, much like a disclosure statement objection which is for another day. I guess possibly not next month, but hopefully soon thereafter. But there is one point that I would like to address that I think is relevant for today and, you know, in mediation.

The TCC says that based on its analysis of local council properties, I think all of which have been appraised at this point, the local councils can contribute to "multiples" of the $300 million number that the BSA has identified in the plan that it filed as the local council aggregate settlement contribution.

Now we have done our own analysis and we disagree vehemently with the TCC's view of that potential. We think that the appraisals do not properly account for deed restrictions and conservation easements and other limitations on local council properties across the country. We have other issues, frankly, with the appraisals.

We also think that these types of disputes are exactly why we have mediation with three very able mediators appointed by Your Honor so that we can discuss the issues and avoid litigating them if we can. So we would invite the TCC to share their analysis with us in mediation. And if we can

find common ground that is fantastic, like we did on the preliminary injunction extension. And if we don't, at least we will have tried our hardest. I'm sure they will as well and we will know where we disagree and we can proceed from there.

I do just want to mention that the TCC said in its status report that it had reached out to certain individual local councils to discuss the TCC's view about their properties based on the appraisals. The local councils to whom Mr. Stang reached out to discuss these matters are not mediation parties. I believe almost all of them have responded, and to the extent that they have they have asked the TCC to work with the ad hoc committee which I would just reiterate we are fully prepared to do.

So thank you, Your Honor. That is all I have for the moment.

THE COURT: Thank you.

Let me hear from the tort claimants committee.

MR. STANG: James Stang, Pachulski Stang Ziehl & Jones, for the tort claimants committee.

First, Your Honor, we want a consensual resolution of this case. Survivors and -- well, the (indiscernible) committee has been accused more than once in conversation with other parties that (indiscernible) and the local councils. That simply is not true. I (indiscernible) the tort claimants

committee is not concerned about whether the Boy Scouts (indiscernible) exists post-confirmation. Their concern is a reasonable compensation (indiscernible). If the Boy Scouts cannot continue to (indiscernible) post-confirmation so be it. Our goal is to protect our constituencies and get them compensation. Our goal is always not the liquidation (indiscernible) for the local councils.

The issue that Ms. Lauria described was -- we were informed of that on Monday in a phone call with counsel. We have not received a single notification from the mediators that that mediation has been since scheduled. No one has asked the tort claimants committee if they were (indiscernible). No one has discussed with us whether it was safe to travel to Miami for mediation.

I have (indiscernible) creditors committee. I don't know if he's willing to -- he lives in South Florida, whether he is willing to travel to White & Case's offices. I am not available to White & Case's. I have several previous (indiscernible) conditions that can be at home. I have vaccinated and I have asked counsel what precautions they were taking to ensure that it was safe to go their offices. They said they have (indiscernible) protocol.

So COVID issues aside the fact that we have not even consulted (indiscernible) about any availability to go to -- it sounds like counsel hopes that their case

(indiscernible). I think it is just (indiscernible) of what is going on in the mediation process generally.

So Mr. Mason's comments about the councils, I think, is a further illustration of where we are. I don't have to have a settlement (indiscernible) in the context of mediation. We have analysis of five local councils (indiscernible), their assets, their cash, their investments, their camp utilization, their camp values, the reviewed deed restrictions on thousands of properties.

We reached out to the local councils because they are in breach. There is no invitations to date that we have to have with them about the value of those (indiscernible) which is a huge issue in talking to the parties that are liable. So we decided to cut through that.

The first counsel said we're not interested in talking to you about talking to the local councils. One of them hasn't even responded to our inquiry. The debtors said that (indiscernible) not to you individually, but we will talk to you through the local councils. Two of those local councils are actually members of the ad hoc committee. So I don't understand what (indiscernible) talk to us through the committee, through the ad hoc committee.

Frankly, we'd be willing to talk to all 253 (indiscernible) but the information we got was confidential and (indiscernible) unless they all agreed. So we have been

invited to talk to the ad hoc committee, which we intend to do. Mr. Mason doesn't know that (indiscernible), but it is our intention to do that.

That committee has no authority over any of the other local councils. Mr. Mason has repeatedly said that the committee cannot bind them. I don't know what communications are going to go forward from that meeting to the rest of the constituents of the ad hoc committee.

So the fact that they're not mediation parties, Silicon Valley, Garden State, Grand Canyon, these are local councils, Your Honor, doesn't mean they flock to us. We are trying to keep our constituents informed of what is going on. We have had three, what I call, (indiscernible) available to all survivors. We have had (indiscernible). We have (indiscernible) a couple of thousands of people that downloaded the recordings of those webinars. We have had town halls (indiscernible) who represent survivors.

So they're useful, informing them as to what is going on. Honestly, I have heard, I don't know the (indiscernible), coming onto those town hall meetings to listen as to what is going on. So this notion that somehow there's all this communication going on between us and the local councils. Obviously, we're not (indiscernible) of the mediations at the moment with the BSA. We have had lots of conversations. As you can tell from our (indiscernible)

progress to where it should be.

Issues that we have with plan and disclosure statements or webinar statements (indiscernible) we have too many things to do today (indiscernible). In a sense (indiscernible) was right, it was kind of a preview of the disclosure statement objection. It also works with some other issues that have not (indiscernible). The estimation matter Mr. Patton talked about it. (Indiscernible) demonstrates how much (indiscernible) and whether (indiscernible) disclosure depends on a lot of the work that the BSA and local councils do.

At the end of the day local councils and chartered organizations, (indiscernible) of all liabilities. I understand the actions with the insurers, the settlements. I understand there needs to (indiscernible) for them to continue (indiscernible). The lack of information that is in the disclosure statement that will be provided to the creditors I think there has to be a real change in attitude by councils as to what assets are in the disclosure (indiscernible), what the alternatives are so that they can look at (indiscernible).

Your Honor, we will continue working towards a global resolution, but we have a lot of work to do. We are committed to doing it, but we have got to have partners. Telling us that we have to be in Miami without asking us (indiscernible), who's coming, (indiscernible).

Thank you, Your Honor.

THE COURT: Thank you.

Let me from the unsecured creditors committee.

MR. RINGER: Good morning, Your Honor. Rachel Ringer from Kramer Levin on behalf of the creditors committee.

Your Honor -- as Your Honor saw from the first mediators report we were able to achieve a resolution for the treatment of our constituency which is embodied in the version of the plan that was filed in early March with the caveat that, you know, given the timing as reflected in that plan and disclosure statement those documents, themselves, we are still in the process of reviewing.

In terms of the schedules I generally agree with the comments laid out by Ms. Lauria. From the committee's perspective, and I think as recognized by, effectively, all the parties in the case, you know, our constituency is small by comparison with the exception of really (indiscernible) for pension claims that are resolved through the plan, and the claims held by our constituency, as I think was referenced in the TCC status report, is not the claims that precipitates the bankruptcy filing.

With that in mind we did work very hard with the debtor and with JP Morgan to negotiate a deal for constituency that not only addressed our claims, but allow the organization to take what we view is a critical first step for

confirmation. We do recognize that there are, you know, still a lot of wood to chop. We are happy to and look forward to continuing to work with the debtors to try and achieve greater consensus around the plan.

Key to our agreements and key to the settlements that we reached with the debtor is the continued viability of the organization. That is important not only for the members of our committee and the members of our constituency, many of whom are going to continue doing business with the organization post-bankruptcy, but also because, as Your Honor has heard a little bit about in prior hearings, the assumption of the pension and the avoiding the items that would trigger a potentially very large claim is important for preserving recoveries to, you know, non-general unsecured creditors and preserving recoveries for all other constituencies in the case.

You know, we've always believed our constituency could be an important and constructive building block and we are happy to have reached an agreement but also recognize that we, along with debtors and other parties in the case, still have work to do before confirmation.

THE COURT: Thank you.

Let me hear from the FCR.

MR. HARRON: Good morning, Your Honor. This is Ed Harron for the FCR.

Can you hear me okay?

THE COURT: I can.

MR. HARRON: If I may, Your Honor, I'd like to address two things, the plan and the estimation motion that we filed yesterday with the TCC and the coalition.

Your Honor, we talked about this in other mass tort cases but its generally the case that a mass tort bankruptcy only concludes when you have some level of consensus between the company and the claimants. And Imerys is an example of that where we have a consensual plan.

Unfortunately, Your Honor, the plan that's on file does not reflect any sort of consensus, and I think it's plain from the TCC's response that it will be a subject of claimant opposition.

And, just to be clear, at this moment, I know that we're not (indiscernible), but at this moment the FCR does not support that plan. And to be frank, Your Honor, we think it ignores the elephant in the room.

You know, this case is unique in many ways. But among the unique facts here is the existence of about 84,000 claims that were filed as of the bar date. And Your Honor has heard in prior hearings that the compensability of those claims, the value of those claims, it will be highly contested by among others, but at least we know the (indiscernible) of issues.

But those same considerations which claims are compensable and how much are they worth and that feeds into all the confirmation price areas. That informs claimants on the votes that form the criteria and values in the TDP.

It's necessary for the court to conduct the best interest analysis to compare to the cover available to tort claimants against -- the tort survivors, pardon me -- against, for example, what the commercial claimants are receiving.

Also, this case puts at issue third-party releases to the local councils, to the charter organizations, to insurers. And, of course, the fundamental consideration of the court when evaluating third-party releases is how the consideration compare to the liability.

So, to make a long story short, Your Honor, we think the plan is putting the cart before the horse. And we've discussed with the debtor what we believe to be a more appropriate strategy. And we discussed this with them before we filed the motion. But we think the way to advance this case is for a court to determine the magnitude of the liability to the abused claimants. And we're attempting to address that issue via the estimation motion.

And Ms. Lauria mentioned that the estimation motion would be up for consideration on the April 15th hearing. That's not our intention, Your Honor. In fact, we wanted to bring the motion to your attention today. Mr. Brady set up a

chambers this morning, so we have an opportunity to discuss it with you but later this afternoon we plan to file a motion to withdraw the (indiscernible).

We believe (indiscernible) 157 -- pardon me 28 U.S.C. 157(b)(2)(b), the liquidation of personal injury claims is beyond this court's core jurisdiction. And because it's our intention, at least, in part, to use the estimation motion of the basis to potentially fix distributions to claimants, again, it falls squarely within 157(b)(2)(b) which said not matters which are among the court's core jurisdiction.

So we collectively -- we spent a lot of time consideration which court was best situated to resolve the estimation. And it's our view, particularly in light of 157(b)(2)(b), primarily in light of that statute. We believe the District Court is probably the appropriate place to litigate the estimation issues.

THE COURT: How does that fit into a timetable that the BSA believes is necessary to make sure we have a continuing Boy Scouts?

MR. HARRON: Well, I don't want to speak out of school, but BSA says it does not fit into their timetable. We have -- the motion has an expedited schedule and they'll proceed -- we intend to proceed quickly but when we get over to District Court, you know, it will be subject to the court's availability.

THE COURT: Correct.

MR. HARRON: But the BSA timetable we think erroneously assumes that confirmation in the near term is an option. We don't accept that premise. We don't think -- we think the current plan is a road to nowhere. And it may be the case of (indiscernible) BSA funds prosecuting that plan. Maybe that's not in the best interest of the estate.

THE COURT: It may be. I don't know. I'm surprised that anyone thinks that the plan that was filed is the plan that's going to be confirmed.

So I think you've all been in this game long enough to know that's not the case. So what my concern is, though, and I don't know what, you know, you file your motion, of course. I don't know what the District Court will think about the argument you're making with respect to who can determine it.

And what concerns me more, quite frankly, is a timeframe with the District Court that has on its plate and coming up with hopefully the relaxation of -- well not hopefully, the relaxation, with possibilities of return to criminal trials, a docket that it has to prioritize. So that is a concern I have.

But parties, of course, are free to file whatever motions they think are appropriate and legally required. But I have that concern of the backlog of criminal docket that --

it's my understanding the District Court will need to prioritize.

But, you know, I read the motion and I've seen what's been filed, as I said, the flurry of filings. The parties are free to take the positions they want to take. I'm not sure if they can take them back at some point.

MR. HARRON: Your Honor, I just want to clarify a few points.

One, we seem to be committed to mediation. And we don't see the estimation path and the mediation path as regionally exclusive. So it's our hope that the estimation process will bring the parties closer together, rather than further apart.

And with the plan and the timing, we do share the concerns about timing. Certainly, my client has no interest in harming a long-term process of the Boy Scouts. But it's our view that, as Your Honor noted, the plan that's on file will not be the plan that's confirmed.

But when we play it out, we think that any plan that's going to be confirmed ultimately will require an estimation of some sort. And so, it's our view, that we can proceed with the estimation now and perhaps use that as an opportunity to bring the parties together. And once that litigation is completed or near completed, then we can move more promptly to a plan process.

THE COURT: Okay. Thank you.

MR. HARRON: Thank you, Your Honor.

MR. MOULTON: David Moulton. May I speak for the coalition?

THE COURT: Yes.

MR. MOLTON: Good morning, Judge. It's David Molton of Brown Rudnick for the Coalition of Abused Scouts for Justice.

I want to say a few words. I'm going to try to be as concise as I can, Your Honor. I know that a lot of folks have already spoken about things that I was going to say.

I know that folks have talked about a lot of wood to chop. I think that that's a fair statement, but probably an understatement. I think that that's a forest to chop and I know Mr. Stang has talked about the local council issue and the official tort claimants' issues and efforts in connection with local council.

I think also, Judge, one of the, as alluded to earlier, one of the elephants in this room, as Your Honor has seen from the history of this case and our involvement in it, is the insurers. And what they're going to do, what they're going to bring to this plan.

So I think we can't respoke it. Just looking at the Boy Scout proposal and local council's proposal, but also the issue of the insurers. And I want to address, go right to

the heart of what you said about estimation, Judge. Because what you have in the estimation motion, the two fiduciaries for the survivors, plus the ad hoc committee.

The coalition that as Your Honor knows represents a significant amount of those survivors for collective purposes in this bankruptcy case joined together, all of those parties are working extremely hard in the mediation. I don't think anybody on this in-conference in your courtroom will say that that's not the case.

We've all extended hours of good faith efforts working with the debtors, working with the local council, engaging as appropriate and necessary. And to the extent we can with the insurers through the mediators in order to move this case.

At the present time, Judge, the timetable suggested by the estimation is very aggressive. We did that in light of exactly what the debtors concern was and in light of the suggestion and what I knew the question from Your Honor would be.

Your Honor said you read it. We appreciate that, Judge. Paragraph eleven is the proposed case management ordered. We narrowed that, that's 111 days' timetable for all of this to get done. You know assuming that the order is granted and estimation is granted in mid-April, that puts us, you know, within fair game of concluding if that timetable is

accepted and abided by.

And I know that other folks are going to have their say on that timetable and surely the court hearing this will have its say on that. But it puts us not beyond or substantially beyond the timetable that Ms. Lauria mentioned. So we tried very hard to do that.

Number two, Judge, and I know it's been talked about earlier in earlier hearings in mass tort bankruptcies estimation often is teed up and often it results in incenting and facilitating the mediation and consent, not the opposite.

I refer Your Honor to PGE that I know Your Honor heard from before from some of my colleagues where an estimation was teed up in front of the district judge and soon there afterwards, you had a deal between the debtors and the prior victims on value and the amount that would be paid to them in the plan.

Just across the hall, the physical hall, at one period of time, an incest, Your Honor, I think it was -- well it's going to be a year and a half, almost two years ago, the debtor teed up an estimation process very early in the program. And what happened is under the mediation auspices of Judge Carey, mediation happened with that regime be proposed by the debtor which mediation went to a consensual plan.

So it's important to understand that from the survivor constituency's perspective, in light of -- and I

don't want to get into mediation discussions. That's not appropriate. I'm not even going to allude were they successful, non-successful progress or non-progress. But, clearly, the survivor constituencies in light of everything that Your Honor had seen in this case so it's important and necessary to tee this up at this point in time for the reasons that Mr. Harron described.

I will say, Your Honor, that you know the coalition agrees with the TCC and the FCR that the plan itself is unconfirmable and will not be voted. There will be -- I can't say no survivor, but there will be overwhelming survivor opposition and vote no to the plan.

There's a lot of issues that I know Mr. Stang stood and raised that 2388 that was filed yesterday, I think it's fair to say that the coalition doesn't have to repeat them or join in them.

Just some of the things that weren't said in there, you know, number one, we have great concerns under the present plan. First of all, it purports to be insurance neutral but yet it gives the insurers enhanced rights such as the ability to avoid direct claim litigation where that litigation is allowed in various states.

Further, Judge, in terms of the millennium factors because non-debtor releases here as stated by Ms. Boelter from day one, Ms. Boelter, Ms. Lauria, and Mr. Andolina are

absolutely essential to Boy Scouts' surviving, if it's going to emerge from Chapter 11 and survive.

A key issue in evaluating whether one of the Millennium, Master Mortgage, Metromedia, whatever you want to call the case law that gives the court the criteria for evaluating non-debtor releases. Whether the claim effected by the releases are going to be paid in full. Clearly, the issues there are the value of the claims which is we're dealing with now with the tee up of the estimation, but also the value of the insurance assets.

I think it's important to note that no matter what the argument is of the contribution of the local council to the debtors, I think it's undisputed among everybody in this virtual courtroom today, Your Honor, that those assets even if to the maximum requested by the survivor constituencies, the hard assets, you know, will not be even -- will be de minimis in terms of satisfying (indiscernible).

So really what is the value of the insurance assets. And we're really concerned, Judge, that a key issue is what are the obligations of those companies with respect to the proposal made by the debtors in terms of transferring insurance rights under the insurance neutral plan to a trust and one of those issues is, I think, is previewed, I believe, in prior hearings whether the insurers can state that all they owe is the amount that was actually paid into the trust,

meaning by the Boy Scouts, or whether their coverage obligation is coextensive with the actual value of the claim.

Those are all issues that we believe need to be addressed, one way or other in this case before a plan can be confirmed. And in that way will give you, Your Honor, the ability to make the Millennium decision to evaluate those criteria based on actual disclosure and ascertain ability of the value of the claim and what is being transferred to the trust to satisfy those claims.

So, Your Honor, I think, what we've asked the debtor's counsel nicely and sometimes not so nicely is put off the hearings next month. There's no reason for all the parties in this room, the talented lawyers in your courtroom to be expending time and resources objecting to a plan that as Your Honor knows won't be the plan that's confirmed and clearly has substantial disqualifications to confirmability now, let alone deficiencies and disclosure.

Instead of spending that time and telling us as Ms. Lauria just did, well we think we may have to adjust the schedule, but you know we want to hold it until when? Until everybody files their objection and the debtor replies and further money is spent on a wasted effort that we all know and then to a plan that cannot be confirmed?

No, let's put a hiatus on that, Your Honor, and to use that money to allow Boy Scouts that saves money from the

Boy Scouts' estate to be channeled, so to say, into more productive activities over the next month. Let's get the estimation motion teed up and decided. And, again, there's a case management procedure proposed therein that we think works and addresses all the issues, Your Honor, that have been previewed to Your Honor before regarding this case and the claim.

Get it teed up and continue with Judge Carey and Crofton and Tim Gallagher's efforts to bring parties to some common ground. We're fully behind that, Your Honor. The coalition has been since day one. And I'd ask Your Honor, you know, to consider those points in terms of next step.

MS. LAURIA: Your Honor, this is Jessica Lauria. May I just briefly respond to the time line point? Because I think that was, in fact, the purpose of the status conference.

MR. BUCHBINDER: Excuse me. This is Dave Buchbinder. May I be heard briefly on behalf of the U.S. Trustee, Your Honor?

THE COURT: I'd like to hear from all the parties who want to speak. And then, certainly, Ms. Lauria, I will come back to you.

MS. LAURIA: Thank you, Your Honor.

THE COURT: Mr. Buchbinder.

MR. BUCHBINDER: Thank you, Your Honor. David Buchbinder on behalf of the United States Trustee.

I'd like the Court and the parties to be aware that the U.S. Trustee has provided the debtor with numerous comments regarding the plan, the disclosure statement, and the solicitation procedures motion was also fraught with numerous concerns. And we do share many of the concerns echoed, not only by the Court, in your initial comments, Your Honor, but in earlier comments, as outlined by the status report filed by the tort claimants committee. And I would just like the Court to know that at this point in time.

Also, as a human being here, it seems that there are two things that are undisputed. Before this case can go to consensus, we need to know the size of two pots, the size of the claimant pot and the size -- from whatever sources they come from -- of the pot that's available to pay compensation. And what I've heard here this morning, as a human being, is a lot of excuses and reasons why we can't do that now, we can't do this for this reason or that reason.

And after acknowledging that these are the two issues, that's where whatever little agreement exists breaks down. It's incumbent on the parties to roll up their sleeves and sit down and deal with this seriously and realistically because that's what's going to answer the questions, including getting consensus to this case and minimizing, as opposed to exponentially increasing the administrative expenses. Thank you, Your Honor.

THE COURT: Thank you.

MR. ANKER: Your Honor, this is Mr. Anker. May I be heard?

THE COURT: Yes, Mr. Anker.

MR. ANKER: Yes, Your Honor. For the record, Philip Anker from Wilmer, Cutler, Pickering, Hale & Dorr, for Hartford, the Hartford Insurers.

Your Honor, I certainly want to echo what Mr. Buchbinder just said, that we all need to roll up our sleeves, and we all need to avoid unnecessary administrative expenses. And Ms. Lauria talked about those expenses.

Your Honor may not end up deciding whether there will be an estimation motion in the first instance; it may be the District Court. But that -- since people have started to politic and try to poison the well, let me briefly respond. I think Your Honor's instinct that this is a bad aide and an idea that is simply going to lead to more administrative expense is right.

Among other things, let's just start with two basic propositions, which are: One, does the motion have merit? And two, can Your Honor decide it? Your Honor, under 157, cannot liquidate for distribution purposes an unliquidated personal injury claim. The most significant part of the motion that has been in front of you that was filed is Footnote 3. Footnote 3 reads, quote:

"Estimation of aggregate liability will not determine the liquidating amount of any particular individual claim. The plan contemplated that the movants will likely provide that such individual amounts will be determined through trust distribution procedures, the TDP, or through release of actions in the tort system through adjudication, as permitted by the TDP."

That means, first, Your Honor can resolve the motion; and second, the motion is directly contrary to 502(c), the Bankruptcy Code provision on estimation, which says -- if I can call it up quickly and I apologize, Your Honor:

"There shall be estimated, for purpose of allowance under this section, any contingent or unliquidated claim" -- singular -- "the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case."

Yes, there are procedures for valuing that are done in connection with a plan; for valuing assets of an estate and liabilities of an estate. But what is being proposed here with respect to estimation flies in the face of the words of the statute. And the proposition that Your Honor can't consider it flies in the face of the words of the jurisdictional statute 28 U.S.C. 157. We will make those arguments.

But this -- let's ask the real question, what is going on and why it's going on. What's going on -- and Mr.

Moulton, with all due respect -- and I've known him for a long time -- is being -- and he smiles, and I think he acknowledges that I know him -- is cute, is being cute. What really is being sought here is some sort of adjudication by someone of aggregate liability, so that, then, when it comes to coverage litigation, someone can say, ah hah, that's already been determined.

If we want insurance neutrality here, I agree with Mr. Moulton, the current plan is not insurance-neutral. It denies carriers rights, doesn't grant them rights. One of our rights is to defend every claim in the tort system, if we want to; and, if not, if not, that is a breach of the policy, and it provides for defense to coverage. If there's going to be insurance-neutrality here, there needs to be language that either honors our rights or gives us all defenses to coverage that that creates and doesn't have anything that this Court does or the District Court does affect that ultimate coverage decision.

Having said all of that, I want to come back to and actually echo something that Your Honor said and Ms. Lauria said. This case has led to enormous expense and a lack of consensus. There is an ongoing mediation. I am not going to breach the mediation privilege, either. But I think Ms. Lauria would attest that our client has been constructive and helpful, and we are trying to see if we can get to something

that ultimately makes sense, given the extraordinary -- and I know Mr. Moulton likes to stay away from this. But going from 275 filed claims in the tort system to 86,000 is staggering and tells you something is -- I'm trying to remember what the Shakespeare expression was, something is amiss in Denmark, or whatever that expression was.

Something doesn't smell right, and that has to be dealt with, but this estimation process is not the way to do it. It simply is inconsistent with the Code and with the jurisdictional statute. Thank you, Your Honor.

THE COURT: Thank you.

MR. ROBBINS: Your Honor, I wonder if I could -- this is Larry Robbins. Our firm is litigation counsel to the coalition in connection with the estimation.

I had thought that all we were appropriately supposed to do today was to call the fact of the estimation motion to the Court's attention. Mr. Anker has just given what I assume is the first half of his oral argument on the merits. I don't propose to engage on it. But I also don't want the moment to pass with the suggestion that we believe that that substantive opposition has any merit. We don't.

And when Mr. Anker and his co-counsel put those arguments in writing, in due course -- which is how motions are supposed to be handled -- we will respond. And we are confident that whatever court resolves the threshold question

of whether there should be an estimation will conclude that it's appropriate and that the time line that we proposed is fully consistent with the debtors' goal of getting a plan confirmed in a timely manner.

Unless the Court is asking for argument on the merits today, I'm going to stop here because I don't think an oral argument of the sort Mr. Anker just gave is warranted.

THE COURT: Thank you, Mr. Robbins.

Anyone else before I go back to mister -- to Ms. Lauria?

MR. MOULTON: Judge, it's Mr. Moulton again. I just want to tell Mr. Anker that the last time I was called "cute" was in high school, so thank you.

MS. LAURIA: Thank you, Your Honor. And I think we're getting --

MR. SCHIAVONI: (Indiscernible) I'm sorry, I had mute on. Your Honor, this is Tanc Schiavoni for Century. May I be heard for just a moment before Ms. Lauria?

THE COURT: What hearing would be complete if I didn't hear from you?

MR. SCHIAVONI: I -- and Your Honor, what I'm going to say is really -- I really want to talk about estimation, but I'm not going to. Okay? I just want to say something very brief, that I think will be noteworthy, and that is:

I have had many disagreements with Ms. Lauria. I

don't necessarily agree with a lot of the things in the plan. But I think you should give her some more time and a chance. We're willing to work with her, and I think she can be very creative. So I would give her a little bit more string to run out here, and that's me saying positive things about Ms. Lauria and the Boy Scouts. So let me end on that note and thank you for hearing me.

THE COURT: Thank you.

Anyone else?

(No verbal response)

THE COURT: Ms. Lauria.

MS. LAURIA: Thank you, Your Honor. Jessica Lauria, White & Case, on behalf of Boy Scouts of America.

While Mr. Schiavoni deprived me of the joke I was going to make about my boxing helmet, as you can see, with my big puffy earphones today, because that was an unusual occurrence. But I do wear these things for a reason. And as you can see, we're a little bit stuck in between our plaintiff colleagues -- who we agree with all of the remarks that were made, it is our desire to equitably compensate victims -- and our insurers.

But without delving into the merits of the plan or the estimation, I do think we need to return to the time line because that, I think, is where you started, Your Honor.

On the estimation, we share Your Honor's concern

about the District Court's calendar and the time line that the District Court would be able to accommodate. But even if this were in front of Your Honor, I should note that the hundred-and-eleven-day time line that was proposed in the estimation conveniently expires right at the debtors' statutory exclusivity period.

And as I read the motion, it suggested that the bankruptcy cases should hold tight while the estimation work proceeds -- with that hearing at some point in mid-August, again, when our statutory exclusivity expires -- so that, apparently, the other parties can deprive the debtors of their time in Chapter 11 and their attempts to reach a consensual deal. We don't think that's appropriate and we don't think that should guide the Court today in determining what our time line is for confirmation.

As I said, Your Honor, and just to put a finer point on it, accrued professional fees through the end of February are upwards of $100 million. By the time we get to August, we're estimating they'll be around $150 million. That's just -- that's not right for a nonprofit case. And we are trying to reign that in with the mediation process.

With respect to Mr. Moulton's point on moving the disclosure statement hearing, Your Honor, we understand that if we need to move that to accommodate parties, but as I said earlier, only by a bit. We are getting to the point in this

case -- and certainly, I think we will be there by the end of April, that we're going to need the Court to start calling balls and strikes on disputed issues. And those disputed issues go beyond 2004 requests and 2019 motions. We have pretty serious issues that we'll need to bring before the Court at the appropriate time on an appropriate briefing schedule. So, in our view, pushing the disclosure statement hearing off indefinitely or to a date past the 111 days or well into the future is just not right for this particular case.

So, again, if the Court is inclined to move that date, we would say only move it by a very little bit because we do believe we need to come in front of the Court, potentially in the near term -- let's see how the mediation goes through the month of March -- to call some balls and strikes for us.

THE COURT: When you say "a little bit," what are you thinking?

MS. LAURIA: You know, I would say two weeks, two to four weeks. I know we have an omnibus mid-May, I think it's May 15th, if I'm not mistaken, or thereabouts.

(Pause in proceedings)

THE COURT: May 19th.

Well, thank you for all of the input. As I said, I have read what's been filed, the flurry of papers noted, the

adversary proceeding that's been filed, obviously the estimation motion. Sometimes I think I am not the audience for some of these filings because I can read a mediator's report and understand exactly what it meant. But the -- and I -- so if parties perceive that their filings are helpful for some reason, of course you can file what you want. But again, I don't always think I'm the intended audience.

The concern I have with going forward with the disclosure statement at this point is because I don't see some very necessary information and documents, quite frankly, that I would want to see at a disclosure statement, including the TDPs. Those who are involved in Imerys with me know that I did not send out that disclosure statement until we had TDPs. They can be negotiated or they can not be negotiated. But there's -- but I think -- and think this plan has that gap in it, where parties don't know what, in fact, the treatment is going to be.

So, for very practical reasons, I think it's difficult, perhaps, to go forward with that hearing in mid-April. On the other hand, I hesitate to move it because deadlines usually focus people and things get achieved. What I think, here, perhaps can focus people are the mediation sessions that are to take place later this month.

And whether attending in person or attending via Zoom, I expect everybody to be there, who the mediators

request be there. I don't want to hear that someone decided it was inconvenient or they couldn't show. We're $100 million into fees in this case, I think that is a staggering number, and progress needs to be made. Victims need to be compensated appropriately and the Boy Scouts' mission needs to continue. And that's evident from -- everyone that I see here has voiced that view.

And I will say that some of the letters that I've received from individual -- individuals who are abuse survivors, or who say they are abuse survivors -- and they get docketed -- also share that view, which I find quite heartening and somewhat amazing sometimes; that those survivors, some of them, are still involved in scouts, their kids are involved in scouts, and they see a role for scouts going forward. Boy Scouts, I should be specific.

So I think that goal needs to be paramount, and I think it affects the mediation. It affects the timing of disclosure statement and confirmation. It affects how much this is going to cost. And quite frankly, every dollar to professional fees is a dollar that comes out of some creditor's pocket.

So I'm going to move the disclosure statement hearing to April 29th and 30th. And I will look for any further mediation reports that the mediators find appropriate to file after further mediation sessions. And we'll have a

further status report or hearing on April 12th.

MR. ABBOTT: Your Honor, Derek Abbott for the debtors. I assume we can just work with chambers to tighten up specific timing for that and get notice --

THE COURT: Yeah, I'm looking in the afternoon. And if that doesn't work for parties, generally, we can do it on the 13th. My thought is to try to get in a status before objections are due to disclosure statement, recognizing that some people may still have to work on it notwithstanding, but people seem to have a jump on it. And I want it sufficiently after the sessions with the mediator, so that discussions can continue, as they often do after the mediation, and we can see if -- what kind of consensus, if any, is reached on overall issues or discrete issues. But I'm generally available the afternoon of the 12th and 13th, and I don't have a preference, but that's my thinking.

MR. ABBOTT: (Indiscernible)

THE COURT: Thank you.

MR. BUCHBINDER: Your Honor, Dave Buchbinder for the record.

I take it that the objection deadlines will be extended accordingly?

THE COURT: Yes, they need to be extended accordingly.

MR. BUCHBINDER: Thank you, Your Honor.

THE COURT: Thank you.

Okay. What's next?

MR. ABBOTT: Yes. Your Honor, the next matters on the agenda are related, Items 7 and 8. I believe the Court requested status on the 2004 motion filed by the insurers. I'm suspecting the Court may have questions. But I'll cede the podium, obviously, to the insurers' counsel.

THE COURT: Okay. Well, here's my thoughts. I had been working on ruling on these motions when the flurry of paper came in. And quite frankly, I had waited to see what the plan was going to look like before I ruled on these motions. And now I think we've somewhat eclipsed them, in that, if this estimation motion goes forward, then I see no reason why that discovery shouldn't go forward as part of that process. I may not be the person who is presiding over that process or making that decision.

But I considered this, the requested discovery -- and I should qualify that by saying that certain of the discovery could go forward, was my thinking -- would be or could be relevant to estimation and could be relevant to the TDPs, more so than objections to claims because, at least under this plan, as filed, the survivor proofs of claim are expunged from the docket. I'm not making a comment on whether or not that's appropriate, but that's what this plan says with respect to those proofs of claim form -- forms and said that

those claims will be -- I forget exact language, but the claims will be resolved exclusively in accordance with the TDPs, which we've already discussed that we don't have yet.

So my inclination was to permit certain of the discovery to go forward, but I think it needs to be racked into where we are now. So I'm going to hold off, again, and let's see where it goes. But I think certain of this discovery is appropriate. And quite frankly, I see in the estimation motion the movants wanting to do similar, if not the same type of discovery, which they opposed -- well, the coalition opposed two weeks ago, so I think it needs to be racked into that. So I'm not going to rule separately on it at this point.

MR. MOULTON: Judge, can I add one point, just for clarification, if Your Honor lets me?

THE COURT: Mr. Moulton.

MR. MOULTON: Yeah. I don't think we oppose, Judge. I think we opposed the 2004 process, which was a unilateral process, I think, at the hearing. We suggested that we were willing to engage in a reciprocal process or come to an agreement as to a process.

And I do note, Your Honor -- and Your Honor is correct that that sort of process that was suggested by the first motion, which would -- what I call the "claims motion," that I think Your Honor is probably referring to --

THE COURT: Uh-huh.

MR. MOULTON: -- is, in fact, covered by 11(d) of the estimation, but it endeavors a cooperative, collaborative regime. And if that -- a cooperative and reciprocal regime. And if that regime is unable to be agreed to, then the presiding court will decide it.

So I do want to say I don't think -- I don't necessarily think it's an accurate characterization that we were opposed to it. I think the survivors have their claims. I think our estimation motion with the TCC and the FCR shows that we believe in our claims. It's interesting, I know, again, referring to my friend Mr. Anker's "cute" reference, but it's almost too cute by half that the very issue that we've been hearing since day one of our emergence in this case, now we put it on, teed it up. Apparently, they're not in favor of it, so that's an interesting thing.

But the estimation process and the proposed discovery regime in it does cover that. And it would be my suggestion, Judge, that that be left to the Judge who's administering that to work within -- with the parties and come up with a doable plan and regime. That would be my only point, Your Honor.

Otherwise, you know, clearly, with respect to the second motion, what I call the "attorney discovery motion," we just stand on our -- you know, I'm not going to repeat what

was said at length a month ago. And the claims -- I note Your Honor's points on claims objection, which we still stand on our arguments. Thank you, Judge.

MR. SCHIAVONI: Your Honor, Tanc Schiavoni for Century.

We do have -- it could have been lost in the motion, but we do have the request for relief under 3007-1(f). And I'm not -- and Your Honor will obviously rule whenever you choose to. But I just would ask that -- you know, I think a ruling on that could be decoupled from the other issues. If you some -- if you decided you want to deal with this -- the discovery collectively, you know, I defer to the Court's decisions about how to administer matters. But 3007 is a sort of separate issue, and it is sort of tied to solicitation here, about whether -- you know, what claims should vote, what claims should not.

We put before the Court specific uncontested evidence of proofs of claim bearing signatures, the same signature for multiple different names of claimants and other such things that are very problematic. We look forward to the U.S. Trustee weighing in on these issues, as they examine the evidence. But we think the 3007 relief is a separate issue that we'd ask Your Honor to take into consideration and consider ruling on. Thank you, Your Honor.

THE COURT: Thank you.

My thought was that I was going to consider the Rule 3007 issue after I saw what discovery yielded. But I'll make a decision on that when I see whether or not I'm going to be handling the estimation motion and -- because I think I need to see what's happening there. I may decide -- if I'm not handling it, so that I cannot coordinate all of this, then I may rule separately on the Rule 3007 request.

I do think, to some extent, all of these issues are intertwined. And the estimation, for example, the discovery you want with respect to the -- or from the attorneys, the individual attorneys and the aggregaters may be appropriate discovery in the estimation motion context. And so I'm -- but since I may not be handling that, I'm not going to rule on it for now. And I will consider whether I rule on the 3007 separately, once I know whether or not I'm handling the estimation motion.

MR. SCHIAVONI: Your Honor, we -- if you recall, we took an appeal on the bar date order that's before Judge Andrews.

THE COURT: Ah.

MR. SCHIAVONI: One of the issues there was -- so I just -- so, if you remember that, one of the issues there was sort of how the form questions -- the adequacy of the questions, what would happen. It's a -- you know, it's as if a prophet wrote that email -- that brief. It foretells what

might go wrong. And I'm not -- no -- and Your Honor, I mean no criticism, obviously, to the Court. It's like, you know, I think we were all faced, at that time, not -- you know, with some novel issues.

But Judge Andrews does have before him an appeal that asks him to -- that, because of -- you know, the substance of the appeal is the claim shouldn't be granted presumptive validity. Okay? So that is before him.

Now just one thing to close on: It's still before him. I'm not sure how many months have gone by. But you know, perhaps -- Mr. Moulton would be very happy if like he gets to the estimation after he gets out that appeal for six months. Okay?

THE COURT: Well, my --

MR. SCHIAVONI: I mean --

THE COURT: My guess is --

MR. SCHIAVONI: -- it's like -- it's illustrative of the case --

THE COURT: My guess is, if the District Court takes this, you're going to be in front of Judge Andrews, so you'll be able to address him on multiple issues. I could be wrong, but that's generally how it happens. So -- and I -- has he had argument on that yet?

MR. SCHIAVONI: No, Your Honor, he hasn't.

THE COURT: Okay. Well, I will consider this. I -

- as I said, I was going to sequence it a little differently, but I will rethink whether I need to -- how I should sequence it, once I know what I'm handling and what I'm not handling and we see --

MR. SCHIAVONI: Thank you, Your Honor.

THE COURT: I'd like to see if the mediation results in something that could somehow meet this issue, as well, or address this issue, as well. So we'll see. Okay. Thank you, everyone.

What is next?

MR. ABBOTT: Thank you, Your Honor.

The next item on the agenda is the debtors' motion for preliminary injunction. I believe that matter has been resolved, but I'll cede the mic to Mr. Andolina, Your Honor, who will (indiscernible)

THE COURT: Mr. Andolina.

MR. ANDOLINA: Good morning, Your Honor. Michael Andolina, White & Case, on behalf of the Boy Scouts of America.

Yes, Your Honor. As Ms. Lauria previewed and Mr. Abbott just stated, some continued good news and momentum to report. Your Honor, we filed a motion to extend the preliminary injunction on February 19th. Prior to the objection deadline on that motion, we engaged in extensive mediated negotiations with the UCC, the TCC, the coalition,

the FCR, and the ad hoc committee of local councils. And Your Honor, the parties were able to finalize a stipulation and proposed order that was filed at Docket 151.

That stipulation was served on all parties in the adversary on March 8th. There were no objections by any plaintiff to either our motion or to that stipulation. As Your Honor is aware, Century had filed a limited objection to the stipulation. We greatly appreciate the conversations we had over the last several days, in particular with Mr. Schiavoni, Mr. Lucas, and Mr. Celentino, assisted by Mediator Tim Gallagher. And we were able to resolve Century's limited objection.

Your Honor, we provided a blackline version of the proposed order to the Court. I don't know if Your Honor has had an opportunity to review that. We can -- I can either read the language or we can submit that to Your Honor, you know, through a filing. But all the parties to the stipulation -- the TCC, the UCC, the insurers and the ad hoc -- have signed off on that additional language to the proposed order. And we would ask that the Court enter the order and stipulation as soon as the Court has an opportunity to review that proposed language.

THE COURT: It was just handed to me. Let me see. Okay. It looks fine.

Does anyone else wish to be heard?

MR. STANG: Your Honor, this is Mr. Stang. I'd like to make a comment, please.

THE COURT: Yes.

MR. STANG: Your Honor, while it's good news -- good that we're not having a preliminary injunction trial today, the real good news will be if (indiscernible) satisfied the conditions for the extension of their preliminary injunction. And this (indiscernible) this is an agreement between the TCC and the (indiscernible) and the counsels have been told (indiscernible) eligible for the extension of the injunction, this is what you have to do (indiscernible) production of documents.

And we've talked about (indiscernible) before, they are critically important to our survivors, to our (indiscernible) organizations (indiscernible) liable for the abuse they suffered and may be channeled parties or participating parties under the proposed plan. So we keep our fingers crossed.

We've been through this (indiscernible) before, local counsel producing information. And (indiscernible) they have -- they did supply information (indiscernible) disclosures, but there was a response. So we're hoping that, through (indiscernible) the debtor (indiscernible) can (indiscernible) counsel to make those searches (indiscernible) rosters under the conditions specified in the stipulation.

Your Honor, Mr. Pfau, who represents abuse survivors, filed a joinder to the (indiscernible) response, I should say, to the preliminary injunction (indiscernible) like to make a comment to the Court.

THE COURT: Okay.

MR. PFAU: Your Honor, this is Michael Pfau. Can you hear me clearly?

THE COURT: I can hear you, yes.

MR. PFAU: Okay. My apologies. I'm traveling, so I had to appear via iPhone. But if you can hear me and see me, great.

I filed a joinder -- I represent a number of abuse survivors across the country, and I filed a joinder and am appearing in conjunction with David Klauder, a Delaware bankruptcy attorney. We filed that joinder, we thought it was important because we wanted to raise an issue with you that we think is critically important. We styled our joinder a cautious joinder, not an enthusiastic joinder, and it's cautious because we have been seeking the troop rosters for a long time. Don't need to get into that now because we have agreement, or at least agreement on a protocol that will allow us to obtain those rosters.

The rosters may not be as important for the bankruptcy lawyers and bankruptcy professionals, but they are of critical importance to those of us who are representing

survivors in this case. And you know, why are the rosters so important? The rosters allow the survivors to identify the local council in the sponsoring organization. Not many, but some of my clients have not been able to identify the sponsoring organization that sponsored the troop when they were children.

I have been told that there are tens of thousands of claimants who have not identified a sponsoring organization. Now this is important because the injunction does not toll the statute of limitations for the lawyers that are practicing in State Court, and it doesn't allow for discovery.

And the reason I wanted to speak, Your Honor, on my client's behalf, and I think on behalf of many of the tort lawyers representing abuse survivors was a timing issue. There are three states who have passed limbo legislation, New Jersey, New York, and North Carolina, where those windows are going to be closing this year. We need to be able to identify, in order to preserve the statute of limitations, those sponsoring organizations, and we need the troop rosters.

I'm glad we've reached a point where we have a protocol in place to obtain that discovery. But we thought it was important, Your Honor, to raise this issue. It's of critical important to us, to put it on your radar. Hopefully, we'll not be back asking for any relief in this regard. But

we thought it was important to join, important to state our piece, and like I said, put this on your radar. So thank you.

THE COURT: Thank you.

Is there anyone else who wishes to be heard?

MR. CELENTINO: Your Honor, this is Joe Celentino of Wachtell, Lipton, Rosen & Katz, for the ad hoc committee. May I be heard?

THE COURT: Yes. Can I remind everyone else, please mute your microphones? Thank you.

Mr. Celentino.

MR. CELENTINO: Good morning. I'll be brief, Your Honor.

As you have no doubt just heard, this -- we support the preliminary injunction stipulation that Your Honor is being asked to enter, and we hope that you will. As you can tell from the comments that were made just now, the injunction stipulation is a compromise, and it's a compromise that we support because it's one that will let the parties focus on mediation, which, as Your Honor heard this morning, is critical, given where we are in the case right now. It is critical that we can get to a global resolution in the short time frame that we have here.

We believe this stipulation will help move these cases forward to a positive conclusion, which is in everyone interests -- everyone's interests here. And we hope that Your

Honor will enter the stipulation this morning. And we will continue, the ad hoc committee will continue to work to move these places -- these cases to a global resolution. Thank you, Your Honor.

THE COURT: Thank you.

Anyone else?

(No verbal response)

THE COURT: Okay. Well, I have reviewed the revised form of order and I will enter it as consensual and recognize that it is a compromise that the parties who negotiated it have reached. I do not have any plaintiff in the underlying litigation in front of me objecting to any further extension of the preliminary injunction, and so I will grant it. I will address whatever subsequently occurs with respect to the compromise, as and when it's brought in front of me. So that will be signed.

MR. ABBOTT: Thank you, Your Honor.

THE COURT: Anything further?

MR. ABBOTT: Thank you, Your Honor. Your Honor, Derek Abbott again for -- on behalf of the debtors. No, that completes the agenda. We appreciate the Court's time and guidance today.

THE COURT: Thank you. And I encourage everyone to make good use of the mediators and the mediation session that was coming up. If I were channeling Judge Fitzgerald -- who

many of you have been in front of on mass tort cases -- I would say bring your toothbrushes and be prepared to come to a resolution. We're adjourned.

UNIDENTIFIED: Happy St. Patrick's Day, everyone.

UNIDENTIFIED: Thanks, David. Nice hat.

UNIDENTIFIED: Thank you, everybody. Thank you, Judge.

UNIDENTIFIED: Thank you, Your Honor.

(Proceedings concluded at 11:05 a.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Mary Zajaczkowski March 17, 2021
Mary Zajaczkowski, CET**D-531