IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
INSYS THERAPEUTICS, INC., *et al.*,[1]	Case No. 19-11292 (JTD)
Debtors.	(Jointly Administered)
	Hearing Date: April 13, 2021 at 10:00 a.m. (EDT) **Related to ECF Nos. 1538 & 1557**

REPLY IN FURTHER SUPPORT OF MOTION OF THE INSURANCE RATEPAYER CLASS CLAIMANTS FOR THE ENTRY OF AN ORDER (A) APPROVING THE INSURANCE RATEPAYER ALLOCATION PLAN, (B) APPROVING THE FORMS AND METHODS FOR NOTIFYING THE CLASS OF RESOLUTION OF THE RATEPAYERS' CLAIMS, AND (C) GRANTING RELATED RELIEF

1. The Insurance Ratepayer Class Claimants (the "**Ratepayers**"),[2] on behalf of themselves and all those similarly situated (the "**Insurance Ratepayer Class**" or "**Class**"), hereby reply in further support of the entry of an Order substantially in the form submitted with the *Motion of the Insurance Ratepayer Class Claimants for the Entry of an Order (A) Approving the Insurance Ratepayer Allocation Plan, (B) Approving the Forms and Methods for Notifying the Class of Resolution of the Ratepayers' Claims, and (C) Granting Related Relief* (the "**Motion**") [Docket No. 1538].

2. On March 30, 2021, Louisiana Health Services Indemnity Company d/b/a Blue Cross and Blue Shield of Louisiana ("**LH**") filed an objection (the "**Objection**") [ECF No. 1557]

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

[2] The "**Insurance Ratepayer Class Claimants**" are Complete Fleet Services, Inc. ("**Class Representative**") and Ronald D. Stracener; F. Kirk Hopkins; Jordan Chu; Amel Eiland; Nadja Streiter; Michael Konig; Eli Medina; Barbara Rivers; Marketing Services of Indiana, Inc.; William Taylor; Glenn Golden, Gretta Golden and Michael Christy; Edward Grace; Debra Dawsey; Darcy Sherman; Kimberly Brand; Lou Sardella; Michael Klodzinski; Kevin Wilk; Heather Enders; William Stock; Jason Reynolds; MSI Corporation; Deborah Green-Kuchta; W. Andrew Fox; Dora Lawrence; Michael Lopez; Al Marino, Inc.; and Zachary R. Schneider.

to the Motion based on the proposed notice to the Class members and the potential return to Class members. Of note, however, is that no other party has objected.

RELEVANT BACKGROUND

3. Under the *Second Amended Joint Chapter 11 Plan of Liquidation of Insys Therapeutics, Inc. and its Affiliated Debtors* [ECF No. 1115-2] (the "**Second Amended Plan**"), the Ratepayers' claims are classified as part of the Class 5 claims against the Debtors' estates, along with those of third-party payers (the "**TPPs**"), one of which is LH.

4. In order to allocate Class 5 assets between the Insurance Ratepayer Class and TPPs, this Court entered an *Order Approving Stipulation By and Between the Debtors, the Official Committee of Unsecured Creditors, and the Insurance Ratepayer Claimants Establishing Class Claims Procedures* [ECF No. 982] on December 13, 2019, by which the Court approved the *Stipulation By and Between the Debtors, the Official Committee of Unsecured Creditors, and the Insurance Ratepayer Claimants Establishing Class Claims Procedures* [ECF No. 982-1] (the "**Stipulation**").

5. In connection with the creation of the Insys Liquidating Trust (the "**ILT**") under the Second Amended Plan, the Stipulation established a claims procedure for the Class, entitled *Class Claim Procedures for Insurance Ratepayer Class Claims*, a copy of which the Debtors filed with the Court as Exhibit N to the *Notice of Filing of Plan Supplement Pursuant to the Second Amended Joint Chapter 11 Plan of Reorganization of Insys Therapeutics, Inc. and Its Affiliated Debtors* [ECF No. 1049-14] (the "**Insurance Ratepayer Class Claim Procedures**").

6. As Section 5.7(i) of the Second Amended Plan required, the Debtors filed the *ILT Claims Arbiter Submission Procedures* as Exhibit I to the *Notice of Filing of Plan Supplement Pursuant to the Second Amended Joint Chapter 11 Plan of Reorganization of Insys Therapeutics,*

Inc. and Its Affiliated Debtors [ECF No. 1049-9], which established procedures for the resolution of the Ratepayers' claims as between the Ratepayers and TPPs through an arbitration conducted by Arbiter Kenneth R. Feinberg.

7. On October 27, 2020, after making written submissions to this Court, the TPPs and the Insurance Ratepayer Class participated in an arbitration before Arbiter Feinberg.

8. On November 2, 2020, after considering the submissions of the parties and the oral arguments, Arbiter Feinberg issued a binding allocation determination (the "**Arbitration Award**"). *See* Exhibit A to the Motion.

9. The arbitration agreement between the Ratepayers and the TPPs provided for a final, binding decision from Arbiter Feinberg, and he entered his decision pursuant to that agreement. Indeed, the very first line of the Arbitration Award entered by Arbiter Feinberg reads, "By agreement of the parties, acting as the ILT Claims Arbitrator, I am authorized to render a binding allocation determination between and among the Ratepayers and the TPPs." *Id.*

10. LH has not otherwise sought to challenge the process or the Arbitration Award beyond filing the Objection.

ARGUMENT

I. LH Does Not Have Standing to Object to the Motion[3]

11. Section 1109 of the Bankruptcy Code governs standing and provides that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b).

[3] No other party in these proceedings has objected to Ratepayers' Motion, including any party who might have standing to do so. All parties registered for e-notice on the Court's ECF system have received notice of filing of the filing of Ratepayers' Motion.

12. Section 1109(b), while expansive and inclusive, is subject to limitations. A "party in interest" is "one who 'has a sufficient stake in the proceeding so as to require representation.'" *Su v. Offshore Grp. Ins. Ltd.* (*In re Vantage Drilling Int'l*), 603 B.R. 538, 545 (D. Del. 2019) (quoting *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 210 (3d Cir. 2004)). "[T]he Third Circuit . . . defines a party in interest as 'anyone who has a legally protected interest that could be affected by a bankruptcy proceeding.'" *Id.* (quoting *In re James Wilson Assocs.*, 965 F.2d 160, 169 (7th Cir. 1992)).

13. "Bankruptcy standing requires a statement of or identification of a pecuniary or an economic or property interest . . . that is susceptible to redress and as to which parties should be able and afforded an opportunity to address the Bankruptcy Court." *Id.* In other words, a party must demonstrate "some injury-in-fact, *i.e.*, some specific, identifiable trifle of injury, or personal stake in the outcome of the litigation that is fairly traceable to the Plan." *Id.*; *see also In re Glob. Indus. Techs., Inc.*, 645 F.3d 201, 210 (3d Cir. 2011); *In re W.R. Grace & Co.*, 475 B.R. 34, 176–77 (D. Del. 2012) ("[C]ourts have found that a party in interest in a bankruptcy case must have some legally protected interest that either has been adversely affected (thereby warranting judicial relief) or that is in actual danger of being adversely affected (if relief is not granted)."), *aff'd*, 532 F. App'x 264 (3d Cir. 2013).

14. Here, LH cannot point to any legal or pecuniary interest it has in the outcome of the Motion that does not conflict with the Arbitration Award, and as discussed below, LH may not collaterally challenge that award through this Objection. The allocation plan provided in the Motion does not affect the legal or pecuniary rights of LH or any other of the TPPs in their 90% of the award. Rather, this challenge attempts to affect the way in which the Ratepayers are

requesting to administer and distribute *their* 10% portion of the award, in which the TPPs have no interest.

II. LH May Not Collaterally Challenge the Arbitration Award via this Objection

15. Through its Objection, LH attempts to take a second bite at the arbitration apple. This is improper for two reasons.

16. First, LH seeks to informally and inappropriately challenge the decision of Arbiter Feinberg. But the Third Circuit has established very narrow circumstances in which an arbitration award may be challenged, and such circumstances are not present here.

17. The proper procedure for challenging an arbitration award is to move the Court to vacate the award, which LH has not done. But even if it had, "[r]eview of arbitration awards under the FAA is 'extremely deferential.' Vacatur is appropriate only in 'exceedingly narrow' circumstances, such as where arbitrators are partial or corrupt, or where an arbitration panel manifestly disregards, rather than merely erroneously interprets, the law." *Metromedia Energy, Inc. v. Enserch Energy Servs., Inc.*, 409 F.3d 574, 578 (3d Cir. 2005) (quoting *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003)) (citation omitted); *accord Local 863 Int'l Bhd. of Teamsters v. Jersey Coast Egg Producers, Inc.*, 773 F.2d 530, 533 (3d Cir. 1985) (error of law is insufficient basis for vacatur). "Likewise, an arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award." *Metromedia Energy, Inc.*, 409 F.3d at 578 (quoting *Major League Umpires Ass'n v. Am. League of Pro. Baseball Clubs*, 357 F.3d 272, 279–80 (3d Cir. 2004)).

18. Here, LH does not contend—nor could it—that the Arbiter's ruling was based on "improvident," or "even silly" factfinding. And even if it did, it does not ask this Court to vacate the Arbiter's decision. It merely seeks to prevent Claimants from enacting the valid award.

19. Second, the doctrine of *res judicata* bars LH from relitigating the issue of distribution of funds between TPPs and the Ratepayers.

20. Under the doctrine of *res judicata*, a prior judgment has dispositive effect on a later dispute if a particular issue "could have been raised in the earlier proceeding." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 276 (3d Cir. 2014). *Res judicata* "bars a claim [that was] litigated between the same parties or their privies in earlier litigation where the claim arises from the same set of facts as a claim adjudicated on the merits in the earlier litigation." *Guilfoil v. Weinstein*, No. CV 17-171-GMS, 2017 WL 2229878, at *2 (D. Del. May 18, 2017).

21. Here, LH and Claimants were parties to the arbitration, and LH's objection to the Class's receipt of compensation "arises from the same set of facts" that was before the arbitrator. Importantly, "a valid and final award by arbitration has the same effects under the rules of res judiacata, subject to the same exceptions and qualifications, as a judgment of a court." RESTATEMENT (SECOND) OF THE LAW OF JUDGMENTS § 84(1) (AM. LAW INST. 1982).

22. Accordingly, LH may not object to the distribution of funds via its Objection.

III. LH Relies on the Wrong Standard

23. Even if LH were allowed to bring its Objection—which it is not—the Objection is devoid of legal analysis and is nothing more than a pellucid effort on the part of LH to deprive the Ratepayers of their recovery because LH is unsatisfied with the arbitration decision that awarded it 90% of Class 5 assets.

24. At the outset, LH misstates the standard for this Court's review of the plan of allocation. Throughout its objection, LH repeatedly complains that Ratepayers' plan of notice and allocation is not "fair, reasonable, and adequate." But it presents no basis for that standard, nor can it. The "fair, reasonable, and adequate" standard is for approval of class *settlements*

under Rule 23(e). FED. R. CIV. P. 23(e); *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010) ("In evaluating a class action settlement under Rule 23(e), a district court determines whether the settlement is fundamentally fair, reasonable, and adequate."). There has been no settlement with the TPPs here.

25. The proper standard for approval is Rule 23(c)(2), which requires only that the notice to class members be the "best notice practicable under the circumstances."

26. These circumstances are unprecedented; as LH itself recognizes, a class of insurance ratepayers has never before been certified, and Ratepayers are obliged to find the best notice practicable for reaching approximately 219 million parties in order to allocate an award of what is estimated will be between $1 and $2 million. At this time, it is too early to determine exactly how much money will be available for distribution to the Class, as total value for the Ratepayers' claims will depend on the outcome of post-confirmation litigation claims. However, it is possible that the per capita award for the Insurance Ratepayer Class would be less than a penny per class member, before administration expenses, attorneys' fees, or costs. Yet Ratepayers have been able to devise a notice and allocation plan that has the potential to reach the vast majority of American insurance ratepayers and notify them of their rights, while reserving value for those claimants who choose to visit the claims administration website. *See, e.g. In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1106 (5th Cir. 1977) (preventing an unnecessary depletion of fund proceeds "is a legitimate factor which the district court must consider when devising the best notice practicable under the circumstances" (internal quotation mark omitted)); *Catala v. Resurgent Cap. Servs. L.P.*, No. 08CV2401 NLS, 2010 WL 11508446, at *7 (S.D. Cal. Jan. 29, 2010) (direct notice "impracticable" given the amount of the fund); *New York ex rel. Vacco v. Reebok Int'l Ltd.*, 903 F. Supp. 532, 533 n.1 (S.D.N.Y. 1995) ("This was

plainly the best notice practicable under the circumstances given the enormous number of potential class numbers who had purchased products, the lack of warranty cards to identify customers, and the high costs of individual notice."); *Carlough v. Amchem Prod., Inc.*, 158 F.R.D. 314, 325 (E.D. Pa. 1993) ("In determining the reasonableness of the effort required [for notice], the court must look to the anticipated results, costs, and amount involved.") (internal quotations omitted).

27. Ratepayers have retained American Legal Claim Services, LLC ("**ALCS**"). ALCS has administered hundreds of notice and allocation plans over the past decade, and managing director Benny W. Davis, Jr., has successfully distributed recoveries to hundreds of millions of claimants. *See* Amended Declaration of Benny W. Davis, Jr., attached hereto as Exhibit 1 ("**Davis Decl.**"), ¶ 2.

28. Using Mr. Davis's experience, ALCS has devised the best notice practicable for reaching as many Class members as possible, using a multi-faceted approach.

29. First, ALCS will advertise through ubiquitous social media platforms. *Mylan Pharm., Inc. v. Warner Chilcott Pub. Ltd.* Co., No. 12-3824, 2015 WL 12791433, at *4 (E.D. Pa. Jan. 28, 2015) (best notice practicable in the circumstances included advertising on social media and in *People* magazine and maintaining a claims administration website). The vast majority of Americans use social media, including the two most popular social media platforms, Facebook and Instagram. Davis Decl. ¶ 13.

30. ALCS also will utilize Google Ads to target ratepayer claimants. Google is the world's dominant search engine, with over 87% market share in the United States, and the platform will allow ALCS to specifically target purchasers of private insurance. Davis Decl. ¶¶ 12, 15.

31. Outside of social media, ALCS will issue publication notice in *People* magazine, a major, nationally circulated periodical. Davis Decl. ¶ 19.

32. LH's ploy of comparing Ratepayers' proposed notice and allocation plan to other cases is a red herring. In bringing this Court's attention to the Purdue Pharma L.P. bankruptcy supplemental notice plan, for example, LH fails to inform this Court for whom that notice was intended, the resources available to market that notice, or, consequently, the success of that notice campaign. Moreover, LH fails to inform this Court that, while Ratepayer-styled claims in *Purdue Pharma L.P.* were subject to the doctrine of *cy pres*, that result was a part of the mediated agreement between the Insurance Purchasers (as they were called) and the Debtors, who agreed that any resolution would be dedicated to specific abatement uses. *See* Statement/Mediators' Report, *In re Purdue Pharma*, Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. Sept. 23, 2020), ECF No. 1716. Distribution to that class was not an option, something LH well understands and yet failed to acknowledge in its Objection. Here, Ratepayers were charged with finding the "best notice practicable under the circumstances" to ensure recovery for the Class within the confines of its share of the estates' assets.

33. LH's final argument against the Ratepayers' notice and allocation plan amounts to feigned distress over how much money the Ratepayer Insurance Class members will receive. This faux altruism is akin to a defendant's worrying whether the plaintiff is savvy enough to manage its recovery after a judgment. Ratepayers did not choose the percentage of the Class 5 assets that they would be allocated; they were awarded this sum after argument before a talented and experienced arbitrator, and they are obliged to derive what value they can. If LH were truly concerned that the Ratepayers' recovery would not be great enough, it could have advocated during arbitration that a greater share of the Class 5 assets go to the Ratepayer Insurance Class.

34. Based on the realities of the award to which the Ratepayers find themselves entitled, they have devised what they believe to be the "best notice practicable" under the circumstances. However, if this Court identifies improvements based on its experience, the Ratepayers would defer to any amendment the Court sees fit.

CONCLUSION

For all the foregoing reasons, the Ratepayers respectfully request that the Court overrule the Objection and enter the Proposed Order granting the relief requested in the Motion.

Respectfully submitted,

/s/ Joseph H. Huston, Jr.

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