

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

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**In re** : **Chapter 11**
  
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**INSYS THERAPEUTICS, INC., et al.,** : **Case No. 19-11292 (KG)**
  
:
  
**Debtors.**<sup>1</sup> : **Jointly Administered**
  
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: **Obj. Deadline: October 15, 2019 at 4:00 p.m. (ET)**
  
: **Hearing Date: October 22, 2019 at 10:00 a.m. (ET)**
  
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**DEBTORS’ FIRST OMNIBUS MOTION FOR ENTRY OF AN ORDER  
AUTHORIZING THE REJECTION OF CERTAIN EXECUTORY CONTRACTS  
NUNC PRO TUNC TO THE DATE OF FILING OF THIS MOTION**

**THIS MOTION SEEKS TO REJECT CERTAIN EXECUTORY CONTRACTS. COUNTERPARTIES RECEIVING THIS MOTION SHOULD LOCATE THEIR NAMES AND THEIR CONTRACTS ON EXHIBIT 1 TO THE PROPOSED ORDER ATTACHED HERETO. PLEASE REVIEW THIS MOTION IN ITS ENTIRETY, INCLUDING EXHIBIT 1 TO THE PROPOSED ORDER ATTACHED HERETO, TO DETERMINE IF THIS MOTION AFFECTS YOUR CONTRACT AND YOUR RIGHTS THEREUNDER.**

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

**Relief Requested**

1. By this Motion, the Debtors seek authority pursuant to sections 105(a) and 365(a) of title 11 of the United States Code (the “**Bankruptcy Code**”) and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) to reject certain executory contracts,

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, as applicable, are: Insys Therapeutics, Inc. (7886); IC Operations, LLC (9659); Insys Development Company, Inc. (3020); Insys Manufacturing, LLC (0789); Insys Pharma, Inc. (9410); IPSC, LLC (6577); and IPT 355, LLC (0155). The Debtors’ mailing address is 410 S. Benson Lane, Chandler, Arizona 85224.

including any amendments, supplements or modifications thereto, each as set forth on **Exhibit 1** to the Proposed Order (defined below) (the “**Rejected Contracts**”), effective as of the date of filing of this Motion (the “**Rejection Date**”).

2. A proposed form of order granting the relief requested in this Motion is attached hereto as **Exhibit A** (the “**Proposed Order**”).

### **Jurisdiction**

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

4. Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”), the Debtors consent to the entry of a final judgment or order with respect to the Motion if it is determined that the Court would lack Article III jurisdiction to enter such final order or judgment absent consent of the parties.

### **Background**

#### **A. General Background**

5. On June 10, 2019 (the “**Petition Date**”), the Debtors each commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. The Chapter 11 Cases are being jointly administered for procedural purposes only pursuant to Bankruptcy Rule 1015(b) and Local Rule 1015-1.

7. On June 20, 2019, the Office of the United States Trustee for the District of Delaware (the “**U.S. Trustee**”) appointed an official committee of unsecured creditors in these Chapter 11 Cases (the “**Committee**”). No trustee or examiner has been appointed in these Chapter 11 Cases.

8. On July 2, 2019, the Court entered the *Order (A) Approving Bidding Procedures for Sale of Debtors’ Assets, (B) Scheduling Auction for and Hearing to Approve Sale of Debtors’ Assets, (C) Approving Form and Manner of Notice of Sale Auction, and Sale Hearing, (D) Approving Assumption and Assignment Procedures, and (E) Granting Related Relief* [Docket No. 210] (the “**Bidding Procedures Order**”). In accordance with the Bidding Procedures Order, the Debtors have or are in the process of selling to various buyers (each, a “**Buyer**”) all or substantially all of their assets [Docket Nos. 515, 525, 641 and 671] (collectively, the “**Sale Transactions**”).

9. On September 17, 2019, the Debtors filed a chapter 11 plan [Docket No. 612] and accompanying disclosure statement [Docket No. 613].

10. Additional information regarding the circumstances leading to the commencement of these Chapter 11 Cases and the Debtors’ business and capital structure is set forth in the declaration of Andrew G. Long, the Debtors’ Chief Executive Officer, filed on the Petition Date [D.I. 11] (the “**Long Declaration**”).<sup>2</sup>

## **B. The Rejected Contracts**

11. The Rejected Contracts consist of national drug rebate and retail refund pricing agreements that provide discounted prescriptions to qualified insured patients. For a product to be covered under Medicaid or Medicare, Federal law requires drug manufacturers to

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<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings given to them in the Long Declaration.

enter into many of these rebate programs for applicable products.<sup>3</sup> Pursuant to the Rejected Contracts, the Debtors are billed quarterly by third-party administrators and governmental agencies that administer these programs, and the Debtors in turn pay a rebate to these third-party administrators and governmental agencies. Generally, rebates by the Debtors are paid two-to-three months after the quarter in which prescriptions subject to the rebates are filled.

12. As a result of the Sale Transactions, the Debtors no longer require the Rejected Contracts. Accordingly, the Debtors are seeking to reject the Rejected Contracts pursuant to this Motion.

### **Basis for Relief Requested**

#### **A. The Rejection of the Rejected Contracts is an Appropriate Exercise of the Debtors' Business Judgment**

13. Section 365(a) of the Bankruptcy Code provides that a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). The bankruptcy court should approve a debtor's rejection of an executory contract or unexpired lease if such rejection is an exercise of the debtor's sound business judgment, benefits its estate, and is not made in bad faith. *See In re Bildisco*, 682 F.2d 72, 79 (3d Cir. 1982), *aff'd*, 465 U.S. 513 (1984) ("[t]he usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the 'business judgment' test."); *Sharon Steel Corp. v. Nat'l Fuel Gas Distr. Corp.*, 872 F.2d 36, 39-40 (3d Cir. 1989) (affirming rejection of a service agreement as sound exercise of debtor's business judgment where bankruptcy court found rejection would benefit estate); *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 511 (Bankr. D. Del. 2003) (holding the business judgment standard applicable, absent bad faith, whim, or caprice). In

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<sup>3</sup> See section 1927 of the Social Security Act.

applying the business judgment standard, bankruptcy courts afford great deference to a debtor's decision to assume or reject executory contracts. *See In re Summit Land Co.*, 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstances, court approval of debtor's decision to assume or reject an executory contract "should be granted as a matter of course").

14. The Debtors' decision to reject the Rejected Contracts constitutes an exercise of the Debtors' sound business judgment. As is set forth in the Long Declaration, one of the primary goals of the Chapter 11 Cases was to engage in a Sale Process with respect to the Assets. The Sale Process has been successful and, pursuant to the Sale Transactions, substantially all of the Assets have been sold or are in the process of being sold.

15. In connection with the Sale Transactions, each Buyer designated certain contracts and leases for assumption by the Debtors and assignment to the applicable Buyer. However, certain contracts and leases have not been designated for assumption and assignment and the Debtors are in the process of evaluating whether maintaining such contracts and leases would be beneficial or burdensome to the Debtors' estates. As a result of such analysis, the Debtors anticipate filing motions to reject certain contracts and leases. This Motion is the first of such motions.

16. Once all of the Sale Transactions are consummated, the Debtors will no longer have an operating business. The Debtors will have limited, if any, operations, aside from those activities that are necessary or appropriate to wind down their business and to resolve the Chapter 11 Cases. Accordingly, the Debtors have no further need for the Rejected Contracts. Thus, as none of the Rejected Contracts are needed by the Debtors, rejecting the Rejected Contracts is a reasonable exercise of the Debtors' business judgment as it will preserve estate assets and therefore maximize distributions to creditors.

**B. *Nunc Pro Tunc* Rejection of the Contracts is Appropriate**

17. The Debtors respectfully request that the rejection of the Rejected Contracts be effective *nunc pro tunc* to the date hereof. Courts that have permitted retroactive rejection generally have permitted rejection of an executory contract or unexpired lease to be effective as of the date on which the nondebtor party to the executory contract or unexpired lease was given definitive notice of the debtor's intent to reject. *See, e.g., In re Mail Systems Liquidation, Inc.*, Case No. 11-11187 (PJW) (Bankr. D. Del. Oct. 18, 2011) (authorizing rejection of contracts *nunc pro tunc* to date of filing motion). Accordingly, the Debtors will (i) serve notice of this Motion by overnight mail on the counterparties to all of the Rejected Contracts, demonstrating their unequivocal intent to reject the Rejected Contracts; and (ii) not withdraw their rejection of any of the Rejected Contracts absent the consent of the relevant counterparties. The Debtors have also made the Committee aware of the filing of this Motion and will further consult with the Committee, as necessary, regarding rejection of the Rejected Contracts. The Debtors believe, therefore, that retroactive rejection effective as of the date of filing of this Motion is necessary, appropriate, and in accordance with applicable law.

**Reservation of Rights**

18. The Debtors may have claims against the counterparties to the Rejected Contracts arising under, or independently of, the Rejected Contracts. The Debtors do not waive such claims by the filing of this Motion or by the rejection of the Rejected Contracts. The Debtors are diligently reviewing and evaluating their remaining contracts and leases and reserve the right to identify additional executory contracts for rejection in the future. This Motion should not be construed as a determination that any contracts or agreements not described herein are to be assumed or rejected. Nothing contained herein is intended or should be construed as an admission of the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any

claim, or an approval, assumption, or rejection of any agreement, contract, lease, or sublease under section 365 of the Bankruptcy except as expressly set forth herein.

**Waiver of Bankruptcy Rule 6004(a) and 6004(h)**

19. To implement the foregoing successfully, the Debtors request, to the extent Bankruptcy Rule 6004 is applicable to the relief requested herein, that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h) and any other applicable Bankruptcy Rule.

**Notice**

20. Notice of this Motion has been provided to (a) the Office of the United States Trustee for the District of Delaware (Attn: Jane M. Leamy); (b) the counsel to the Committee; (c) the Securities and Exchange Commission; (d) the Internal Revenue Service; (e) the United States Attorney's Office for the District of Delaware; (f) the Department of Justice; (g) the non-Debtor parties to the Rejected Contracts; and (h) all parties who have requested service of notices in these Chapter 11 Cases pursuant to Bankruptcy Rule 2002. The Debtors respectfully submit that this notice is sufficient under the circumstances.

**No Previous Request**

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

WHEREFORE the Debtors respectfully request entry of the Proposed Order granting the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: October 8, 2019  
Wilmington, Delaware

/s/ Megan E. Kenney

RICHARDS, LAYTON & FINGER, P.A.  
John H. Knight (No. 3848)  
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-and-

WEIL, GOTSHAL & MANGES LLP  
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*Attorneys for the Debtors  
and Debtors in Possession*



**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

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In re:	:	Chapter 11
	:	
INSYS THERAPEUTICS, INC., <i>et al.</i> ,	:	Case No. 19-11292 (KG)
	:	
Debtors. <sup>1</sup>	:	(Jointly Administered)
	:	
	:	<b>Obj. Deadline: October 15, 2019 at 4:00 p.m. (ET)</b>
	:	<b>Hearing Date: October 22, 2019 at 10:00 a.m. (ET)</b>
	:	
	X	

**NOTICE OF MOTION AND HEARING**

**PLEASE TAKE NOTICE** that, on October 8, 2019, Insys Therapeutics, Inc. and its affiliated debtors in the above-captioned chapter 11 cases, as debtors and debtors in possession (collectively, the “**Debtors**”), filed the *Debtors’ First Omnibus Motion for Entry of an Order Authorizing the Rejection of Certain Executory Contracts Nunc Pro Tunc to the Date of Filing of This Motion* (the “**Motion**”) with the United States Bankruptcy Court for the District of Delaware (the “**Court**”).

**PLEASE TAKE FURTHER NOTICE** that any responses or objections to the relief requested in the Motion, if any, must be in writing and filed with the Clerk of the Court, 824 N. Market Street, 3rd Floor, Wilmington, Delaware 19801, on or before **October 15, 2019 at 4:00 p.m. (prevailing Eastern Time)**.

**PLEASE TAKE FURTHER NOTICE** that if any objections to the Motion are received, the Motion and such objections shall be considered at a hearing before The Honorable Kevin Gross, United States Bankruptcy Judge for the District of Delaware, at the Bankruptcy

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, as applicable, are: Insys Therapeutics, Inc. (7886); IC Operations, LLC (9659); Insys Development Company, Inc. (3020); Insys Manufacturing, LLC (0789); Insys Pharma, Inc. (9410); IPSC, LLC (6577); and IPT 355, LLC (0155). The Debtors’ mailing address is 410 South Benson Lane, Chandler, Arizona 85224.

Court, 824 N. Market Street, 6th Floor, Courtroom No. 3, Wilmington, Delaware 19801 on **October 22, 2019 at 10:00 a.m. (prevailing Eastern Time).**

**PLEASE TAKE FURTHER NOTICE THAT IF NO OBJECTIONS TO THE MOTION ARE TIMELY FILED IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.**

Dated: October 8, 2019  
Wilmington, Delaware

/s/ Megan E. Kenney  
RICHARDS, LAYTON & FINGER, P.A.  
John H. Knight (No. 3848)  
Paul N. Heath (No. 3704)  
Zachary I. Shapiro (No. 5103)  
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*Attorneys for the Debtors and Debtors in Possession*

**Exhibit A**

**Proposed Order**

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

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<b>In re</b>	:		<b>Chapter 11</b>
	:		
<b>INSYS THERAPEUTICS, INC., et al.,</b>	:		<b>Case No. 19-11292 (KG)</b>
	:		
<b>Debtors.<sup>1</sup></b>	:		<b>Jointly Administered</b>
	:		
	:		<b>Re: D.I. _____</b>
	X		

**ORDER GRANTING DEBTORS’ FIRST OMNIBUS MOTION  
FOR AN ORDER AUTHORIZING THE REJECTION OF CERTAIN EXECUTORY  
CONTRACTS EFFECTIVE *NUNC PRO TUNC* TO OCTOBER 8, 2019**

Upon the motion (the “**Motion**”),<sup>2</sup> of Insys Therapeutics, Inc. and its affiliated debtors, as debtors and debtors in possession (collectively, the “**Debtors**”), for entry of an order (this “**Order**”), pursuant to sections 105(a) and 365(a) of title 11 of the United States Code (the “**Bankruptcy Code**”) and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) authorizing and approving the rejection of the Rejected Contracts, effective as of October 8, 2019 (the “**Rejection Date**”); as more fully described in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware* dated February 29, 2012; and consideration of the Motion and the requested relief being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, as applicable, are: Insys Therapeutics, Inc. (7886); IC Operations, LLC (9659); Insys Development Company, Inc. (3020); Insys Manufacturing, LLC (0789); Insys Pharma, Inc. (9410); IPSC, LLC (6577); and IPT 355, LLC (0155). The Debtors’ mailing address is 410 S. Benson Lane, Chandler, Arizona 85224.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.

Motion having been provided, and it appearing that no other or further notice need be provided; and the Court having reviewed the Motion; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and it appearing that the relief requested in the Motion is in the best interests of the Debtors and their respective estates and creditors; and after due deliberation and sufficient cause appearing therefor:

**IT IS HEREBY ORDERED THAT:**

1. The Motion is granted to the extent set forth herein.
2. The Rejected Contracts, identified on **Exhibit 1** attached to this Order, are hereby rejected by the Debtors effective as of the Rejection Date.
3. Any claims arising from the rejection of the Rejected Contracts by the Debtors shall be filed by no later than thirty (30) days after the date of service of this Order in accordance with the procedures for filing proofs of claim set forth in the *Order Pursuant to 11 U.S.C. §§ 502(b)(9) and 105(a), Fed. R. Bankr. P. 2002, 3003(c)(3), 5005, and 9007, and Local Rules 2002-1(e), 3001-1, and 3003-1 for Authority to (I) Establish Deadlines for Filing Proofs of Claim, (II) Establish the Form and Manner of Notice Thereof, and (III) Approve Procedures for Providing Notice of Bar Date and Other Important Deadlines* [D.I. 294].
4. Nothing herein shall prejudice the rights of the Debtors to argue that any of the Rejected Contracts were terminated prior to the Rejection Date or that any claim for damages arising from the rejection of the Rejected Contracts is limited to the remedies available under any applicable termination provision of such contract, as applicable, or that any such claim is an obligation of a third party and not that of the Debtors or their estates.
5. Adequate notice of, and an opportunity for a hearing on, the Motion has been provided, and such notice satisfies the requirements of Bankruptcy Rule 6004(a).

6. Notwithstanding any applicability of Bankruptcy Rules 6004(h), 7062, or 9014, the terms and conditions of this Order are immediately effective and enforceable upon its entry.

7. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this order.

8. This Court shall retain jurisdiction to hear and determine all matters arising from or related to this Order.

**Exhibit 1**

**Rejected Contracts**

#*	Counterparty	Debtor Counterparty	Description	Executed Date	Expiration Date	Address
1	Centers for Medicare & Medicaid	INSYS THERAPEUTICS INC	GAP PROGRAM DATA AGREEMENT	3/13/2013	N/A	7500 Security Boulevard, Mail Stop S2-14-26 Baltimore, Maryland 21244-1850
2	Department of Health and Human Services	INSYS THERAPEUTICS INC	GAP PROGRAM DATA AGREEMENT	3/14/2013	N/A	7500 Security Boulevard, Mail Stop S2-14-26 Baltimore, Maryland 21244-1850
3	Department of Health and Human Services	INSYS THERAPEUTICS INC	PHARMACEUTICAL PRICING AGREEMENT ADDENDUM	1/4/2017	N/A	7500 Security Boulevard, Mail Stop S2-14-26 Baltimore, Maryland 21244-1850
4	SECRETARY OF HEALTH AND HUMAN SERVICES	INSYS MANUFACTURING	MEDICAID NATIONAL DRUG REBATE AGREEMENT	3/29/2018	N/A	7500 Security Boulevard, Mail Stop S2-14-26 Baltimore, Maryland 21244-1850
5	TRICARE MANAGEMENT ACTIVITY	INSYS THERAPEUTICS INC	DEPARTMENT OF DEFENSE (DOD) RETAIL REFUND PRICING AGREEMENT	5/17/2012	1/28/2009	5111 Leesburg Pike Falls Church, VA 22041
6	TRICARE MANAGEMENT ACTIVITY	INSYS THERAPEUTICS INC	DEPARTMENT OF DEFENSE RETAIL REFUND PRICING AGREEMENT	5/17/2012	5/17/2013	5111 Leesburg Pike Falls Church, VA 22041
7	TRICARE MANAGEMENT ACTIVITY	INSYS THERAPEUTICS INC	DOD RETAIL REFUND PRICING AGREEMENT	5/17/2012	N/A	5111 Leesburg Pike Falls Church, VA 22041
8	TRICARE MANAGEMENT ACTIVITY	INSYS THERAPEUTICS INC	DOD RETAIL REFUND PRINCING AGREEMENT	5/17/2012	5/17/2013	5111 Leesburg Pike Falls Church, VA 22041
9	TRICARE MANAGEMENT ACTIVITY	INSYS THERAPEUTICS INC	RETAIL REFUND PRICING AGREEMENT	5/17/2012	5/17/2013	5111 Leesburg Pike Falls Church, VA 22041