

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

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In re

Chapter 11

INSYS THERAPEUTICS, INC. *et al.*<sup>1</sup>

Case No. 19-11292 (KG)

Debtors.

Jointly Administered

Objection Deadline: November 1, 2019 at 4:00 p.m.

Hearing Date: November 8, 2019 at 9:00 a.m.

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**LIMITED OBJECTION OF THE SECURITIES AND EXCHANGE  
COMMISSION TO APPROVAL OF THE DEBTORS' DISCLOSURE STATEMENT**

The United States Securities and Exchange Commission (“Commission”), a statutory party to these proceedings<sup>2</sup> and the federal agency responsible for regulating and enforcing compliance with the federal securities laws, objects to approval of the Disclosure Statement (“Disclosure Statement”) in support of the Chapter 11 Plan (the “Plan”) of Insys Therapeutics, Inc. (“Insys”) and its affiliated debtors (collectively, the “Debtors”), pursuant to Sections 1125(b) and 524(e) of 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”) and applicable law. In support of its limited objection, the Commission respectfully states as follows:

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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 1333 South Spectrum Blvd #100, Chandler, Arizona 85286.

<sup>2</sup> As a statutory party in corporate reorganization proceedings, the Commission “may raise and may appear and be heard on any issue[.]” 11 U.S.C. § 1109(a).

## INTRODUCTION

The Commission objects to the Disclosure Statement<sup>3</sup> because: (i) the Disclosure Statement lacks adequate information, as required under Section 1125(b) of the Bankruptcy Code, to support the release, exculpation, and permanent injunction provisions in the Debtors' Plan; and (ii) the Plan would appear to release, exculpate, and discharge the liability of nondebtor third parties in contravention of Section 524(e) of Bankruptcy Code.

The Disclosure Statement and related documents are deficient as they do not clearly state whether the Debtors are seeking a Third Party Release (as such term is defined below), exculpation, or injunction; the parties covered by any such a release; or the effect of opting out of any such a release. In fact, the Disclosure Statement does not provide any description of the Third Party Release, exculpation, or injunction at all.

To the extent that the Debtors do intend to pursue the Third Party Release, which is bracketed in the Plan, the process is flawed. The Debtors have stated that they will file a list of parties not entitled to the Third Party Release but have not yet done so. Holders of claims and interests cannot know whether potential litigation is sought to be enjoined under the Plan, and should not be forced to guess whether a party is included in the Debtors' unfiled list. In addition, such releases contravene Section 524(e) of the Bankruptcy Code, which provides that only debts of the debtor are affected by Chapter 11 discharge provisions.<sup>4</sup>

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<sup>3</sup> The Commission is aware that some of these issues may constitute objections to confirmation of the Plan. Because of the potential waste of valuable time and resources, the SEC believes it is appropriate to raise these objections to the Plan at the disclosure stage of the case. A court may disapprove a disclosure statement if the plan, on its face, does not meet the confirmation standards of Chapter 11. *In re Main Street AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999).

<sup>4</sup> The staff of the Commission has raised these concerns with the Debtors. However, to date, the Debtors have not modified the Disclosure Statement or related documents to address the Commission's concerns. The

## **BACKGROUND**

The Debtors were a specialty pharmaceutical company that developed and commercialized drugs and drug delivery systems. (Discl. Stmt. at 19). Over the last several years, the Debtors faced substantial litigation relating to the opioid crisis. (Discl. Stmt. at 21). Some of the litigation is based on particular alleged activities of the Debtors' former executives, many of whom either pleaded guilty to or were convicted after trial of federal criminal activity relating to such activities. (Discl. Stmt. at 22). Many of these inquiries and lawsuits against the Debtors (and certain of their former employees, officers, and directors) have focused on the marketing of the Debtors' drugs and issues related to potential violations of the Anti-Kickback Statute and the Food, Drug & Cosmetic Act. (Discl. Stmt. at 22). The Department of Justice brought civil and criminal actions/investigations against the Debtors. (Discl. Stmt. at 22-24).

In addition, Insys, along with certain former officers, is a defendant in three pending federal securities litigation proceedings in federal courts in Arizona and New York, and certain of the Debtors' former officers and directors are defendants in derivative actions pending in Delaware and Arizona. (Discl. Stmt. at 26).

On June 10, 2019, the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Insys is a publicly traded company with its shares formerly listed on the NASDAQ Global Market LLC under the ticker symbol INSY. On June 24, 2019, The Nasdaq Stock Market LLC filed a Form 25 relating to the delisting and deregistration of Insys's common stock under Section 12(b) of the Securities Exchange Act. Insys's common stock now trades on the OTC Pink Sheets Market.

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Commission reserves the right to supplement this objection if an amended version of the Disclosure Statement and related documents are filed.

Since the Petition Date, the Debtors have been engaged in the liquidation of all of their assets, through Section 363 sales approved by the bankruptcy court. (Discl. Stmt. at 34-37). On September 17, 2019, the Debtors filed the Chapter 11 Plan and Disclosure Statement. Pursuant to the Plan, public shareholders and holders of Section 510(b) claims<sup>5</sup> are deemed to reject the Plan and will not receive any distribution unless unsecured creditors are paid in full. (Discl. Stmt. at 12-13).

The Plan contains provisions that seek to release and permanently enjoin actions against nondebtor third parties (the “Third Party Release”) in a manner that we believe contravenes Section 524(e) of the Bankruptcy Code and applicable law. The purported Third Party Release, exculpation, and injunction are set forth in the Plan but are not described in the Disclosure Statement, in violation of Section 1125(b) of the Bankruptcy Code. They are included in the Plan in brackets with a footnote that “[a]s of the date of filing, the Creditors’ Committee and the Settling Creditors do not support this provision, but are still considering.” (Plan at 8 n.2).

The Third Party Release purports to release third parties, including the Debtors’ and the Committee’s and its members’ (a) predecessors, successors, assigns, subsidiaries, and affiliates, (b) officers and directors, principals, equity holders, members, partners, managers, employees, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, solely to the extent each was employed or engaged on or after the Petition Date, or, in the case of any professional, was retained pursuant to

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<sup>5</sup> Section 510(b) of the Bankruptcy Code provides that “[f]or the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, [or] for damages arising from the purchase or sale of such a security . . . shall be subordinated to all claims or interests that are senior to or equal to the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.” 11 U.S.C. § 510(b). Thus, any potential Section 510(b) claim based on public debt is subordinated in payment to the underlying debt instrument.

sections 327 or 1102 of the Bankruptcy Code in these Chapter 11 Cases, and (c) respective heirs, executors, estates, and nominees, in each case in their capacity as such; *provided, however*, that no Person listed on Exhibit A to the Plan shall be a Released Party. (Plan at 16, defining the “Released Parties”). As of the date hereof, Exhibit A has not been filed. The Third Party Release is for any and all claims and causes of action and a wide range of other obligations, but excludes claims arising from fraud, gross negligence, or willful misconduct. (Plan at 68).

The Third Party Release binds holders of claims and interests who: (i) vote in favor of the Plan; (ii) vote to reject the Plan but fail to opt out of the Third Party Release; (iii) are entitled to vote on the Plan but abstain from voting on the Plan and fail to opt out of the Third Party Release; (iv) are deemed to reject the Plan but fail to opt out of the Third Party Release; and (v) all other holders of Claims and Interests to the maximum extent permitted by law. (Plan at 67, defining the “Releasing Parties”).

In addition, the Debtors are seeking a waiver of “the strict notice rule and [to be] excuse[d] . . . from mailing Solicitation Packages to addresses from which the Debtors received mailings returned as undeliverable, unless the Debtors are provided with a new mailing address before the Voting Deadline.” (Mot. to Approve Discl. Stmt. at ¶ 49). The Debtors have not clearly stated whether they will carve out of the Third Party Release those parties to whom they do not mail Solicitation Packages or whose solicitation packages were returned as undeliverable. In addition, the form of confirmation hearing notice provides that the Debtors may seek a non-consensual release, even if parties have submitted an opt-out form.

**DISCUSSION**

**I. The Disclosure Statement lacks adequate information, as required under Section 1125(b) of the Bankruptcy Code, to support the Third Party Release.**

Section 1125(b) of the Code provides in relevant part that “[a]n acceptance or rejection of a plan may not be solicited . . . from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder . . . a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.” 11 U.S.C. 1125(b). Adequate information, in turn, is defined as “information of a kind, and in sufficient detail . . . that would enable a hypothetical investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan . . . .” 11 U.S.C. 1125(a)(1).

Here, the Plan and Disclosure Statement provide conflicting and confusing information about not just the terms of the Third Party Release, but whether such a provision is being sought at all. The Disclosure Statement does not provide *any* description of the Third Party Release, exculpation, or injunction, much less information as to why such provisions are integral to the liquidation, or the specific contributions made by each of the Released Parties and exculpated parties for the benefit of the Releasing Parties. In addition, the Plan includes the Third Party Release in brackets, and fails to disclose the identities of the parties who are not entitled to the release, as Exhibit A to the Plan has not yet been filed. Thus, holders of claims and interests cannot know whether potential litigation against third parties are sought to be enjoined by the Plan. And, the form of confirmation hearing notice provides that Debtors may seek a non-consensual release, even if parties have submitted an opt-out form. Therefore, it not clear what, *if any*, effect opting out will have for holders of claims and interests.

**II. The Third Party Release Contravenes Section 524(e) of the Bankruptcy Code and Applicable Law.**

Section 524(e) addresses the scope of a bankruptcy discharge and states, in relevant part, that the “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.” 11 U.S.C. § 524(e); *See also Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 211 (3d Cir. 2000) (Bankruptcy Code contemplates that a discharge only affects the debts of those submitting to its burdens).

The Commission has historically taken an interest in this issue because the release of nondebtors can have a detrimental impact on public investors.<sup>6</sup> Investors and creditors could be blocked by such provisions from bringing suits against nondebtor parties under the federal securities laws or for breach of fiduciary duty under state law. Nonetheless, courts in this circuit have allowed releases in favor of nondebtors in Chapter 11 cases if the affected parties have individually *consented* to them, and case law addresses the manner in which valid consent can be established. *See, e.g., In re Zenith Electronics Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999). *Cf. In re Arrowmill Dev. Corp.*, 211 B.R. 497, 506-07 (Bankr. D.N.J. 1997).

Here, shareholders who are deemed to reject and are not even receiving a ballot are required to affirmatively opt out. As many of the securities are held in street name, it is quite possible that an equity holder may not receive a beneficial holder ballot from its broker, or may receive inadequate notice of the opt-out form from the broker. Under these circumstances, the Court should not assume that each Class 12 member who does not submit an opt-out form knowingly opts to consensually give up rights against third parties. Moreover, the Debtors have not stated whether they will carveout of the Third Party Release those parties to whom they do

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<sup>6</sup> On its face, the Third Party Release could also apply to tort and personal injury claimants for negligence claims against the Debtors’ directors and officers who continued to be employed post-petition.

not mail Solicitation Packages or whose solicitation packages were returned as undeliverable. Under these circumstances, the Debtors cannot rely on the silence of any voting or non-voting party as a manifestation of that party's consent to the Third Party Release.

**Reservation of Rights**

The Commission reserves the right to argue at the confirmation stage that this Court lacks jurisdiction or authority to approve the Third Party Release and that the Third Party Release and exculpation provisions of the Plan are not consensual, result in disparate treatment of similarly situated class members in contravention of Section 1123(a)(4) of the Bankruptcy Code, and should not be approved as a consensual or nonconsensual release. The Commission further reserves its right to object if, among other things, a Commission carve out to the Third Party Release is not added to the Plan or proposed confirmation order that is acceptable to the Commission. Finally, although the Debtors are liquidating and not entitled to a discharge under Bankruptcy Code Section 1141(d)(3), the Plan nonetheless implements a permanent injunction against all persons and entities from asserting claims against the Debtors that do not comply, or are inconsistent, with the provisions of the Plan. Plan at 64-66. In the Commission's view, the permanent injunction provision is an improper end run around Section 1141(d)(3) of the Bankruptcy Code and the Commission similarly reserves the right to object to this provision at confirmation.



**CONCLUSION**

For all of the foregoing reasons, the Commission requests that the Court deny approval of the Disclosure Statement unless the Third Party Release, exculpation, and injunction are deleted from the Plan or the Plan and Disclosure Statement are amended to describe the Third Party Release, exculpation, and injunction, and state that public shareholders are not bound by the Third Party Release and exculpation or otherwise limited in any form of recovery against nondebtors absent an affirmative election to be bound.

Dated: October 24, 2019  
Washington, DC

UNITED STATES SECURITIES AND  
EXCHANGE COMMISSION

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I HEREBY CERTIFY that on this 24<sup>th</sup> day of October, 2019, I caused copies of the *Limited Objection of the United States Securities and Exchange Commission to Approval of the Debtors' Disclosure Statement* to be served on all ECF Participants via the Court's CM/ECF system. The objection was additionally served by Email and UPS on the parties in the attached service list.

Dated: October 24, 2019  
Washington, DC

UNITED STATES SECURITIES AND  
EXCHANGE COMMISSION

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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 1333 South Spectrum Blvd #100, Chandler, Arizona 85286.

**Service List**

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