

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

-----X
:

In re : **Chapter 11**
:

INSYS THERAPEUTICS, INC., et al., : **Case No. 19-_____ (___)**
:

Debtors.¹ : **Joint Administration Requested**
:

-----X

MOTION OF DEBTORS FOR ENTRY OF AN ORDER (I) AUTHORIZING PAYMENT OF CERTAIN PREPETITION CLAIMS OF CRITICAL VENDORS, (II) CONFIRMING ADMINISTRATIVE EXPENSE PRIORITY OF UNDISPUTED AND OUTSTANDING PREPETITION ORDERS, AND (III) GRANTING RELATED RELIEF

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, pursuant to sections 105(a), 363(b), and 503(b) of title 11 of the United States Code (the “**Bankruptcy Code**”), the Debtors request entry of an order: (i) authorizing, but not directing, the Debtors to pay non-priority, prepetition claims held by vendors whose goods and services are essential to the Debtors’ operations (the “**Critical Vendors**” and such claims, the “**Critical Vendor Claims**”) in an amount not to exceed \$1,770,000 on an interim basis and an additional \$660,000 on a final basis (with respect the amounts sought in both periods, the “**Critical Vendor Cap**”), of which approximately \$50,000 is for certain goods

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.

received within the twenty (20) days prior to the Petition Date (as defined herein) (the “**503(b)(9) Claims**”); (ii) confirming the administrative expense priority status of Outstanding Orders (as defined below) and authorizing, but not directing, the Debtors to pay prepetition amounts related to the Outstanding Orders; and (iii) granting related relief. The Debtors also seek authority to condition the payment of Critical Vendor Claims upon the Critical Vendors’ commitment through a Trade Agreement (as defined herein) or as otherwise described herein to continue providing goods and services to the Debtors on trade terms at least as favorable as those terms in effect before the Petition Date or any recent trade contract.

2. A proposed form of order granting the relief requested herein on an interim basis is annexed hereto as **Exhibit A** (the “**Proposed Interim 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 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 order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

Background

5. On the date hereof (the “**Petition Date**”), the Debtors each commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized

to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or statutory committee of creditors has been appointed in these Chapter 11 Cases.

6. Contemporaneously herewith, the Debtors have filed a motion requesting joint administration of their Chapter 11 Cases pursuant to rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

7. 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 contemporaneously herewith, in support of the Debtors’ chapter 11 petitions and related first day relief (the “**Long Declaration**”).²

The Critical Vendor Claims

A. Debtors’ Operations and Supply Chain

8. To maximize efficiency, the Debtors maintain an outsourced supply chain, with third-party vendors (the “**Operations and Supply Chain Vendors**”) providing ingredients, storage, monitoring, packaging, and distribution services for all of the Debtors’ pharmaceutical products, as applicable, including the Debtors’ marketed products, SYNDROS® and SUBSYS® (the “**Marketed Products**”), and products which are still in development and not yet available for commercial use (the “**Pipeline Products**”).

9. The Debtors also rely on Operations and Supply Chain Vendors to provide equipment and equipment-related services and to manufacture the active pharmaceutical

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Long Declaration.

ingredients (the “APIs,” and their manufacturers, the “API Manufacturers”) used in SUBSYS® and certain of the Pipeline Products.³ The raw ingredients used by the Debtors and the API Manufacturers to produce the APIs are supplied by multiple Operations and Supply Chain Vendors, and are necessary to the manufacturing of the APIs for both the Marketed Products and the Pipeline Products.

10. For all of their pharmaceutical products, as necessary, the Debtors rely on (a) contract manufacturing organizations (each, a “CMO”) to manufacture the APIs into consumable pharmaceuticals,⁴ (b) the applicable API Manufacturer and/or the applicable CMO to test the pharmaceuticals and conduct analytical release studies and stability samples, (c) Operations and Supply Chain Vendors to package the Debtors’ Marketed Products and ensure that the Marketed Products and samples make their way to end-users.⁵

11. Moreover, the equipment and maintenance of the equipment involved in the Debtors’ production of the APIs for SUBSYS® and SYNDROS® from the key raw ingredients is highly specialized. Finding alternative vendors and suppliers for the provision and maintenance of such equipment would be difficult and would pose a significant hardship to the Debtors’ ongoing operations.

12. The difficulties in finding alternative Operations and Supply Chain Vendors are exacerbated by the highly regulated nature of the Debtors’ pharmaceutical business. Nearly

³ The API for SYNDROS® is manufactured directly by the Debtors from raw ingredients provided by certain Operations and Supply Chain Vendors.

⁴ The APIs for the Marketed Products are manufactured into consumable pharmaceuticals by Operations and Supply Chain Vendors. For SUBSYS® only, the API Manufacturer manufactures both the API and the consumable pharmaceutical.

⁵ The Debtors do not take physical possession of the SUBSYS® API or manufactured SUBSYS® pharmaceuticals at any point in the supply chain.

every change to a vendor or product in the Debtors' supply chain requires regulatory approval and compliance on a federal and/or state level. To ensure the quality of drug products, the U.S. Food and Drug Administration (the "FDA") carefully monitors drug manufacturers' compliance with the FDA's Current Good Manufacturing Practice ("CGMP") regulations, which cover, among other things, manufacturing, testing, quality control, and recordkeeping relating to the Debtors' Marketed Products and any Pipeline Products the Debtors intend to commercialize and distribute. For the Debtors to remain in compliance with the CGMP regulations, each of their Operations and Supply Chain Vendors that act as manufacturers and suppliers must also comply with the CGMP regulations.⁶ Operations and Supply Chain Vendors are subject to further regulatory requirements and ongoing inspections by regulatory agencies, including the FDA and the Drug Enforcement Agency, among others. Moreover, if the Debtors seek regulatory approval for any Pipeline Product to be commercialized, marketed, and distributed, the facilities to be used by the Debtors or Operations and Supply Chain Vendors for the manufacture of that Pipeline Product must be approved by the applicable regulatory authorities before that Pipeline Product may be approved and marketed. Even changes relating to seemingly mundane elements of the operation and supply chain—such as switching bottle or label manufacturers—can require months to years of regulatory study and the concomitant expenditure of millions of dollars to execute. More complex changes, like switching to a different CMO or API manufacturer, may take even longer and are more expensive.

13. Accordingly, the nature of the Debtors' business renders switching vendors or suppliers on short notice impracticable. Indeed, replacing suppliers in the Debtors' industry is

⁶ The Debtors' current Operations and Supply Chain Vendors have each passed the CGMP audit and obtained appropriate certification.

time-consuming, cost prohibitive, and in certain circumstances, not feasible. Further, the Debtors do not have long-term agreements with some of the Operations and Supply Chain Vendors, and, therefore, purchase certain ingredients and materials on a purchase order basis. Any failure of an Operations and Supply Vendor to provide necessary services or goods would likely delay production of the Marketed Products, and failure to provide customers with the Marketed Products in a timely manner will adversely affect the willingness of wholesale pharmaceutical distributors or specialty retail pharmacies (the “**Customers**”) to do business with the Debtors in the future. The loss of any Customers, or a material reduction in sales to such Customers, could have a material adverse effect on the Debtors’ cash flow, as well as their ability to maximize value for their estates.

B. The Debtors’ Clinical Studies

14. The Debtors are subject to FDA regulations governing the labeling, packaging, storage, advertising, promotion, recordkeeping, and submission of safety and other post-market indications for the Marketed Products. Some of these regulations may require the Debtors to conduct further clinical trials supporting the safety and efficacy of the Marketed Products, and failure to complete these required trials could result in a withdrawal of the Debtors’ marketing authorizations or approvals. In connection with the FDA approval of the Marketed Products, the Debtors conduct clinical and post-marketing trials to continue gathering safety and efficacy information about the Marketed Products, as well as for marketing purposes.

15. The Debtors rely on highly specialized and/or sole-source contract research organizations (each, a “**CRO**”) to conduct ongoing clinical trials for the Marketed Products and the Pipeline Products. In addition, with respect to other clinical trials of the Marketed Products, the Debtors are dependent on third-party medical institutions, clinical investigators, and contract laboratories (together with the CROs, the “**Clinical Trial Vendors**”) to oversee clinical trial sites,

conduct clinical research, and perform clinical trials with regards to the Debtors' Marketed Products and Pipeline Products.

16. The Clinical Trial Vendors are generally not obligated to enroll or maintain a minimum number of patients in a clinical trial. However, absent payment of the Clinical Trial Vendors' prepetition claims, the Clinical Trial Vendors may cease enrollment of new patients in sufficient numbers for the Debtors to continue clinical trials, which may delay or terminate ongoing trials, negatively impacting the Debtors' business, and sometimes effectively withdrawing treatment from patients enrolled in trials.

17. In addition, many of the Clinical Trial Vendors perform services for which there are no alternative vendors available. Even if there is an alternative vendor available that could perform the necessary services, switching vendors during ongoing clinical trials would cause severe disruption and impede the results of such studies. It is imperative, therefore, that the Debtors have the authority of this Court to pay the prepetition claims of the Clinical Trial Vendors to maintain these critical working relationships.

C. Critical Vendor Process

18. The Debtors and their advisors engaged in a comprehensive process to (a) identify those vendors, suppliers and service providers, described above, that may be "critical" to the Debtors' business and (b) quantify the relief necessary to avoid immediate and irreparable harm to the Debtors at the outset of these Chapter 11 Cases. In this process, the Debtors, with the assistance of their restructuring professionals, assessed a variety of factors, including:

- the goods or services provided by a vendor or supplier;
- whether the goods or services are essential to the Debtors' business needs;
- whether goods or services are provided pursuant to a contract or on a purchase order basis;

- whether failure to pay all or part of a particular vendor's claim could cause the vendor to refuse to ship inventory or provide critical services on a postpetition basis;
- whether failure to pay a particular vendor could result in contraction of trade terms as a matter of applicable non-bankruptcy law or regulation;
- whether the vendor is a sole- or limited-source or high-volume supplier for branded and "in-demand" inventory due to particular local, regional, or national customer preferences;
- whether alternative vendors are available that could provide requisite volumes of similar goods or services on equal (or better) terms and, if so, whether the Debtors would be able to continue operating while transitioning business thereto;
- whether the Debtors' inability to pay all or part of the vendor's prepetition claim could trigger financial distress for the applicable vendor; and
- whether failure to pay the particular vendor could jeopardize the Debtors' valuable proprietary interest in their products.

19. As a result of this analysis, the Debtors have identified the universe and type of vendors that qualify as Critical Vendors, as their support remains essential to the Debtors' ability to preserve and enhance value for the benefit of their estates and their creditors through the seamless transition of their operations into chapter 11 and through a sales process.

D. Customary Trade Terms

20. In exchange for payment of the Critical Vendor Claims, the Debtors propose to use all appropriate efforts to require each Critical Vendor to provide as favorable trade terms, practices, and programs (including credit limits, pricing, cash discounts, timing of payments, allowances, product mix, availability, and other programs) as those trade terms, practices, and programs in place in the 120 days prior to the Petition Date (collectively, the "**Customary Trade Terms**"). Thus, where appropriate, the Debtors seek authority, but not direction, to require as a condition to payment of a Critical Vendor Claim that the applicable Critical Vendor (including a Critical Vendor whose Critical Vendor Claim may be entitled to priority under section 503(b)(9)

of the Bankruptcy Code) enter into a trade agreement (each, a “**Trade Agreement**”). A Trade Agreement, once agreed to and accepted by a Critical Vendor, will be a legally binding contract between the parties governing the commercial trade relationship as provided therein.

21. The Debtors also seek limited authority to pay Critical Vendor Claims in the event no Trade Agreement has been executed or if the Debtors determine, in their business judgment, that a formal Trade Agreement is prohibitive or unnecessary to provide for the continued provision of goods or services on a postpetition basis.

22. In addition, even though certain Critical Vendors are parties to executory contracts and must continue to perform on a postpetition basis regardless of whether they are paid on account of their prepetition claims, the Debtors seek limited authority to pay such Critical Vendor Claims if the Debtors determine, in their business judgment, that the applicable Critical Vendors will cease performance or delivery of goods or services under their respective contracts, the timely performance or delivery of which is critical for the continued operation of the Debtors’ business.

23. Unless otherwise agreed by the Debtors, if any party accepts payment pursuant to the relief requested by this Motion and (a) is a party to an executory contract or (b) thereafter does not continue to provide goods or services on Customary Trade Terms (regardless of whether a Trade Agreement has been executed), then the Debtors reserve all of their rights to treat any payment made pursuant to the relief granted in this Interim Order as an unauthorized postpetition transfer and to exercise any and all appropriate remedies.

Payment of Outstanding Orders

24. Prior to the Petition Date, and in the ordinary course of business, the Debtors have certain orders outstanding with various manufacturers, suppliers, and vendors for goods or

services ordered by the Debtors that will not be delivered until on or after the Petition Date (the “**Outstanding Orders**”). These manufacturers, suppliers, and vendors may be concerned that because the Debtors’ obligations under the Prepetition Orders arose prior to the Petition Date, such obligations will be treated as general unsecured claims in these Chapter 11 Cases. Accordingly, certain vendors may refuse to provide such goods or services to the Debtors (or may recall shipments thereof) purchased pursuant to the Outstanding Orders unless the Debtors issue substitute purchase orders postpetition or obtain an order of the Court providing that all undisputed obligations of the Debtors arising from the postpetition delivery of goods subject to Outstanding Orders are afforded administrative expense priority status under section 503(b) of the Bankruptcy Code.

25. To prevent any disruption to the Debtors’ operations, and given that claims arising from goods or services delivered on and after the Petition Date may be afforded administrative expense priority under section 503(b) of the Bankruptcy Code, the Debtors request entry of an order (a) confirming administrative expense priority under section 503(b) of the Bankruptcy Code for all undisputed obligations of the Debtors arising from the acceptance of any goods or services included in the Outstanding Orders and (b) authorizing, but not directing, the Debtors to satisfy such obligations in the ordinary course of business.

Relief Requested Should Be Granted

A. Payment of the Critical Vendor Claims is Warranted Under Sections 105(a) and 363(b)(1) of the Bankruptcy Code and the Doctrine of Necessity

26. The Court may grant the relief requested herein pursuant to sections 363 and 105(a) of the Bankruptcy Code.

27. Section 363(b) of the Bankruptcy Code provides, in relevant part, that “[t]he [debtor], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of

business, property of the estate.” 11 U.S.C. § 363(b)(1). Under section 363(b) of the Bankruptcy Code, a court may authorize a debtor to pay certain prepetition claims if a sound business purpose exists for doing so. *See In re ICL Holding Co.*, 802 F.3d 547, 551 (3d. Cir. 2015) (citing *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153–54 (Bankr. D. Del. 1999)). Moreover, once “the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.” *In re Filene’s Basement, LLC*, 2014 Bankr. LEXIS 2000, at *39–40 (Bankr. D. Del. 2014) (quoting *In re Johns-Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986)). So long as a debtor’s actions satisfy the business judgment rule, the action “should be approved under section 363(b)(1).” *See In re Dura Auto. Sys.*, 2007 Bankr. LEXIS 2764, at *260 (Bankr. D. Del. 2007); *see also In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (“Overcoming the presumptions of the business judgment rule on the merits is a near-Herculean task.”).

28. In addition, the Court has the authority, pursuant to its equitable powers under section 105(a) of the Bankruptcy Code, to authorize the relief requested herein because such relief is necessary for the Debtors to carry out their fiduciary duties under section 1107(a) of the Bankruptcy Code. Section 105(a) empowers bankruptcy courts to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title,” which includes authorizing the payment of prepetition claims to critical vendors. *See* 11 U.S.C. § 105(a); *In re Friedman’s Inc.*, 738 F.3d 547, 560–61 (3d. Cir. 2013) (noting that critical vendors can “be given preferred treatment under § 105 and § 363”); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (applying section 105(a) to justify an order authorizing the payment of certain prepetition wages, salaries, medical benefits, and business expense claims to debtor’s employees). Under Section 1107(a), a debtor-in-possession has “a fiduciary duty to protect and

maximize the estate's assets" on behalf of a debtor's creditors and other parties in interest. *In re Mushroom Transp. Co.*, 382 F.3d 325, 339 (3d. Cir. 2004); *In re LCI Holding Co.*, 2013 Bankr. LEXIS 988, at *7 (Bankr. D. Del. 2013) ("[T]he Court permits payments to critical vendors when it benefits the bankruptcy estate."); *see also Unofficial Comm. of Equity Holders v. McManigle (In re Penick Pharm., Inc.)*, 227 B.R. 229, 232–33 (Bankr. S.D.N.Y. 1998) ("[U]pon filing its petition, the Debtor became debtor in possession and, through its management . . . was burdened with the duties and responsibilities of a bankruptcy trustee.").

29. Further, the Court may authorize the payment of prepetition claims under the doctrine of necessity when such payment is essential to the continued operation of the debtor's business. *In re Motor Coach Indus. Int'l*, 2009 U.S. Dist. LEXIS 10024, at *7, n.5 (D. Del. 2009); *see also In re Just for Feet, Inc.*, 242 B.R. 821, 824–25 (D. Del. 1999) (noting that "[t]he Supreme Court, the Third Circuit and the District of Delaware all recognize the court's power to authorize payment of pre-petition claims when such payment is necessary for the debtor's survival in chapter 11").

30. The relief requested by this Motion represents a sound exercise of the Debtors' business judgment, is necessary to avoid immediate and irreparable harm to the Debtors' estates, and is justified under sections 363(b) and 105(a) of the Bankruptcy Code. As described above, the Debtors and their advisors have reviewed each of the Debtors' vendors in careful detail with an eye toward each vendor's importance to the Debtors' operational viability. The list of Critical Vendors resulted from the Debtors whittling the vendor universe down to only those which, left unpaid, could bring the Debtors' business to a halt or cause a severe disruption in value. As described above, due to the regulated nature of the Debtors' business and its relationship with its often sole-source and highly customized providers of raw materials and specialized equipment,

the Debtors have limited to no options for replacement suppliers. A loss of any one of the Critical Vendors could delay production of the Marketed Products, create shortages in the Debtors' supply chain, and significantly increase costs to the Debtors. Maintaining its relationships with the Critical Vendors is therefore essential to the continued operation of the Debtors' business. Accordingly, authorizing the Debtors to pay prepetition amounts related to Critical Vendor Claims is in the best interests of the Debtors, their estates, and their stakeholders.

31. The relief requested in this Motion will also allow the Debtors to require that the Critical Vendors continue providing goods and services to the Debtors on Customary Trade Terms. Absent such relief, Critical Vendors may have no incentive to continue providing the Debtors with trade credit, and a number of vendors have informed the Debtors that they will stop providing goods and services altogether upon a single missed or late payment. Such results could be catastrophic for the Debtors, their estates, and all stakeholders. In contrast, the preservation of working capital through the retention or reinstatement of trade credit in sufficient amounts and on favorable terms will conserve liquidity, stabilize the Debtors' business operations, and facilitate their ability to maximize value. The retention and reinstatement of Customary Trade Terms will enable the Debtors to restore the confidence of their customers and mitigate the uncertainty caused by the commencement of these Chapter 11 Cases.

32. Given the nature of the goods and services provided by the Critical Vendors, the consequences if the Critical Vendors cease providing such goods and services to the Debtors, and the resulting loss of value to the Debtors' estates, the relief requested herein is necessary and appropriate. The Debtors' authority to address their Critical Vendor Claims in the initial days of these cases will send a clear signal to their suppliers and customers that the Debtors are both willing and able to conduct business as usual after the Petition Date. Failure to authorize the Debtors to

pay Critical Vendor Claims as provided herein would jeopardize the Debtors' chapter 11 restructuring strategy, and, ultimately, the success of these Chapter 11 Cases.

B. The Court Should Authorize Payment of Claims Entitled to Administrative Priority Pursuant to Section 503(b)(9) of the Bankruptcy Code

33. Section 503(b)(9) of the Bankruptcy Code provides administrative priority for the "value of any goods received by the Debtor within 20 days before the commencement of a case under this title in which goods have been sold to the debtor in the ordinary course of such debtor's business." 11 U.S.C. § 503(b)(9). These claims must be paid in full for the Debtors to confirm a plan. *See id.* § 1129(a)(9)(A).

34. The Debtors anticipate having to pay only approximately \$50,000 in 503(b)(9) Claims. Paying these claims now only provides such creditors what they would otherwise be entitled to receive under a chapter 11 plan. Thus, payment of 503(b)(9) Claims entitled to priority under section 503(b)(9) of the Bankruptcy Code will effect only a change in the timing of such payments, not the amounts or priority thereof. Instead of paying such claims on the effective date of a chapter 11 plan, the Debtors seek authority to pay the 503(b)(9) Claims in the ordinary course of business and to condition payment of 503(b)(9) Claims on claimants' agreement to continue supplying goods and services to the Debtors on the same trade terms given to them prior to the Petition Date or upon new trade terms.

35. Absent authority to pay section 503(b)(9) Claims at the outset of these Chapter 11 Cases, the Debtors could be denied access to the equipment and goods necessary to maintain the Debtors' business operations, and certain 503(b)(9) claimants may withhold support for the Debtors during the chapter 11 process or eliminate favorable trade terms. Such costs and distractions could impair the Debtors' ability to stabilize their operations at this critical juncture to the detriment of all stakeholders. Furthermore, authorizing the Debtors to pay the 503(b)(9)

Claims entitled to 503(b)(9) priority pursuant to the terms set forth herein will eliminate the burden on this Court and the Debtors of individual motions requesting payment on account of such 503(b)(9) Claims.

C. Claims on Account of Outstanding Orders Are Entitled to Administrative Priority

36. Pursuant to section 503(b) of the Bankruptcy Code, obligations that arise in connection with the postpetition delivery of necessary goods and services are afforded administrative expense priority because they benefit the estate postpetition. 11 U.S.C. § 503(b)(1)(A). Accordingly, granting the relief sought herein with respect to the Outstanding Orders will not afford such claimants any greater priority than they otherwise would have if the relief requested herein were not granted, and will not prejudice any other party in interest. Absent such relief, however, the Debtors may be required to expend substantial time and effort reissuing the Outstanding Orders to provide certain suppliers with assurance of such administrative priority. Such a disruption to the continuous and timely flow of critical goods and materials to the Debtors could potentially force the Debtors to halt operations and production, damage the Debtors' business reputation, erode the Debtors' customer base, and ultimately lead to a loss of revenue, all to the detriment of the Debtors and their creditors. Accordingly, the Debtors submit that the Court should confirm the administrative expense priority status of the Outstanding Orders and should authorize the Debtors to pay the Outstanding Orders in the ordinary course of business.

37. For the foregoing reasons, payment of the Critical Vendor Claims in an amount not to exceed the Critical Vendor Cap, absent further order of the Court, including the 503(b)(9) Claims, and payment of prepetition amounts related to the Outstanding Orders is necessary, appropriate, and in the best interests of the Debtors, their estates, and all other parties in interest in these cases.

Bankruptcy Rule 6003(b) Has Been Satisfied

38. Bankruptcy Rule 6003 provides that, to the extent relief is necessary to avoid immediate and irreparable harm, a bankruptcy court may issue an order granting “a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition” before twenty-one (21) days after filing of the petition. Fed. R. Bankr. P. 6003(b). As described above and in the Long Declaration, the Debtors would suffer immediate and irreparable harm if the relief sought herein is not promptly granted. Accordingly, the Debtors submit that the relief requested herein is necessary to avoid immediate and irreparable harm, and, therefore, Bankruptcy Rule 6003 is satisfied.

Request for Bankruptcy Rule 6004(a) and (h) Waivers

39. To implement the foregoing successfully, the Debtors request a waiver of the notice requirements under Bankruptcy Rule 6004(a) and any stay of the order granting the relief requested herein pursuant to Bankruptcy Rule 6004(h). As explained above and in the Long Declaration, the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtors. Accordingly, ample cause exists to justify the waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen-day stay imposed by Bankruptcy Rule 6004(h), to the extent such notice requirements and stay apply.

Reservation of Rights

40. Nothing contained herein is intended or shall be construed as (a) an admission as to the validity of any claim against the Debtors; (b) a waiver of the Debtors’ or any appropriate party in interest’s rights to dispute the amount of, basis for, or validity of any claim against the Debtors; (c) a waiver of any claims or causes of action that may exist against any

creditor or interest holder; or (d) an approval, assumption, adoption, or rejection of any agreement, contract, lease, program, or policy between the Debtors and any third party under section 365 of the Bankruptcy Code. Likewise, if the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended to be and should not be construed as an admission to the validity of any claim or a waiver of the Debtors' rights to dispute such claim subsequently.

Notice

41. Notice of this Motion will be provided to (a) the Office of the United States Trustee for the District of Delaware (Attn: Jane M. Leamy); (b) the holders of the thirty (30) largest unsecured claims against the Debtors on a consolidated basis; (c) the Securities and Exchange Commission; (d) the Internal Revenue Service; (e) the United States Attorney's Office for the District of Delaware; (f) the Department of Justice; and (g) any other party entitled to notice pursuant to Local Rule 9013-1(m) (the "**Notice Parties**"). The Debtors submit that, in view of the facts and circumstances, such notice is sufficient and no further notice is required.

42. 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 interim and final orders granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: June 10, 2019
Wilmington, Delaware

/s/ Paul N. Heath

RICHARDS, LAYTON & FINGER, P.A.
Mark D. Collins (No. 2981)
John H. Knight (No. 3848)
Paul N. Heath (No. 3704)
Amanda R. Steele (No. 5530)
Zachary Shapiro (No. 5103)
One Rodney Square
920 N. King Street
Wilmington, Delaware 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701

-and-

WEIL, GOTSHAL & MANGES LLP
Gary T. Holtzer (*pro hac vice* pending)
Ronit J. Berkovich (*pro hac vice* pending)
Candace M. Arthur (*pro hac vice* pending)
Olga F. Peshko (*pro hac vice* pending)
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

*Proposed Attorneys for the Debtors
and Debtors in Possession*

Exhibit A
Proposed Interim Order

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

	X	
	:	
In re	:	Chapter 11
	:	
INSYS THERAPEUTICS, INC., et al.,	:	Case No. 19-_____ (___)
	:	
Debtors.¹	:	Jointly Administered
	:	
	:	
	X	Re: D.I. _____

**INTERIM ORDER (I) AUTHORIZING PAYMENT
OF CERTAIN PREPETITION CLAIMS OF CRITICAL
VENDORS, (II) CONFIRMING ADMINISTRATIVE EXPENSE
PRIORITY OF UNDISPUTED AND OUTSTANDING PREPETITION
ORDERS, AND (III) GRANTING RELATED RELIEF**

Upon the motion (the “**Motion**”),² dated June 10, 2019, of Insys Therapeutics, Inc. and its affiliated debtors in the above-captioned chapter 11 cases, as debtors and debtors in possession (collectively, the “**Debtors**”), pursuant to sections 105(a), 363(b), and 503(b) of title 11 of the United States Code (the “**Bankruptcy Code**”) and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), the Debtors request entry of an order (i) authorizing the Debtors to pay Critical Vendor Claims in an amount not to exceed the Critical Vendor Cap absent further order of the Court; (ii) confirming the administrative expense priority status of Outstanding Orders, and (iii) granting related relief, all as more fully set forth 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

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 Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to such terms in the Motion.

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 the Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to the Notice Parties; and such notice having been adequate and appropriate under the circumstances, and it appearing that no other or further notice need be provided; and the Court having reviewed the Motion; and the Court having held a hearing to consider the relief requested in the Motion on an interim basis (the “**Hearing**”); and upon the Long Declaration, filed contemporaneously with the Motion, and the record of the Hearing; 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 necessary to avoid immediate and irreparable harm to the Debtors and their estates as contemplated by Bankruptcy Rule 6003, and is in the best interests of the Debtors, their estates, creditors, and all parties in interest; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is granted on an interim basis, as provided herein.
2. The Debtors are authorized, but not directed, pursuant to sections 105(a), 363(b), and 503(b) of the Bankruptcy Code, to pay, or cause to be paid, Critical Vendor Claims and 503(b)(9) Claims in an amount not to exceed \$1,770,000 (the “**Critical Vendor Cap**”), of which approximately \$50,000 shall be for 503(b)(9) Claims, pending entry of a final order on the Motion; provided, that the Debtors are authorized, but not directed, to pay only amounts due and payable as of the Petition Date and amounts that are or become due and payable between the

Petition Date and the date that a final order on the Motion is entered, unless otherwise ordered by the Court.

3. The Debtors shall undertake all appropriate efforts to cause Critical Vendors to enter into Trade Agreements with the Debtors.

4. The Debtors are authorized, but not directed, to condition payment of Critical Vendor Claims upon entry into Trade Agreements in the exercise of their reasonable business judgment.

5. Unless otherwise agreed by the Debtors, if any party accepts payment pursuant to the relief granted in this order (the “**Interim Order**”) and (i) is a party to an executory contract or (ii) thereafter, as applicable, does not continue to provide either goods or services on Customary Trade Terms (regardless of whether a Trade Agreement has been executed), then the Debtors reserve all of their rights to treat any payment made pursuant to the relief granted in this Interim Order as an unauthorized postpetition transfer and to exercise any and all appropriate remedies.

6. All undisputed obligations related to the Outstanding Orders are granted administrative expense priority status in accordance with section 503(b)(1)(A) of the Bankruptcy Code.

7. Nothing in the Motion or this interim order shall be deemed to authorize the Debtors to accelerate any payments not otherwise due prior to the date of the hearing to consider entry of an order granting the relief requested in the Motion on a final basis (the “**Final Hearing**”).

8. Nothing contained in the Motion or this interim order, nor any payment made pursuant to the authority granted by this interim order, is intended to be or shall be construed as (a) an admission as to the validity of any claim against the Debtors; (b) a waiver of the Debtors’

or any appropriate party in interest's rights to dispute the amount of, basis for, or validity of any claim against the Debtors; (c) a waiver of any claims or causes of action that may exist against any creditor or interest holder; or (d) an approval, assumption, adoption, or rejection of any agreement, contract, lease, program, or policy between the Debtors and any third party under section 365 of the Bankruptcy Code.

9. Nothing contained in the Motion or this interim order shall be deemed to constitute an assumption or rejection of any executory contract or prepetition or postpetition agreement between the Debtors and a Critical Vendor or to require the Debtors to make any of the payments authorized herein.

10. The authorization granted hereby to pay Critical Vendor Claims shall not create any obligation on the part of the Debtors to pay the Critical Vendor Claims, and nothing contained in this order shall be deemed to increase, reclassify, elevate to an administrative expense status or otherwise affect the Critical Vendor Claims to the extent they are not paid.

11. The requirements of Bankruptcy Rule 6003(b) have been satisfied.

12. Under the circumstances of these chapter 11 cases, notice of the Motion is adequate under Bankruptcy Rule 6004(a) and Local Rule 9013-1(m).

13. Notwithstanding Bankruptcy Rule 6004(h), this interim order shall be immediately effective and enforceable upon its entry.

14. The Debtors are authorized to take all actions necessary to implement the relief granted in this interim order.

15. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, and/or enforcement of this interim order.

16. The Final Hearing on the Motion shall be held on _____, **2019 at**
___:___ (Prevailing Eastern Time) and any objections or responses to the Motion shall be in
writing, filed with the Court, and served upon (a) the proposed attorneys for the Debtors, (i) Weil,
Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153 (Attn: Gary T. Holtzer,
Esq., Ronit J. Berkovich, Esq., Candace M. Arthur, Esq., and Olga F. Peshko, Esq.), and
(ii) Richards, Layton & Finger, P.A., One Rodney Square, 920 North King Street, Wilmington,
Delaware 19801 (Attn: John H. Knight, Esq., Paul N. Heath, Esq., and Amanda R. Steele, Esq.);
and (b) the Notice Parties; in each case, on or prior to _____, **2019 at 4:00 p.m. (Prevailing**
Eastern Time).

Dated: _____, 2019
Wilmington, Delaware

THE HONORABLE _____
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

-----X
:

In re : **Chapter 11**

:

INSYS THERAPEUTICS, INC., et al., : **Case No. 19-_____ (___)**

:

Debtors.¹ : **Joint Administration Requested**

:

-----X

MOTION OF DEBTORS FOR ENTRY OF AN ORDER (I) AUTHORIZING PAYMENT OF CERTAIN PREPETITION CLAIMS OF CRITICAL VENDORS, (II) CONFIRMING ADMINISTRATIVE EXPENSE PRIORITY OF UNDISPUTED AND OUTSTANDING PREPETITION ORDERS, AND (III) GRANTING RELATED RELIEF

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, pursuant to sections 105(a), 363(b), and 503(b) of title 11 of the United States Code (the “**Bankruptcy Code**”), the Debtors request entry of an order: (i) authorizing, but not directing, the Debtors to pay non-priority, prepetition claims held by vendors whose goods and services are essential to the Debtors’ operations (the “**Critical Vendors**” and such claims, the “**Critical Vendor Claims**”) in an amount not to exceed \$1,770,000 on an interim basis and an additional \$660,000 on a final basis (with respect the amounts sought in both periods, the “**Critical Vendor Cap**”), of which approximately \$50,000 is for certain goods

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.

received within the twenty (20) days prior to the Petition Date (as defined herein) (the “**503(b)(9) Claims**”); (ii) confirming the administrative expense priority status of Outstanding Orders (as defined below) and authorizing, but not directing, the Debtors to pay prepetition amounts related to the Outstanding Orders; and (iii) granting related relief. The Debtors also seek authority to condition the payment of Critical Vendor Claims upon the Critical Vendors’ commitment through a Trade Agreement (as defined herein) or as otherwise described herein to continue providing goods and services to the Debtors on trade terms at least as favorable as those terms in effect before the Petition Date or any recent trade contract.

2. A proposed form of order granting the relief requested herein on an interim basis is annexed hereto as **Exhibit A** (the “**Proposed Interim 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 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 order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

Background

5. On the date hereof (the “**Petition Date**”), the Debtors each commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized

to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or statutory committee of creditors has been appointed in these Chapter 11 Cases.

6. Contemporaneously herewith, the Debtors have filed a motion requesting joint administration of their Chapter 11 Cases pursuant to rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

7. 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 contemporaneously herewith, in support of the Debtors’ chapter 11 petitions and related first day relief (the “**Long Declaration**”).²

The Critical Vendor Claims

A. Debtors’ Operations and Supply Chain

8. To maximize efficiency, the Debtors maintain an outsourced supply chain, with third-party vendors (the “**Operations and Supply Chain Vendors**”) providing ingredients, storage, monitoring, packaging, and distribution services for all of the Debtors’ pharmaceutical products, as applicable, including the Debtors’ marketed products, SYNDROS® and SUBSYS® (the “**Marketed Products**”), and products which are still in development and not yet available for commercial use (the “**Pipeline Products**”).

9. The Debtors also rely on Operations and Supply Chain Vendors to provide equipment and equipment-related services and to manufacture the active pharmaceutical

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Long Declaration.

ingredients (the “APIs,” and their manufacturers, the “API Manufacturers”) used in SUBSYS® and certain of the Pipeline Products.³ The raw ingredients used by the Debtors and the API Manufacturers to produce the APIs are supplied by multiple Operations and Supply Chain Vendors, and are necessary to the manufacturing of the APIs for both the Marketed Products and the Pipeline Products.

10. For all of their pharmaceutical products, as necessary, the Debtors rely on (a) contract manufacturing organizations (each, a “CMO”) to manufacture the APIs into consumable pharmaceuticals,⁴ (b) the applicable API Manufacturer and/or the applicable CMO to test the pharmaceuticals and conduct analytical release studies and stability samples, (c) Operations and Supply Chain Vendors to package the Debtors’ Marketed Products and ensure that the Marketed Products and samples make their way to end-users.⁵

11. Moreover, the equipment and maintenance of the equipment involved in the Debtors’ production of the APIs for SUBSYS® and SYNDROS® from the key raw ingredients is highly specialized. Finding alternative vendors and suppliers for the provision and maintenance of such equipment would be difficult and would pose a significant hardship to the Debtors’ ongoing operations.

12. The difficulties in finding alternative Operations and Supply Chain Vendors are exacerbated by the highly regulated nature of the Debtors’ pharmaceutical business. Nearly

³ The API for SYNDROS® is manufactured directly by the Debtors from raw ingredients provided by certain Operations and Supply Chain Vendors.

⁴ The APIs for the Marketed Products are manufactured into consumable pharmaceuticals by Operations and Supply Chain Vendors. For SUBSYS® only, the API Manufacturer manufactures both the API and the consumable pharmaceutical.

⁵ The Debtors do not take physical possession of the SUBSYS® API or manufactured SUBSYS® pharmaceuticals at any point in the supply chain.

every change to a vendor or product in the Debtors' supply chain requires regulatory approval and compliance on a federal and/or state level. To ensure the quality of drug products, the U.S. Food and Drug Administration (the "FDA") carefully monitors drug manufacturers' compliance with the FDA's Current Good Manufacturing Practice ("CGMP") regulations, which cover, among other things, manufacturing, testing, quality control, and recordkeeping relating to the Debtors' Marketed Products and any Pipeline Products the Debtors intend to commercialize and distribute. For the Debtors to remain in compliance with the CGMP regulations, each of their Operations and Supply Chain Vendors that act as manufacturers and suppliers must also comply with the CGMP regulations.⁶ Operations and Supply Chain Vendors are subject to further regulatory requirements and ongoing inspections by regulatory agencies, including the FDA and the Drug Enforcement Agency, among others. Moreover, if the Debtors seek regulatory approval for any Pipeline Product to be commercialized, marketed, and distributed, the facilities to be used by the Debtors or Operations and Supply Chain Vendors for the manufacture of that Pipeline Product must be approved by the applicable regulatory authorities before that Pipeline Product may be approved and marketed. Even changes relating to seemingly mundane elements of the operation and supply chain—such as switching bottle or label manufacturers—can require months to years of regulatory study and the concomitant expenditure of millions of dollars to execute. More complex changes, like switching to a different CMO or API manufacturer, may take even longer and are more expensive.

13. Accordingly, the nature of the Debtors' business renders switching vendors or suppliers on short notice impracticable. Indeed, replacing suppliers in the Debtors' industry is

⁶ The Debtors' current Operations and Supply Chain Vendors have each passed the CGMP audit and obtained appropriate certification.

time-consuming, cost prohibitive, and in certain circumstances, not feasible. Further, the Debtors do not have long-term agreements with some of the Operations and Supply Chain Vendors, and, therefore, purchase certain ingredients and materials on a purchase order basis. Any failure of an Operations and Supply Vendor to provide necessary services or goods would likely delay production of the Marketed Products, and failure to provide customers with the Marketed Products in a timely manner will adversely affect the willingness of wholesale pharmaceutical distributors or specialty retail pharmacies (the “**Customers**”) to do business with the Debtors in the future. The loss of any Customers, or a material reduction in sales to such Customers, could have a material adverse effect on the Debtors’ cash flow, as well as their ability to maximize value for their estates.

B. The Debtors’ Clinical Studies

14. The Debtors are subject to FDA regulations governing the labeling, packaging, storage, advertising, promotion, recordkeeping, and submission of safety and other post-market indications for the Marketed Products. Some of these regulations may require the Debtors to conduct further clinical trials supporting the safety and efficacy of the Marketed Products, and failure to complete these required trials could result in a withdrawal of the Debtors’ marketing authorizations or approvals. In connection with the FDA approval of the Marketed Products, the Debtors conduct clinical and post-marketing trials to continue gathering safety and efficacy information about the Marketed Products, as well as for marketing purposes.

15. The Debtors rely on highly specialized and/or sole-source contract research organizations (each, a “**CRO**”) to conduct ongoing clinical trials for the Marketed Products and the Pipeline Products. In addition, with respect to other clinical trials of the Marketed Products, the Debtors are dependent on third-party medical institutions, clinical investigators, and contract laboratories (together with the CROs, the “**Clinical Trial Vendors**”) to oversee clinical trial sites,

conduct clinical research, and perform clinical trials with regards to the Debtors' Marketed Products and Pipeline Products.

16. The Clinical Trial Vendors are generally not obligated to enroll or maintain a minimum number of patients in a clinical trial. However, absent payment of the Clinical Trial Vendors' prepetition claims, the Clinical Trial Vendors may cease enrollment of new patients in sufficient numbers for the Debtors to continue clinical trials, which may delay or terminate ongoing trials, negatively impacting the Debtors' business, and sometimes effectively withdrawing treatment from patients enrolled in trials.

17. In addition, many of the Clinical Trial Vendors perform services for which there are no alternative vendors available. Even if there is an alternative vendor available that could perform the necessary services, switching vendors during ongoing clinical trials would cause severe disruption and impede the results of such studies. It is imperative, therefore, that the Debtors have the authority of this Court to pay the prepetition claims of the Clinical Trial Vendors to maintain these critical working relationships.

C. Critical Vendor Process

18. The Debtors and their advisors engaged in a comprehensive process to (a) identify those vendors, suppliers and service providers, described above, that may be "critical" to the Debtors' business and (b) quantify the relief necessary to avoid immediate and irreparable harm to the Debtors at the outset of these Chapter 11 Cases. In this process, the Debtors, with the assistance of their restructuring professionals, assessed a variety of factors, including:

- the goods or services provided by a vendor or supplier;
- whether the goods or services are essential to the Debtors' business needs;
- whether goods or services are provided pursuant to a contract or on a purchase order basis;

- whether failure to pay all or part of a particular vendor's claim could cause the vendor to refuse to ship inventory or provide critical services on a postpetition basis;
- whether failure to pay a particular vendor could result in contraction of trade terms as a matter of applicable non-bankruptcy law or regulation;
- whether the vendor is a sole- or limited-source or high-volume supplier for branded and "in-demand" inventory due to particular local, regional, or national customer preferences;
- whether alternative vendors are available that could provide requisite volumes of similar goods or services on equal (or better) terms and, if so, whether the Debtors would be able to continue operating while transitioning business thereto;
- whether the Debtors' inability to pay all or part of the vendor's prepetition claim could trigger financial distress for the applicable vendor; and
- whether failure to pay the particular vendor could jeopardize the Debtors' valuable proprietary interest in their products.

19. As a result of this analysis, the Debtors have identified the universe and type of vendors that qualify as Critical Vendors, as their support remains essential to the Debtors' ability to preserve and enhance value for the benefit of their estates and their creditors through the seamless transition of their operations into chapter 11 and through a sales process.

D. Customary Trade Terms

20. In exchange for payment of the Critical Vendor Claims, the Debtors propose to use all appropriate efforts to require each Critical Vendor to provide as favorable trade terms, practices, and programs (including credit limits, pricing, cash discounts, timing of payments, allowances, product mix, availability, and other programs) as those trade terms, practices, and programs in place in the 120 days prior to the Petition Date (collectively, the "**Customary Trade Terms**"). Thus, where appropriate, the Debtors seek authority, but not direction, to require as a condition to payment of a Critical Vendor Claim that the applicable Critical Vendor (including a Critical Vendor whose Critical Vendor Claim may be entitled to priority under section 503(b)(9)

of the Bankruptcy Code) enter into a trade agreement (each, a “**Trade Agreement**”). A Trade Agreement, once agreed to and accepted by a Critical Vendor, will be a legally binding contract between the parties governing the commercial trade relationship as provided therein.

21. The Debtors also seek limited authority to pay Critical Vendor Claims in the event no Trade Agreement has been executed or if the Debtors determine, in their business judgment, that a formal Trade Agreement is prohibitive or unnecessary to provide for the continued provision of goods or services on a postpetition basis.

22. In addition, even though certain Critical Vendors are parties to executory contracts and must continue to perform on a postpetition basis regardless of whether they are paid on account of their prepetition claims, the Debtors seek limited authority to pay such Critical Vendor Claims if the Debtors determine, in their business judgment, that the applicable Critical Vendors will cease performance or delivery of goods or services under their respective contracts, the timely performance or delivery of which is critical for the continued operation of the Debtors’ business.

23. Unless otherwise agreed by the Debtors, if any party accepts payment pursuant to the relief requested by this Motion and (a) is a party to an executory contract or (b) thereafter does not continue to provide goods or services on Customary Trade Terms (regardless of whether a Trade Agreement has been executed), then the Debtors reserve all of their rights to treat any payment made pursuant to the relief granted in this Interim Order as an unauthorized postpetition transfer and to exercise any and all appropriate remedies.

Payment of Outstanding Orders

24. Prior to the Petition Date, and in the ordinary course of business, the Debtors have certain orders outstanding with various manufacturers, suppliers, and vendors for goods or

services ordered by the Debtors that will not be delivered until on or after the Petition Date (the “**Outstanding Orders**”). These manufacturers, suppliers, and vendors may be concerned that because the Debtors’ obligations under the Prepetition Orders arose prior to the Petition Date, such obligations will be treated as general unsecured claims in these Chapter 11 Cases. Accordingly, certain vendors may refuse to provide such goods or services to the Debtors (or may recall shipments thereof) purchased pursuant to the Outstanding Orders unless the Debtors issue substitute purchase orders postpetition or obtain an order of the Court providing that all undisputed obligations of the Debtors arising from the postpetition delivery of goods subject to Outstanding Orders are afforded administrative expense priority status under section 503(b) of the Bankruptcy Code.

25. To prevent any disruption to the Debtors’ operations, and given that claims arising from goods or services delivered on and after the Petition Date may be afforded administrative expense priority under section 503(b) of the Bankruptcy Code, the Debtors request entry of an order (a) confirming administrative expense priority under section 503(b) of the Bankruptcy Code for all undisputed obligations of the Debtors arising from the acceptance of any goods or services included in the Outstanding Orders and (b) authorizing, but not directing, the Debtors to satisfy such obligations in the ordinary course of business.

Relief Requested Should Be Granted

A. Payment of the Critical Vendor Claims is Warranted Under Sections 105(a) and 363(b)(1) of the Bankruptcy Code and the Doctrine of Necessity

26. The Court may grant the relief requested herein pursuant to sections 363 and 105(a) of the Bankruptcy Code.

27. Section 363(b) of the Bankruptcy Code provides, in relevant part, that “[t]he [debtor], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of

business, property of the estate.” 11 U.S.C. § 363(b)(1). Under section 363(b) of the Bankruptcy Code, a court may authorize a debtor to pay certain prepetition claims if a sound business purpose exists for doing so. *See In re ICL Holding Co.*, 802 F.3d 547, 551 (3d. Cir. 2015) (citing *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153–54 (Bankr. D. Del. 1999)). Moreover, once “the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.” *In re Filene’s Basement, LLC*, 2014 Bankr. LEXIS 2000, at *39–40 (Bankr. D. Del. 2014) (quoting *In re Johns-Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986)). So long as a debtor’s actions satisfy the business judgment rule, the action “should be approved under section 363(b)(1).” *See In re Dura Auto. Sys.*, 2007 Bankr. LEXIS 2764, at *260 (Bankr. D. Del. 2007); *see also In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (“Overcoming the presumptions of the business judgment rule on the merits is a near-Herculean task.”).

28. In addition, the Court has the authority, pursuant to its equitable powers under section 105(a) of the Bankruptcy Code, to authorize the relief requested herein because such relief is necessary for the Debtors to carry out their fiduciary duties under section 1107(a) of the Bankruptcy Code. Section 105(a) empowers bankruptcy courts to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title,” which includes authorizing the payment of prepetition claims to critical vendors. *See* 11 U.S.C. § 105(a); *In re Friedman’s Inc.*, 738 F.3d 547, 560–61 (3d. Cir. 2013) (noting that critical vendors can “be given preferred treatment under § 105 and § 363”); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (applying section 105(a) to justify an order authorizing the payment of certain prepetition wages, salaries, medical benefits, and business expense claims to debtor’s employees). Under Section 1107(a), a debtor-in-possession has “a fiduciary duty to protect and

maximize the estate's assets" on behalf of a debtor's creditors and other parties in interest. *In re Mushroom Transp. Co.*, 382 F.3d 325, 339 (3d. Cir. 2004); *In re LCI Holding Co.*, 2013 Bankr. LEXIS 988, at *7 (Bankr. D. Del. 2013) ("[T]he Court permits payments to critical vendors when it benefits the bankruptcy estate."); *see also Unofficial Comm. of Equity Holders v. McManigle (In re Penick Pharm., Inc.)*, 227 B.R. 229, 232–33 (Bankr. S.D.N.Y. 1998) ("[U]pon filing its petition, the Debtor became debtor in possession and, through its management . . . was burdened with the duties and responsibilities of a bankruptcy trustee.").

29. Further, the Court may authorize the payment of prepetition claims under the doctrine of necessity when such payment is essential to the continued operation of the debtor's business. *In re Motor Coach Indus. Int'l*, 2009 U.S. Dist. LEXIS 10024, at *7, n.5 (D. Del. 2009); *see also In re Just for Feet, Inc.*, 242 B.R. 821, 824–25 (D. Del. 1999) (noting that "[t]he Supreme Court, the Third Circuit and the District of Delaware all recognize the court's power to authorize payment of pre-petition claims when such payment is necessary for the debtor's survival in chapter 11").

30. The relief requested by this Motion represents a sound exercise of the Debtors' business judgment, is necessary to avoid immediate and irreparable harm to the Debtors' estates, and is justified under sections 363(b) and 105(a) of the Bankruptcy Code. As described above, the Debtors and their advisors have reviewed each of the Debtors' vendors in careful detail with an eye toward each vendor's importance to the Debtors' operational viability. The list of Critical Vendors resulted from the Debtors whittling the vendor universe down to only those which, left unpaid, could bring the Debtors' business to a halt or cause a severe disruption in value. As described above, due to the regulated nature of the Debtors' business and its relationship with its often sole-source and highly customized providers of raw materials and specialized equipment,

the Debtors have limited to no options for replacement suppliers. A loss of any one of the Critical Vendors could delay production of the Marketed Products, create shortages in the Debtors' supply chain, and significantly increase costs to the Debtors. Maintaining its relationships with the Critical Vendors is therefore essential to the continued operation of the Debtors' business. Accordingly, authorizing the Debtors to pay prepetition amounts related to Critical Vendor Claims is in the best interests of the Debtors, their estates, and their stakeholders.

31. The relief requested in this Motion will also allow the Debtors to require that the Critical Vendors continue providing goods and services to the Debtors on Customary Trade Terms. Absent such relief, Critical Vendors may have no incentive to continue providing the Debtors with trade credit, and a number of vendors have informed the Debtors that they will stop providing goods and services altogether upon a single missed or late payment. Such results could be catastrophic for the Debtors, their estates, and all stakeholders. In contrast, the preservation of working capital through the retention or reinstatement of trade credit in sufficient amounts and on favorable terms will conserve liquidity, stabilize the Debtors' business operations, and facilitate their ability to maximize value. The retention and reinstatement of Customary Trade Terms will enable the Debtors to restore the confidence of their customers and mitigate the uncertainty caused by the commencement of these Chapter 11 Cases.

32. Given the nature of the goods and services provided by the Critical Vendors, the consequences if the Critical Vendors cease providing such goods and services to the Debtors, and the resulting loss of value to the Debtors' estates, the relief requested herein is necessary and appropriate. The Debtors' authority to address their Critical Vendor Claims in the initial days of these cases will send a clear signal to their suppliers and customers that the Debtors are both willing and able to conduct business as usual after the Petition Date. Failure to authorize the Debtors to

pay Critical Vendor Claims as provided herein would jeopardize the Debtors' chapter 11 restructuring strategy, and, ultimately, the success of these Chapter 11 Cases.

B. The Court Should Authorize Payment of Claims Entitled to Administrative Priority Pursuant to Section 503(b)(9) of the Bankruptcy Code

33. Section 503(b)(9) of the Bankruptcy Code provides administrative priority for the "value of any goods received by the Debtor within 20 days before the commencement of a case under this title in which goods have been sold to the debtor in the ordinary course of such debtor's business." 11 U.S.C. § 503(b)(9). These claims must be paid in full for the Debtors to confirm a plan. *See id.* § 1129(a)(9)(A).

34. The Debtors anticipate having to pay only approximately \$50,000 in 503(b)(9) Claims. Paying these claims now only provides such creditors what they would otherwise be entitled to receive under a chapter 11 plan. Thus, payment of 503(b)(9) Claims entitled to priority under section 503(b)(9) of the Bankruptcy Code will effect only a change in the timing of such payments, not the amounts or priority thereof. Instead of paying such claims on the effective date of a chapter 11 plan, the Debtors seek authority to pay the 503(b)(9) Claims in the ordinary course of business and to condition payment of 503(b)(9) Claims on claimants' agreement to continue supplying goods and services to the Debtors on the same trade terms given to them prior to the Petition Date or upon new trade terms.

35. Absent authority to pay section 503(b)(9) Claims at the outset of these Chapter 11 Cases, the Debtors could be denied access to the equipment and goods necessary to maintain the Debtors' business operations, and certain 503(b)(9) claimants may withhold support for the Debtors during the chapter 11 process or eliminate favorable trade terms. Such costs and distractions could impair the Debtors' ability to stabilize their operations at this critical juncture to the detriment of all stakeholders. Furthermore, authorizing the Debtors to pay the 503(b)(9)

Claims entitled to 503(b)(9) priority pursuant to the terms set forth herein will eliminate the burden on this Court and the Debtors of individual motions requesting payment on account of such 503(b)(9) Claims.

C. Claims on Account of Outstanding Orders Are Entitled to Administrative Priority

36. Pursuant to section 503(b) of the Bankruptcy Code, obligations that arise in connection with the postpetition delivery of necessary goods and services are afforded administrative expense priority because they benefit the estate postpetition. 11 U.S.C. § 503(b)(1)(A). Accordingly, granting the relief sought herein with respect to the Outstanding Orders will not afford such claimants any greater priority than they otherwise would have if the relief requested herein were not granted, and will not prejudice any other party in interest. Absent such relief, however, the Debtors may be required to expend substantial time and effort reissuing the Outstanding Orders to provide certain suppliers with assurance of such administrative priority. Such a disruption to the continuous and timely flow of critical goods and materials to the Debtors could potentially force the Debtors to halt operations and production, damage the Debtors' business reputation, erode the Debtors' customer base, and ultimately lead to a loss of revenue, all to the detriment of the Debtors and their creditors. Accordingly, the Debtors submit that the Court should confirm the administrative expense priority status of the Outstanding Orders and should authorize the Debtors to pay the Outstanding Orders in the ordinary course of business.

37. For the foregoing reasons, payment of the Critical Vendor Claims in an amount not to exceed the Critical Vendor Cap, absent further order of the Court, including the 503(b)(9) Claims, and payment of prepetition amounts related to the Outstanding Orders is necessary, appropriate, and in the best interests of the Debtors, their estates, and all other parties in interest in these cases.

Bankruptcy Rule 6003(b) Has Been Satisfied

38. Bankruptcy Rule 6003 provides that, to the extent relief is necessary to avoid immediate and irreparable harm, a bankruptcy court may issue an order granting “a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition” before twenty-one (21) days after filing of the petition. Fed. R. Bankr. P. 6003(b). As described above and in the Long Declaration, the Debtors would suffer immediate and irreparable harm if the relief sought herein is not promptly granted. Accordingly, the Debtors submit that the relief requested herein is necessary to avoid immediate and irreparable harm, and, therefore, Bankruptcy Rule 6003 is satisfied.

Request for Bankruptcy Rule 6004(a) and (h) Waivers

39. To implement the foregoing successfully, the Debtors request a waiver of the notice requirements under Bankruptcy Rule 6004(a) and any stay of the order granting the relief requested herein pursuant to Bankruptcy Rule 6004(h). As explained above and in the Long Declaration, the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtors. Accordingly, ample cause exists to justify the waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen-day stay imposed by Bankruptcy Rule 6004(h), to the extent such notice requirements and stay apply.

Reservation of Rights

40. Nothing contained herein is intended or shall be construed as (a) an admission as to the validity of any claim against the Debtors; (b) a waiver of the Debtors’ or any appropriate party in interest’s rights to dispute the amount of, basis for, or validity of any claim against the Debtors; (c) a waiver of any claims or causes of action that may exist against any

creditor or interest holder; or (d) an approval, assumption, adoption, or rejection of any agreement, contract, lease, program, or policy between the Debtors and any third party under section 365 of the Bankruptcy Code. Likewise, if the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended to be and should not be construed as an admission to the validity of any claim or a waiver of the Debtors' rights to dispute such claim subsequently.

Notice

41. Notice of this Motion will be provided to (a) the Office of the United States Trustee for the District of Delaware (Attn: Jane M. Leamy); (b) the holders of the thirty (30) largest unsecured claims against the Debtors on a consolidated basis; (c) the Securities and Exchange Commission; (d) the Internal Revenue Service; (e) the United States Attorney's Office for the District of Delaware; (f) the Department of Justice; and (g) any other party entitled to notice pursuant to Local Rule 9013-1(m) (the "**Notice Parties**"). The Debtors submit that, in view of the facts and circumstances, such notice is sufficient and no further notice is required.

42. 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 interim and final orders granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: June 10, 2019
Wilmington, Delaware

/s/ Paul N. Heath

RICHARDS, LAYTON & FINGER, P.A.
Mark D. Collins (No. 2981)
John H. Knight (No. 3848)
Paul N. Heath (No. 3704)
Amanda R. Steele (No. 5530)
Zachary Shapiro (No. 5103)
One Rodney Square
920 N. King Street
Wilmington, Delaware 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701

-and-

WEIL, GOTSHAL & MANGES LLP
Gary T. Holtzer (*pro hac vice* pending)
Ronit J. Berkovich (*pro hac vice* pending)
Candace M. Arthur (*pro hac vice* pending)
Olga F. Peshko (*pro hac vice* pending)
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

*Proposed Attorneys for the Debtors
and Debtors in Possession*

Exhibit A
Proposed Interim Order

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

	X	
	:	
In re	:	Chapter 11
	:	
INSYS THERAPEUTICS, INC., et al.,	:	Case No. 19-_____ (___)
	:	
Debtors.¹	:	Jointly Administered
	:	
	:	
	X	Re: D.I. _____

**INTERIM ORDER (I) AUTHORIZING PAYMENT
OF CERTAIN PREPETITION CLAIMS OF CRITICAL
VENDORS, (II) CONFIRMING ADMINISTRATIVE EXPENSE
PRIORITY OF UNDISPUTED AND OUTSTANDING PREPETITION
ORDERS, AND (III) GRANTING RELATED RELIEF**

Upon the motion (the “**Motion**”),² dated June 10, 2019, of Insys Therapeutics, Inc. and its affiliated debtors in the above-captioned chapter 11 cases, as debtors and debtors in possession (collectively, the “**Debtors**”), pursuant to sections 105(a), 363(b), and 503(b) of title 11 of the United States Code (the “**Bankruptcy Code**”) and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), the Debtors request entry of an order (i) authorizing the Debtors to pay Critical Vendor Claims in an amount not to exceed the Critical Vendor Cap absent further order of the Court; (ii) confirming the administrative expense priority status of Outstanding Orders, and (iii) granting related relief, all as more fully set forth 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

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 Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to such terms in the Motion.

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 the Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to the Notice Parties; and such notice having been adequate and appropriate under the circumstances, and it appearing that no other or further notice need be provided; and the Court having reviewed the Motion; and the Court having held a hearing to consider the relief requested in the Motion on an interim basis (the “**Hearing**”); and upon the Long Declaration, filed contemporaneously with the Motion, and the record of the Hearing; 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 necessary to avoid immediate and irreparable harm to the Debtors and their estates as contemplated by Bankruptcy Rule 6003, and is in the best interests of the Debtors, their estates, creditors, and all parties in interest; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is granted on an interim basis, as provided herein.
2. The Debtors are authorized, but not directed, pursuant to sections 105(a), 363(b), and 503(b) of the Bankruptcy Code, to pay, or cause to be paid, Critical Vendor Claims and 503(b)(9) Claims in an amount not to exceed \$1,770,000 (the “**Critical Vendor Cap**”), of which approximately \$50,000 shall be for 503(b)(9) Claims, pending entry of a final order on the Motion; provided, that the Debtors are authorized, but not directed, to pay only amounts due and payable as of the Petition Date and amounts that are or become due and payable between the

Petition Date and the date that a final order on the Motion is entered, unless otherwise ordered by the Court.

3. The Debtors shall undertake all appropriate efforts to cause Critical Vendors to enter into Trade Agreements with the Debtors.

4. The Debtors are authorized, but not directed, to condition payment of Critical Vendor Claims upon entry into Trade Agreements in the exercise of their reasonable business judgment.

5. Unless otherwise agreed by the Debtors, if any party accepts payment pursuant to the relief granted in this order (the “**Interim Order**”) and (i) is a party to an executory contract or (ii) thereafter, as applicable, does not continue to provide either goods or services on Customary Trade Terms (regardless of whether a Trade Agreement has been executed), then the Debtors reserve all of their rights to treat any payment made pursuant to the relief granted in this Interim Order as an unauthorized postpetition transfer and to exercise any and all appropriate remedies.

6. All undisputed obligations related to the Outstanding Orders are granted administrative expense priority status in accordance with section 503(b)(1)(A) of the Bankruptcy Code.

7. Nothing in the Motion or this interim order shall be deemed to authorize the Debtors to accelerate any payments not otherwise due prior to the date of the hearing to consider entry of an order granting the relief requested in the Motion on a final basis (the “**Final Hearing**”).

8. Nothing contained in the Motion or this interim order, nor any payment made pursuant to the authority granted by this interim order, is intended to be or shall be construed as (a) an admission as to the validity of any claim against the Debtors; (b) a waiver of the Debtors’

or any appropriate party in interest's rights to dispute the amount of, basis for, or validity of any claim against the Debtors; (c) a waiver of any claims or causes of action that may exist against any creditor or interest holder; or (d) an approval, assumption, adoption, or rejection of any agreement, contract, lease, program, or policy between the Debtors and any third party under section 365 of the Bankruptcy Code.

9. Nothing contained in the Motion or this interim order shall be deemed to constitute an assumption or rejection of any executory contract or prepetition or postpetition agreement between the Debtors and a Critical Vendor or to require the Debtors to make any of the payments authorized herein.

10. The authorization granted hereby to pay Critical Vendor Claims shall not create any obligation on the part of the Debtors to pay the Critical Vendor Claims, and nothing contained in this order shall be deemed to increase, reclassify, elevate to an administrative expense status or otherwise affect the Critical Vendor Claims to the extent they are not paid.

11. The requirements of Bankruptcy Rule 6003(b) have been satisfied.

12. Under the circumstances of these chapter 11 cases, notice of the Motion is adequate under Bankruptcy Rule 6004(a) and Local Rule 9013-1(m).

13. Notwithstanding Bankruptcy Rule 6004(h), this interim order shall be immediately effective and enforceable upon its entry.

14. The Debtors are authorized to take all actions necessary to implement the relief granted in this interim order.

15. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, and/or enforcement of this interim order.

16. The Final Hearing on the Motion shall be held on _____, **2019 at**
___:___ (Prevailing Eastern Time) and any objections or responses to the Motion shall be in
writing, filed with the Court, and served upon (a) the proposed attorneys for the Debtors, (i) Weil,
Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153 (Attn: Gary T. Holtzer,
Esq., Ronit J. Berkovich, Esq., Candace M. Arthur, Esq., and Olga F. Peshko, Esq.), and
(ii) Richards, Layton & Finger, P.A., One Rodney Square, 920 North King Street, Wilmington,
Delaware 19801 (Attn: John H. Knight, Esq., Paul N. Heath, Esq., and Amanda R. Steele, Esq.);
and (b) the Notice Parties; in each case, on or prior to _____, **2019 at 4:00 p.m. (Prevailing**
Eastern Time).

Dated: _____, 2019
Wilmington, Delaware

THE HONORABLE _____
UNITED STATES BANKRUPTCY JUDGE