UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re: INSYS THERAPEUTICS, INC., *et al.*,[1] Debtors.	Chapter 11 Case No. 19-11292 (KG) (Jointly Administered) Objection Deadline: November 4, 2019 at 12:00 PM[2] Hearing Date: November 8, 2019 at 9:00 AM **Re: D.I. 613, 715**

OBJECTION OF SECURITIES LEAD PLAINTIFF TO APPROVAL OF DISCLOSURE STATEMENT FOR JOINT CHAPTER 11 PLAN OF LIQUIDATION PROPOSED BY INSYS THERAPEUTICS, INC. AND ITS AFFILIATED DEBTORS

Clark Miller ("Lead Plaintiff"), the court-appointed lead plaintiff in the securities class action captioned as *Di Donato v. Insys Therapeutics, Inc., et al.*, Case No. CV-16-00302-PHX-NVW (the "Securities Litigation"), pending in the United States District Court for the District of Arizona (the "District Court"), for himself and the certified class in the Securities Litigation (the "Certified Class"), hereby submits this objection (the "Objection") to approval of (a) the proposed disclosure statement (the "Disclosure Statement") [Docket No. 613] for the *Joint Plan of Liquidation Proposed by Insys Therapeutics, Inc. and its Affiliated Debtors* (the "Plan") [Docket No. 612] filed by the debtors and debtors in possession (the "Debtors") in the above-captioned chapter 11 bankruptcy cases (the "Chapter 11 Cases") and (b) the Debtors' motion (the "Solicitation Procedures Motion") [D.I. 715] seeking approval of the Disclosure Statement and

[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] Lead Plaintiff's deadline to object to the Disclosure Statement and Solicitation Procedures has been extended to November 4, 2019 at 12:00 Noon (ET) with the consent of the Debtors. Lead Plaintiff is engaged in discussions with the Debtors to consensually resolve the issues set forth below prior to the extended deadline but, as of the filing hereof, such issues have not yet been resolved.

proposed procedures for soliciting votes on the Plan (the "Solicitation Procedures"). As and for this Objection, Lead Plaintiff respectfully states as follows:

PRELIMINARY STATEMENT[3]

1. Through a broad Third-Party Release that attempts to engineer "deemed consent" through an opt-out mechanism that would bind even holders of claims in impaired, non-voting classes, the Plan potentially impacts the direct claims of Lead Plaintiff and the other members of the Certified Class against some or all of the Non-Debtor Defendants in the Securities Litigation. Lead Plaintiff and the Certified Class will receive nothing under the Plan, nor are any of the Non-Debtor Defendants – certain former directors and officers of Insys who oversaw the Debtors' downfall –providing any contribution whatsoever in exchange for what appears to be a gratuitous Third-Party Release. The Plan is at best unclear about whether any of the Non-Debtor Defendants will be Released Parties under the Third-Party Release – and the Disclosure Statement fails to disclose the terms and scope of the Third-Party Release at all. On that basis alone, the Disclosure Statement should not be approved.

2. The Disclosure Statement also lacks adequate disclosure in other areas to advise Lead Plaintiff, the Certified Class, and creditors generally of the Plan's impact on their claims against the Debtors and the Non-Debtor Defendants and on the continued prosecution of the Securities Litigation. Among other things, the Disclosure Statement:

- contains a woefully inadequate description of the Securities Litigation;
- violates Bankruptcy Rule 3016(c) by failing to disclose the scope of the Third-Party Release and Plan Injunction;
- fails to provide any legal or factual basis for the Third-Party Release or the Plan Injunction, particularly as they may relate to Lead Plaintiff, the Certified Class, and the Securities Litigation;

[3] Capitalized terms used in this Preliminary Statement have the meanings given thereto below.

- does not disclose whether or how the Debtors intend to preserve evidence potentially relevant to the Securities Litigation after the effective date of the Plan;

- does not disclose whether or how Lead Plaintiff and the Certified Class will be able to pursue their claims against the Debtors to the extent of available insurance; and

- does not (nor do the Plan or the Solicitation Procedures) acknowledge Lead Plaintiff's authority to opt out of the Third-Party Release on behalf of the Certified Class.

Unless the Debtors modify the Plan to address the fatal defects that will prevent its confirmation, augment the Disclosure Statement with fulsome disclosure regarding each of the issues above, and remedy the related defects in the Solicitation Procedures, the Disclosure Statement and Solicitation Procedures should not be approved.

BACKGROUND

The Securities Litigation

3. The Securities Litigation is a federal securities class action filed in February 2016. By order entered June 3, 2016 (the "Lead Plaintiff Order") [Securities Litigation D.I. 40], the District Court appointed Lead Plaintiff as lead plaintiff and Kessler Topaz Meltzer & Check, LLP as lead counsel ("Lead Counsel") in the Securities Litigation.

The Second Amended Complaint

4. Lead Plaintiff filed his *Second Amended Complaint for Violation of the Federal Securities Laws* (the "Second Amended Complaint") on December 22, 2016, against Insys Therapeutics, Inc. ("Insys") and Messrs. John N. Kapoor, Michael L. Babich, and Darryl S. Baker, three of Insys' then-current and former officers and directors (the "Non-Debtor Defendants" and collectively with Insys, the "Defendants").[4]

[4] A fourth individual defendant was dismissed in August 2017.

5. Specifically, the Second Amended Complaint alleges that the Defendants' materially false and misleading statements and omissions of material fact artificially inflated and/or maintained artificial inflation in the price of Insys' common stock from August 12, 2014 through December 8, 2016,[5] in violation of Sections 10(b) and/or 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder by the United States Securities and Exchange Commission ("SEC"), 17 C.F.R. § 240.10b-5.

Certification of the Certified Class

6. On September 20, 2019, the District Court entered an order certifying the Certified Class (the "Class Certification Order") [Securities Litigation D.I. 271], providing in pertinent part as follows:

> IT IS FURTHER ORDERED that this action is certified as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3) on behalf of a Class consisting of all persons and entities who purchased or otherwise acquired Insys Therapeutics, Inc., common stock during the period from March 3, 2015, through January 25, 2016, and were damaged thereby. Excluded from the Class are (a) Defendants, (b) present and former directors or executive officers of Insys and members of their immediate families (as defined in 17 C.F.R. § 229.404, Instructions (1)(a)(iii) and (1)(b)(ii)); (c) any of the foregoing individuals' or entities' legal representatives, heirs, successors, or assigns; and (d) any entity in which any Defendant has or had a controlling interest, or which is related to or affiliated with any Defendant.

7. The Class Certification Order further appointed Lead Plaintiff as class representative and Lead Counsel as class counsel for the Certified Class.

[5] As discussed below, the District Court subsequently established the class period for the Certified Class as March 3, 2015 through January 25, 2016 (the "Class Period"). See ¶ 14 below.

The Plan, Disclosure Statement, and Solicitation Procedures

8. The Debtors filed these Chapter 11 Cases on June 10, 2019. On September 17, 2019, the Debtors filed the Plan and Disclosure Statement. A hearing on the Disclosure Statement is presently scheduled for October 22, 2019.

The Third-Party Release and Plan Injunction

9. Article 10.5(b) of the Plan contains a deemed release (the "Third-Party Release") of numerous non-Debtors' claims against the Debtors and myriad other non-Debtors, as follows:

> *(b) Release by Holders of Claims and Interests*
>
> As of the Effective Date, for good and valuable consideration, the adequacy of which is hereby confirmed, including, without limitation, the service of the Released Parties before and during the Chapter 11 Cases to facilitate the liquidation of the Debtors and the implementation of the Trust Formation Transactions, and except as otherwise explicitly provided in the Plan or in the Confirmation Order, the Released Parties shall be deemed conclusively, absolutely, unconditionally, irrevocably and forever released and discharged, to the maximum extent permitted by law, as such law may be extended subsequent to the Effective Date, except as otherwise explicitly provided herein, by (i) the holders of all Claims who vote to accept the Plan, (ii) the holders of all Claims that are Unimpaired under the Plan, (iii) the holders of all Claims whose vote to accept or reject the Plan is solicited but who do not vote either to accept or to reject the Plan, (iv) the holders of all Claims or Interests who vote, or are deemed, to reject the Plan but do not opt out of granting the releases set forth herein, (v) the holders of all Claims and Interests who were given notice of the opportunity to opt out of granting the releases set forth herein but did not opt out, and (vi) all other holders of Claims and Interests to the maximum extent permitted by law, in each case from any and all Claims, counterclaims, disputes, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action, Liens, remedies, losses, contributions, indemnities, costs, liabilities, attorneys' fees and expenses whatsoever, including any derivative claims, asserted or assertable on behalf of the Debtors or their Estates (including any Causes of Action arising under chapter 5 of the Bankruptcy Code), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, asserted or unasserted, accrued or unaccrued, existing or hereinafter arising, whether in law or equity, whether sounding in tort or contract, whether arising under federal or state statutory or common law, or any other applicable international, foreign, or domestic law, rule, statute, regulation, treaty, right, duty, requirement or otherwise, that such holders or their estates, affiliates, heirs, executors, administrators, successors, assigns, managers, accountants, attorneys,

> representatives, consultants, agents, and any other Persons or parties claiming under or through them would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any Claim or Interest or other Person, based on or relating to, or in any manner arising from, in whole or in part, the Debtors or their Estates, the Chapter 11 Cases, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements or interactions between any Debtor and any Released Party (including the exercise of any common law or contractual rights of setoff or recoupment by any Released Party at any time on or prior to the Effective Date), the Trust Formation Transactions, the restructuring of any Claim or Interest before or during the Chapter 11 Cases, the Disclosure Statement, the Plan and related agreements, instruments, and other documents, and the negotiation, formulation, preparation or implementation thereof, the solicitation of votes with respect to the Plan, or any other act or omission, other than Claims or Causes of Action arising out of, or related to, any act or omission of a Released Party that constitutes fraud, gross negligence or willful misconduct.

Pursuant to Article 10.5(b)(iv), the holders of claims in impaired, non-voting classes would be deemed to grant the Third-Party Release unless they take affirmative steps to opt out of it – even though they are receiving nothing under the Plan and are not entitled to vote. This would effectively leave members of the Certified Class, who likely received no notice of these Chapter 11 Cases, with no remedy for the Defendants' wrongdoing, even if covered by insurance.

10. The "Released Parties" receiving the Third-Party Release comprise a sweeping universe that includes, among others, the Debtors and their "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 sections 327 or 1102 of the Bankruptcy Code in these Chapter 11 Cases[.]" See Plan at 16. Through the temporal limitation in this definition, it is clear that the Non-Debtor Defendants, in their capacity as former officers and directors of the Debtors, are not Released Parties. However, because equity holders, in their

capacity as such, are not "employed or engaged" by the Debtors, it is at best unclear whether this limitation applies to equity holders, requiring them to have been employed or engaged by the Debtors in some other capacity on a postpetition basis in order to constitute Released Parties. Thus, because some or all of the Non-Debtor Defendants have held or currently hold equity interests in the Debtors, it is unclear whether they are intended to be Released Parties under the Plan.

11. The Plan also contains an injunction barring "the commencement or prosecution by any Person, whether directly, derivatively, or otherwise, of any Claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action, losses, or liabilities released pursuant to this Plan" from taking essentially any action to prosecute such claims after the Plan is confirmed (the "Plan Injunction"). See Plan, Art. 10.7.

Treatment of the Claims of Lead Plaintiff and the Certified Class Under the Plan

12. The claims of Lead Plaintiff and the Certified Class against the Debtors (the "Class Claims") arise from the purchase and sale of securities of Insys, and thus are subject to subordination pursuant to section 510(b) of the Bankruptcy Code. Claims subordinated pursuant to section 510(b), including the Class Claims, are classified in Class 9 under the Plan. Pursuant to the Plan, claims in Class 9 "shall be deemed expunged, discharged, released, and extinguished without further action by or order of the Bankruptcy Court, and shall be of no further force or effect." See Plan, Art. 4.9. Because Class 9 is receiving nothing under the Plan, holders of Claims in Class 9 are deemed to reject the Plan and are not entitled to vote. As discussed above, holders of claims in impaired, non-voting classes such as Class 9 would be required to opt out of the Third-Party Release even though they are receiving nothing under the Plan and are not entitled to vote. Adding insult to injury, the Plan, Disclosure Statement, and Solicitation

Procedures do not even appear to recognize Lead Plaintiff's inherent authority to opt out of the Third-Party Release on behalf of the Certified Class.

OBJECTION

13. The proponent of a chapter 11 plan may only solicit votes to accept or reject that plan once the Court has approved the written disclosure statement for that plan as containing "adequate information." 11 U.S.C. § 1125(b). Section 1125(a) of the Bankruptcy Code defines "adequate information" as follows:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to . . . a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan[.]

11 U.S.C. § 1125(a); see also Century Glove, Inc. v. First Am. Bank of New York, 860 F.2d 94, 100 (3d Cir. 1988); In re Zenith Elecs. Corp., 241 B.R. 92, 99-100 (Bankr. D. Del. 1999) (the disclosure statement must contain information that is "reasonably practicable [to permit an] informed judgment" by holders of claims or interests to vote on the plan); see also Kirk v. Texaco, Inc., 82 B.R. 678, 681 (S.D.N.Y. 1988).

14. The purpose of a disclosure statement for a chapter 11 plan "is to provide 'adequate information' to creditors to enable them to decide whether to accept or reject the proposed plan." In re Feretti, 128 B.R. 16, 18 (Bankr. D.N.H. 1991) (citations omitted). Whether a disclosure statement provides "adequate information will be determined by the facts and circumstances of each case." See Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir. 1988).

15. Although courts assess adequacy on a case-by-case basis, a disclosure statement must contain "simple and clear language delineating the consequences of the proposed plan on

[creditors'] claims and the possible . . . alternatives so that [creditors] can intelligently accept or reject the Plan." In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988). In essence, a disclosure statement "must clearly and succinctly inform the average . . . creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." Ferretti, 128 B.R. at 19. The Disclosure Statement does not contain adequate information to enable Lead Plaintiff, or creditors generally, to fully assess the extent to which the Plan will impact them and, in particular, the Certified Class or the Securities Litigation. Thus, the Disclosure Statement should not be approved as adequate in its current form.

16. Courts also will not approve disclosure statements that describe plans that are "so fatally flawed that confirmation is impossible." In re U.S. Brass Corp., 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996); see also John Hancock Mutual Life Insurance Co. v. Route 37 Business Park Associates, 987 F.2d 154, 157 (3d Cir. 1993). Because, as discussed more fully below, the Plan cannot be confirmed in its current form, it would be counterproductive to approve the Disclosure Statement and authorize the Debtors to expend estate resources soliciting votes on an unconfirmable Plan.

I. THE DISCLOSURE STATEMENT SHOULD NOT BE APPROVED BECAUSE THE THIRD-PARTY RELEASE RENDERS THE PLAN UNCONFIRMABLE.

17. The Disclosure Statement should not be approved because it describes a plan of reorganization that cannot be confirmed in its current form. See Route 37, 987 F.2d at 157; see also In re Beyond.com, 289 B.R. 138, 140 (Bankr. N.D. Cal. 2003) (denying approval of disclosure statement for unconfirmable plan); In re Phoenix Petroleum Co., 278 B.R. 385, 394 (Bankr. D. Pa. 2001) ("If the disclosure statement describes a plan that is so 'fatally flawed' that confirmation is 'impossible,' the court should exercise its discretion to refuse to consider the adequacy of disclosures."); In re Main Street AC, Inc., 234 B.R. 771, 775 (Bankr. N.D. Cal

1999) (noting that it is well accepted that a court may disapprove a disclosure statement, even if it contains adequate information, where the underlying plan is not confirmable). The Plan is unconfirmable for at least three reasons.

18. First, the Third-Party Release is improper if and to the extent that it purports to release the direct claims belonging to Lead Plaintiff and the Certified Class against the Non-Debtor Defendants. If the Non-Debtor Defendants are indeed Released Parties under the Plan (which, as discussed in Section II.B below, is impossible to ascertain with any certainty from the Plan and Disclosure Statement), then the Third-Party Release threatens to strip Lead Plaintiff and the Certified Class – who are receiving nothing under the Plan – of their likely only source of compensation, the Securities Litigation against the Non-Debtor Defendants. There is no legitimate factual or legal basis for such a result, particularly where members of the Certified Class are receiving nothing under the Plan.

19. Second, the Plan purports to require holders of claims in impaired, non-voting classes, such as Lead Plaintiff and the Certified Class, to salvage their claims against any Released Parties by affirmatively opting out of the Third-Party Release. This opt-out requirement would improperly place the onus on defrauded investors to locate and review the Plan, study the complicated Third-Party Release, and ascertain that even though they are receiving nothing under the Plan and thus are not entitled to vote, they nevertheless must take affirmative steps to preserve their rights against the Released Parties. That exercise is excessively convoluted even for parties represented by counsel, much less absent class members, but is further complicated by the fact that it is *impossible to ascertain* the universe of Released Parties – and thus the scope of the Third-Party Release – without the Plan Supplement, which has not been filed and will not be filed for some time. Moreover, many members of the Certified

Class no longer hold the Debtors' securities and thus are likely unaware of the Plan, the voting deadline, or the Chapter 11 Cases generally. Placing the burden of locating and interpreting complex legal documents on individual members of the Certified Class, *who are receiving nothing under the Plan*, and many of whom likely are not even aware that they have claims against the Non-Debtor Defendants that could be impacted by the Third-Party Release, is fundamentally inequitable and legally unjustified.

20. As applied to holders of claims in impaired, non-voting classes, such as Lead Plaintiff and the Certified Class, the defective opt-out provision in the Plan and Solicitation Procedures, and the illusory "consent" supposedly created thereby, transform the Third-Party Release into a de facto nonconsensual release. While the Third Circuit has suggested, in dicta, that nonconsensual third-party releases might be permissible if supported by specific factual findings that such releases are fair and necessary to a debtor's reorganization, see In re Continental Airlines, 203 F.3d 203, 214 (3d Cir. 2000), the Third-Party Release falls far short of that standard. Unlike debtors in the few chapter 11 cases where nonconsensual third-party releases have passed muster, the Debtors are liquidating, not reorganizing. The Non-Debtor Defendants are no longer employed by the Debtors, are contributing nothing to the Plan, and will provide no benefit whatsoever to the Debtors' proposed post-confirmation liquidation activities. If the Third-Party Release were to release the claims of Lead Plaintiff and/or the Certified Class against the Non-Debtor Defendants, the release would be purely gratuitous and prejudicial – the antithesis of the "fair and necessary" touchstone identified in Continental.

21. Even if the Plan's opt-out mechanism could be described as consensual with respect to Lead Plaintiff and the Certified Class (which it is not), no reasonable, fully informed member of the Certified Class would ever voluntarily relinquish its independent, direct claims

against the solvent Non-Debtor Defendants or anyone else *in exchange for absolutely nothing*. See In re Chassix Holdings, Inc., 533 B.R. 64, 78 (Bankr. S.D.N.Y. 2015). Here, Lead Plaintiff and the Certified Class are receiving nothing under the Plan, and their rights to access applicable insurance would be stripped away. Members of the Certified Class – to the extent they are even aware of the Plan or the Chapter 11 Cases at all – have little reason to do anything, much less find and decipher a convoluted Third-Party Release whose operative provisions are spread out across multiple Plan provisions and a Plan Supplement that has not even been filed yet and will not be filed for some time. The proposed opt-out mechanism is simply a means of engineering illusory "consent" to a release to which no rational member of the Certified Class would ever consent at all.

22. Third, the Third-Party Release renders the Plan unconfirmable because this Court lacks jurisdiction, constitutional adjudicatory authority, or both to release any direct, non-bankruptcy, non-core claims asserted by Lead Plaintiff and the Certified Class against the Non-Debtor Defendants in the Securities Litigation. Lead Plaintiff and the Certified Class are constitutionally entitled to adjudication of those claims in an Article III tribunal (the District Court), and thus they cannot be released or otherwise adjudicated by this Court.

23. To correct these fatal defects that will prevent the eventual confirmation of the Plan, the Plan must expressly exclude Lead Plaintiff and the Certified Class, and their claims against the Non-Debtor Defendants in the Securities Litigation, from the Third-Party Release and the Plan Injunction. Absent such revisions, the Disclosure Statement and Solicitation Procedures should not be approved. To that end, Lead Plaintiff suggests that the following should be added to the definition of "Released Parties" in the Plan, with a corresponding disclosure in the

Disclosure Statement, to clarify that the Non-Debtor Defendants, in their capacity as such, are not Released Parties, as follows:

> , provided that the non-Debtor defendants now or hereafter named in the securities class action captioned as *Di Donato v. Insys Therapeutics, Inc., et al.*, Case No. CV-16-00302-PHX-NVW, pending in the United States District Court for the District of Arizona, in their capacity as such, shall not be Released Parties.

Finally, for the avoidance of any doubt or ambiguity otherwise created by the language of the Third-Party Release, the Plan should expressly indicate as follows, with a corresponding disclosure in the Disclosure Statement:

> Notwithstanding anything to the contrary in this Plan, the Plan Supplement, or the Confirmation Order, nothing herein or therein does, shall, or may be construed to release, enjoin, or otherwise adversely impact the claims and causes of action asserted against any non-Debtor defendant now or hereafter named in the securities class action captioned as *Di Donato v. Insys Therapeutics, Inc., et al.*, Case No. CV-16-00302-PHX-NVW, pending in the United States District Court for the District of Arizona.

Absent the foregoing revisions, the Plan is not confirmable and thus the Disclosure Statement and Solicitation Procedures should not be approved.

II. THE DISCLOSURE STATEMENT SHOULD NOT BE APPROVED BECAUSE IT DOES NOT PROVIDE ADEQUATE INFORMATION.

A. The Disclosure Statement contains an inadequate description of the Securities Litigation.

24. The Securities Litigation involves allegations of substantial wrongdoing by Insys and certain of its former officers and directors. Yet, the Disclosure Statement contains no meaningful description of the Securities Litigation. Instead, the Disclosure Statement states only that "Insys, along with certain former officers, is a defendant in three pending federal securities litigation proceedings in federal courts in Arizona and New York." See Disclosure Statement, Art. 4.2(a). That is not adequate information under section 1125 of the Bankruptcy Code.

25. To resolve this omission, the following paragraph should be added to Section 4.4(a) of the Disclosure Statement:

> A securities class action captioned as *Di Donato v. Insys Therapeutics, Inc., et al.*, Case No. CV-16-00302-PHX-NVW, (the "Securities Litigation") was commenced in the United States District Court for the District of Arizona in February of 2016. By order entered June 3, 2016, the United States District Court for the District of Arizona (the "Arizona District Court") appointed Clark Miller ("Lead Plaintiff") as lead plaintiff and Kessler Topaz Meltzer & Check, LLP as Lead Counsel in the Securities Litigation. Lead Plaintiff filed his *Second Amended Complaint for Violation of the Federal Securities Laws* (the "Securities Complaint") against Insys Therapeutics, Inc. and four of its then-current and former officers and directors (the "Non-Debtor Defendants" and collectively with Insys Therapeutics, Inc., "Defendants") on December 22, 2016. All of the Non-Debtor Defendants have since left the Debtors' employ. The Securities Complaint alleges, among other things, that Defendants engaged in a scheme to mislead investors by misrepresenting and omitting material facts in claiming that prescriptions for the Debtors' "Subsys" product, written by oncologists, were a key factor in Subsys sales growth during fiscal year 2014, while concealing that such sales growth resulted primarily from (a) paying doctors across the country illegal kickbacks in the form of cash, food, alcohol, and other forms of "entertainment" for prescribing Insys' "Subsys" product to patients for off-label use, such as back pain and migraines, at ever-increasing and more expensive doses, and (b) using an "Insurance Reimbursement Center" to deliberately falsify patient diagnoses, use Insys-generated scripts to lie during telephone conversations with payer personnel, and pretend to be employees of prescribing doctors, all to mislead medical insurers, including Medicare and Medicaid, into approving payments for Subsys. The Securities Complaint alleges that Defendants' materially false and misleading statements and omissions of material fact artificially inflated and/or maintained artificial inflation in the price of Insys Therapeutics, Inc. common stock from March 3, 2015 through January 25 , 2016, in violation of Sections 10(b) and/or 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder by the United States Securities and Exchange Commission, 17 C.F.R. § 240.10b-5.

B. The Disclosure Statement violates Bankruptcy Rule 3016(c) by failing to disclose the scope of the Third-Party Release and the Plan Injunction.

26. Bankruptcy Rule 3016(c) provides that

> [i]f a plan provides for an injunction against conduct not otherwise enjoined under the [Bankruptcy] Code, the plan and disclosure statement shall describe in specific and conspicuous language (bold, italic, or underlined text) all acts to be enjoined and identify the entities that would be subject to the injunction.

Fed. R. Bankr. P. 3016(c); see also In re Lower Bucks Hosp., 471 B.R. 419, 460 (Bankr. E.D. Pa. 2012). The Lower Bucks court noted that although Bankruptcy Rule 3016(c) purports to address only injunctions, "[i]ts purpose is to alert parties in interest that the plan purports to restrict their rights in ways that ordinarily would not result from confirmation of a plan." Lower Bucks Hosp., 471 B.R. at 460. "Whether 'enjoined' or merely 'released,' in this case, the Plan was designed to deprive [third parties] of their right to prosecute a claim against a non-debtor." Id. Thus, Bankruptcy Rule 3016(c) applies to the presentation of both the Third-Party Release and the Plan Injunction in the Plan and Disclosure Statement. See id.

27. The Disclosure Statement does not comply with Bankruptcy Rule 3016(c). The Disclosure Statement does not describe or explain the Third-Party Release and the Plan Injunction at all, much less in specific and conspicuous language with emphasized text. See Disclosure Statement, Art. 6.4. In fact, the Disclosure Statement's discussion of the Plan is all of two sentences: "This Disclosure Statement contains the material terms of the Plan and a more detailed description will be added. The Plan, in its entirety, is attached as Exhibit A." Id. The Disclosure Statement does not indicate when the Debtors intend to add a "more detailed description" of the Plan.

28. As a glaring example, the Disclosure Statement does not make specific reference to the fact that the Third-Party Release and Plan Injunction might release and enjoin the prosecution of the claims asserted against the Non-Debtor Defendants in the Securities Litigation. Even if a hypothetical member of the Certified Class was aware of the Plan and located and reviewed the Disclosure Statement and Plan, there is nothing whatsoever in the Disclosure Statement to inform that class member of the potential impact the Third-Party

Release and Plan Injunction could have on his, her, or its claims against the Non-Debtor Defendants.

29. Rather, to ascertain the types of claims the Third-Party Release would release, and thus, that the Plan Injunction would bar after the effective date of the Plan, a hypothetical party must first ascertain whether a particular claim or remedy is one released pursuant to the Plan. If the answer to that inquiry is "Yes," then the Plan Injunction would enjoin the creditor from asserting the claim. In practice, the analysis is remarkably convoluted. To ascertain whether a claim has been released under the Plan, a creditor must determine (a) that the creditor holds a claim against a non-Debtor in the first instance, (b) whether that claim is "based on or relating to, or in any manner arising from, in whole or in part the Debtors," among other potential categories of claims, and (c) whether the party against which they seek to assert the claim is a "Released Party," a definition that again incorporates multiple broad tiers of related parties, defined only by broad categories, requiring cross-references among multiple defined terms, and with no explanatory disclosure in the Disclosure Statement. Even after navigating that maze, the creditor would still be unable to ascertain whether the potential defendant was a Released Party until the Debtors file Exhibit A to the Plan many weeks hence.

30. It is essentially impossible for members of the Certified Class, many of whom are likely not even aware that they might have claims against the Debtors or the Non-Debtor Defendants, to ascertain from the Disclosure Statement the full universe of Released Parties and claims impacted by the Third-Party Release and the Plan Injunction. The exercise is daunting even after an exhaustive analysis of the Plan. A hypothetical creditor likely will have no idea what claims against non-Debtors are impacted by the Third-Party Release, particularly where the definition of "Released Parties" identifies such parties (other than the Debtors) solely by

category and where the Disclosure Statement makes no effort to explain the Third-Party Release or the Plan Injunction.

31. The end result of this analysis is that it is essentially impossible for a member of the Certified Class to reasonably ascertain, even after attempting to navigate numerous provisions of multiple documents, whether the Plan will release a particular claim against a particular non-Debtor. Thus, there is no way a member of the Certified Class reading the Disclosure Statement (if they are even aware that it exists) could make an informed decision whether to object to or opt out of the Third-Party Release. Absent appropriate revisions to the Disclosure Statement and Plan to remedy the defects and issues relating to the scope and appropriateness of the Third-Party Release and Plan Injunction, the Disclosure Statement and Solicitation Procedures should not be approved. To be clear, though, the fatal defects in the Third-Party Release cannot be cured simply by additional disclosure.

C. The Disclosure Statement fails to provide any legal or factual basis for the Third-Party Release or the Plan Injunction, particularly as they relate to Lead Plaintiff, the Certified Class, and the Securities Litigation.

32. As discussed above, there is no legitimate factual or legal basis for the Debtors' failure to expressly exclude the Non-Debtor Defendants, and the direct claims of Lead Plaintiff and the Certified Class against the Non-Debtor Defendants, from the scope of the Third-Party Release. If the Non-Debtor Defendants are in fact Released Parties, the Third-Party Release would be particularly onerous since Lead Plaintiff and the Certified Class are receiving nothing under the Plan.

33. Moreover, if the Non-Debtor Defendants are Released Parties, the Third-Party Release will operate as an impermissible *de facto* final judgment dismissing the claims of Lead Plaintiff and the Certified Class against the Non-Debtor Defendants, even though those claims

cannot be adjudicated outside of the District Court unless Lead Plaintiff and the Certified Class consent to Bankruptcy Court adjudication (which they do not and will not). Despite these glaring flaws, the Disclosure Statement does not even attempt to provide any justification for the gratuitous Third-Party Release – because one does not exist. Of course, explicitly excluding the Non-Debtor Defendants from the definition of Released Parties, and excluding the claims of Lead Plaintiff and the Certified Class against the Non-Debtor Defendants from the scope of the Third-Party Release, would mitigate this issue.

D. The Disclosure Statement does not disclose whether or how the Debtors intend to preserve evidence potentially relevant to the Securities Litigation after the effective date of the Plan.

34. Insys was named as a defendant in the Securities Litigation prior to the filing of the Debtors' chapter 11 cases. At this time, Insys remains a defendant, although the automatic stay under section 362 of the Bankruptcy Code presently prevents the continued prosecution of the Securities Litigation with respect to Insys. As a party, Insys is obligated to preserve evidence relevant to the Securities Litigation. See, e.g., Fed. R. Civ. P. 37(e) (defining remedies for failure to preserve electronically stored information that should have been preserved in anticipation of litigation); Leon v. IDX Systems Corp., 464 F.3d 951, 959 (9th Cir. 2006) ("A party's destruction of evidence qualifies as willful spoliation if the party has 'some notice that the documents were *potentially* relevant to the litigation before they were destroyed.'") (quoting U.S. v. Kitsap Physicians Serv., 314 F.3d 995, 1001 (9th Cir. 2002)).

35. Notwithstanding the Debtors' duty to preserve evidence that is potentially relevant to the Securities Litigation, the Plan only requires the Debtors to preserve evidence relevant to the "Insurance Rights, the Products Liability Insurance Rights, and Causes of Action on behalf of the Trusts." See Plan, Art. 5.13(a). The Plan does not contain any requirement that

the Debtors or the liquidating trustee take any action to preserve evidence potentially relevant to the Securities Litigation, nor does the Disclosure Statement contain any explanation of what, if any, measures the Debtors or the liquidation trustee will implement to ensure such evidence is retained and preserved through the completion of the Securities Litigation.

36. Lead Plaintiff has completed fact discovery in the Securities Litigation. However, any deficiency in the Debtors' prior document production may necessitate supplemental discovery in the future. In the event such supplemental discovery becomes necessary, the loss, destruction, or unavailability of evidence potentially relevant to the Securities Litigation would materially prejudice Lead Plaintiff and the Class in the prosecution of the Securities Litigation. Accordingly, the Plan must require the Debtors and their successors (the liquidating trusts contemplated by the Plan) to preserve originals or true copies of the Debtors' books, records, and documents, electronically stored information, and other evidence potentially relevant to the Securities Litigation until the conclusion of the Securities Litigation. To that end, the Plan or any order confirming the Plan should include the following provision, with a corresponding disclosure in the Disclosure Statement:

> Until the entry of a final order of judgment or settlement in the litigation captioned as *Di Donato v. Insys Therapeutics, Inc., et al., Case No. CV-16-00302-PHX-NVW* (the "Securities Litigation"), the Debtors, the Liquidating Trustee, and any other transferee of the Debtors' books, records, documents, files, electronic data (in whatever format, including native format), or any tangible object potentially relevant to the Securities Litigation, wherever stored (collectively, the "Potentially Relevant Books and Records") (a) shall preserve and maintain the Potentially Relevant Books and Records, (b) shall not destroy, abandon, transfer, or otherwise render unavailable such Potentially Relevant Books and Records, and (c) shall comply with any order of any court of competent jurisdiction or document request or subpoena, as applicable, issued in connection with the Securities Litigation with respect to any Potentially Relevant Books and Records, subject to any

appropriate objections pursuant to the Federal Rules of Civil Procedure or the Federal Rules of Evidence.

37. In addition, the Plan and Disclosure Statement should make clear that the Plan Injunction will not impact the ability of Lead Plaintiff and the Certified Class to obtain the Debtors' books and records that are potentially relevant to the Securities Litigation through post-confirmation discovery in the Securities Litigation, subject to any appropriate objections thereto.

E. The Disclosure Statement does not disclose whether the claims of Lead Plaintiff and the Certified Class against Insys will be preserved to the extent of available insurance coverage.

38. The Debtors' prepetition directors' and officers' liability insurance policies are left intact by the Plan and deemed assumed to the extent they are executory contracts. See Plan, Art. 8.7. In addition, because the Plan is a plan of liquidation, the Debtors are not entitled to a discharge, see 11 U.S.C. § 1141(d)(3)(A), and thus, the claims of Lead Plaintiff and the Certified Class against the Debtors should remain unaffected to the extent a recovery is available from available insurance. However, Disclosure Statement does not explain whether or how the Plan would permit Lead Plaintiff or the Certified Class to access coverage under such policies in connection with their claims against the Debtors to the extent of available insurance coverage, which would have no impact on the Debtors' estates.

39. In addition, the Plan purports to permit the liquidating trustee being appointed pursuant to the Plan to "pursue all Causes of Action (other than Causes of Action arising from the Products Liability Insurance Policies which shall be reserved for the Victims Restitution Trust) that are not released under the Plan." See Plan, Art. 5.8(b). The Plan should expressly preserve and clarify that this provision does not, as it should not, grant the liquidating trustee any greater rights than any other party with claims covered by Debtors' directors' and officers'

insurance policies. Thus, the following proviso should be added to the end of Article 5.8(d) of the Plan:

> (ix) nothing in the Plan or Confirmation Order shall (a) constitute a finding or stipulation that any proceeds of any of the Debtors' directors' and officers' insurance policies are property of the Estate or that the Insys Liquidating Trust has any priority with respect to such insurance proceeds; (b) modify or supersede any provision (including but not limited to any priority of payments provision) of any of the Debtors' directors' and officers' insurance policies, or (c) otherwise preclude the lead plaintiff and the certified class in the litigation captioned as *Di Donato v. Insys Therapeutics, Inc., et al.*, Case No. CV-16-00302-PHX-NVW, pending in the United States District Court for the District of Arizona, or any party entitled to coverage under the Debtors' directors' and officers' insurance policies from seeking and obtaining coverage thereunder.

F. The Plan and Solicitation Procedures should be modified to acknowledge Lead Plaintiff's authority to opt-out of the Third-Party Release on behalf of the Certified Class.

40. The Plan must expressly recognize Lead Plaintiff's authority to opt out of the Third-Party Release on behalf of the Certified Class. Lead Plaintiff, like all class representatives in federal class-action litigation, is a fiduciary for all absent members of the Certified Class. See, e.g., In re Gen. Motors Corp. Pick-Up Truck Fuel Prod. Liab. Litig., 55 F.3d 768, 801 (3d Cir. 1995) ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed."); Schick v. Berg, 2004 WL 856298, *4 (S.D.N.Y. Apr. 20, 2004) ("The general rule is that the named plaintiff and counsel bringing the action stand as fiduciaries for the entire class, commencing with the filing of a class complaint.").

41. The Lead Plaintiff Order empowered Lead Counsel to, among other things, "speak for all Plaintiffs and class members in all matters regarding the litigation[.]" Lead

Plaintiff Order, ¶ 3. On that basis alone, Lead Plaintiff, through Lead Counsel, has the authority to opt out of the Third-Party Release on behalf of all members of the Certified Class. In addition, now that the Certified Class has been certified, Lead Plaintiff has that authority in his capacity as class representative. As a fiduciary for the Certified Class, Lead Plaintiff not only has the *ability* to take necessary actions to protect the rights of absent members of the Certified Class, including by opting out of the Third-Party Release on their behalf, he may have an affirmative *obligation* to do so. The same duty applies to lead counsel, which "must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4).

42. Nowhere are these duties more essential than in connection with the Third-Party Release, which threatens to eviscerate the claims of Lead Plaintiff and the Certified Class against numerous solvent Non-Debtor Defendants. In order to enable Lead Plaintiff to fulfill his fiduciary duty, the Court should find in any order approving the Solicitation Procedures that Lead Plaintiff has inherent authority (or, absent such a finding, expressly authorize Lead Plaintiff) to opt out of the Third-Party Release on behalf of the entire Certified Class.

43. Such a finding is also consistent with Lead Plaintiff's inherent powers as a court-appointed lead plaintiff. For instance, even prior to certification of the Certified Class, Lead Plaintiff had the ability to further amend the Second Amended Complaint, defend against dispositive motions, take and defend discovery, and engage in numerous other litigation-related activities to preserve the claims of the Certified Class. Where the Third-Party Release and Plan Injunction would have essentially the same practical effect as an order dismissing the Second Amended Complaint with prejudice with respect to most or all of the Non-Debtor Defendants,[6]

[6] For the avoidance of doubt, Lead Plaintiff respectfully submits that this Court lacks jurisdiction and/or constitutional adjudicatory authority to approve the Third-Party Release and Plan Injunction with respect to the claims of Lead Plaintiff and the Certified Class against the Non-Debtor Defendants (or any other non-Debtor

the ability to opt-out of that release is no different from Lead Plaintiff's inherent ability to defend a motion to dismiss.

44. The ability to opt-out on behalf of the entire Certified Class does not expand upon Lead Plaintiff's rights in any way or prejudice the Debtors or the Non-Debtor Defendants. On the contrary, it simply enables Lead Plaintiff to fulfill his duties under Fed. R. Civ. P. 23 and the PSLRA, and to take the necessary steps to avoid the manifest injustice threatened by the Third-Party Release. By opting out of the Third-Party Release on behalf of the entire Certified Class, Lead Plaintiff will prevent the Debtors from artificially "'deeming "consent' to exist in situations where no affirmative consent ha[s] actually been manifested," where, if given the option to affirmatively consent, no rational class member would ever consent at all. See Chassix, 533 B.R. at 78. Recognizing Lead Plaintiff's ability to opt-out on behalf of the Certified Class will preserve and protect the rights and claims of class members so they can decide for themselves whether to participate in the Securities Litigation when the time comes.

RESERVATION OF RIGHTS

45. Neither the filing of this Objection nor anything contained herein are intended to limit, prejudice, or otherwise impact any rights of Lead Plaintiff or the Certified Class in connection with the filing, solicitation, or confirmation of the Plan (or any other plan) or approval of the Disclosure Statement and the Plan's solicitation procedures. Lead Plaintiff, on behalf of itself and the Certified Class, hereby reserves all such rights, including but not limited to the rights to (a) object on any and all grounds to (i) approval of the disclosure statement and solicitation procedures for any plan and (ii) confirmation of any plan, (b) vote on any plan, and take any other action permitted or required under the Bankruptcy Code and other applicable law,

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party), and reserves the right to oppose confirmation of the Plan on any basis, including but not limited to the inability of an Article I court to enter a final order releasing or enjoining such claims.

on behalf of itself and the Certified Class, and (c) seek, on behalf of itself and the Certified Class, any other relief in connection with the foregoing.

46. For the avoidance of doubt, this Objection does not, shall not, and shall not be deemed to:

a. constitute a submission by Lead Plaintiff, either individually or for the Certified Class or any member thereof, to the jurisdiction of the Bankruptcy Court;

b. constitute consent by Lead Plaintiff, either individually or for the Certified Class or any member thereof, to entry by the Bankruptcy Court of any final order in any non-core proceeding, **which consent is hereby withheld unless, and solely to the extent, expressly granted in the future with respect to a specific matter**;

c. waive any substantive or procedural rights of Lead Plaintiff or the Certified Class or any member thereof, including but not limited to (a) the right to challenge the constitutional authority of the Bankruptcy Court to enter a final order or judgment on any matter, (b) the right to have final orders in non-core matters entered only after de novo review by a District Court judge, (c) the right to trial by jury in any proceedings so triable herein, in the Debtors' Chapter 11 Cases, including all adversary proceedings and other related cases and proceedings (collectively, "Related Proceedings"), in the Securities Litigation, or in any other case, controversy, or proceeding related to or arising from the Debtors, their chapter 11 cases, any Related Proceedings, or the Securities Litigation, (d) the right to have the reference withdrawn by a United States District Court in any matter subject to mandatory or discretionary withdrawal, or (e) all other rights, claims, actions, arguments, counterarguments, defenses, setoffs, or recoupments to which Lead Plaintiff or the Certified Class or any member thereof are or may be entitled under agreements, at law, in equity, or otherwise, all of which rights, claims, actions, arguments, counterarguments, defenses, setoffs, and recoupments are expressly reserved.

47. **For the avoidance of doubt, Lead Plaintiff, on behalf of itself and the Certified Class and the members thereof, does not consent, and expressly objects, to (a) the Third-Party Release and Plan Injunction and (b) this Court's entry of any final order or judgment that this Court lacks jurisdiction or statutory and/or constitutional adjudicatory authority to enter without the affirmative and knowing consent of all parties affected thereby. Lead Plaintiff, on behalf of itself and the Certified Class and the members**

thereof, further reserves all rights to object to confirmation of the Plan, or any other plan proposed in the Chapter 11 Cases, on any basis, including but not limited to the fact that the Court lacks constitutional adjudicatory authority pursuant to Stern v. Marshall, 564 U.S. 462 (2011), and its progeny to approve a release of the claims of Lead Plaintiff and the Certified Class against the Non-Debtor Defendants.

CONCLUSION

48. For all of the foregoing reasons, the Disclosure Statement should not be approved unless the issues raised in this Objection are addressed through appropriate modifications of the Disclosure Statement, Plan, and the Plan's solicitation procedures.

Dated: November 4, 2019

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CERTIFICATE OF SERVICE

I, Christopher P. Simon, hereby certify that on November 4, 2019, I caused a true and correct copy of *Objection of Securities Lead Plaintiff to Approval of Disclosure Statement for Joint Chapter 11 Plan of Liquidation Proposed by Insys Therapeutics, Inc. and its Affiliated Debtors* to be served upon all interested parties via CM/ECF and upon the parties listed below in the manner indicated.

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