

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

In re:

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

Debtors.

Chapter 11

Case No. 19-11292 (KG)

(Jointly Administered)

Objection Deadline: January 6, 2020 at 4:00 PM (ET)

Hearing Date: January 16, 2020 at 9:00 AM (ET)

**Re: D.I. 928, 955**

**LIMITED OBJECTION OF SECURITIES LEAD PLAINTIFF TO CONFIRMATION OF  
THE SECOND AMENDED 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 limited objection (the “Limited Objection”) to confirmation of the *Second Amended Joint Plan of Liquidation Proposed by Insys Therapeutics, Inc. and its Affiliated Debtors* (the “Second Amended Plan”) [D.I. 928]<sup>2</sup> filed by the debtors in possession (the “Debtors”) in the above-captioned chapter 11 bankruptcy cases (the “Chapter 11 Cases”). As and for this Limited Objection, Lead Plaintiff respectfully states as follows:

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

<sup>2</sup> The Debtors subsequently filed the solicitation version of the Second Amended Plan at D.I. 955.

**PRELIMINARY STATEMENT**<sup>3</sup>

1. Lead Plaintiff objects to confirmation with respect to certain provisions of the Second Amended Plan that, at the very least, warrant clarification to avoid any future confusion or unintended consequences. To that end, any Confirmation Order entered in these Chapter 11 Cases should clarify that

- the Third-Party Release does not release or otherwise impact any of the claims of Lead Plaintiff and the Certified Class against the Non-Debtor Defendants;
- nothing in the Second Amended Plan, any Plan Document (including the Asset Transfer Agreements), or the Confirmation Order alters or otherwise impacts the rights of any party in connection with the D&O Policies or provides the ILT with any other or greater rights with respect to the D&O Policies than whatever rights, if any, the Debtors had prior to the Effective Date;
- notwithstanding the treatment of the Class Claims through Class 10 of the Second Amended Plan, Lead Plaintiff, on behalf of himself and the Certified Class, retains the ability to pursue the Class Claims against Insys solely to the extent of available insurance; and
- the VRT and the ILT, as applicable, shall retain originals or true copies of all of the Potentially Relevant Books and Records until the conclusion of the Securities Litigation.

**BACKGROUND**

**The Securities Litigation**

2. 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

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<sup>3</sup> Capitalized terms used in this Preliminary Statement have the meanings given thereto below.

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***

3. 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 or former officers and directors (the “Non-Debtor Defendants”) and collectively with Insys, the “Defendants”).<sup>4</sup>

4. The Second Amended Complaint alleges, among other things, 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,<sup>5</sup> 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***

5. 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.,

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<sup>4</sup> A fourth individual defendant was dismissed in August 2017.

<sup>5</sup> 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.

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.

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

6. On December 13, 2019, Lead Plaintiff filed a consent motion (the "Motion to Dismiss") [Securities Litigation D.I. 311] to dismiss Insys from the Securities Litigation with prejudice, subject to a carve-out preserving the rights of Lead Plaintiff to pursue the claims it filed on behalf of himself and the Certified Class in these Chapter 11 Cases [Claim Nos. 10585, 10586] (the "Class Claims"). The Non-Debtor Defendants have consented to the relief requested in the Motion to Dismiss, subject to provision of notice to the Certified Class.

7. On December 20, 2019, the Non-Debtor Defendants filed a motion for summary judgment in the Securities Litigation [Securities Litigation D.I. 317].

### **The Second Amended Plan and Disclosure Statement**

8. The Debtors filed these Chapter 11 Cases on June 10, 2019. On November 29, 2019, the Debtors filed the Second Amended Plan and the accompanying disclosure statement (the "Disclosure Statement") [D.I. 929].<sup>6</sup>

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<sup>6</sup> The Debtors subsequently filed the solicitation version of the Disclosure Statement at D.I. 956.

**LIMITED OBJECTION**

**A. The Confirmation Order should expressly provide that the Third-Party Release does not release or otherwise impact the claims of Lead Plaintiff and the Certified Class against the Non-Debtor Defendants.**

9. Article 10.5(b) of the Second Amended Plan contains a deemed release (the “Third-Party Release”) of certain claims and causes of action against various categories of individuals and entities by, among others, holders of claims against and interests in the Debtors who do not opt out of granting the Third-Party Release. Article 10.7, in turn, contains an injunction that would bar, among other things, prosecution of claims released through the Third-Party Release. In his objection (the “Disclosure Statement Objection”) [D.I. 843] to approval of the initial version of the Disclosure Statement [D.I. 613], Lead Plaintiff asserted that a potential ambiguity in the *Joint Plan of Liquidation Proposed by Insys Therapeutics, Inc. and its Affiliated Debtors* [D.I. 612] made it at best unclear whether any of the Non-Debtor Defendants were “Released Parties” under the Third-Party Release. See Disclosure Statement Objection, ¶ 10.

10. After filing the Disclosure Statement Objection, bankruptcy counsel for Lead Plaintiff engaged in extensive discussions with counsel for the Debtors, who confirmed that none of the Non-Debtor Defendants were intended to be Released Parties. In the Second Amended Plan, the Debtors modified the Third-Party Release to eliminate the ambiguity that Lead Plaintiff identified in the Disclosure Statement Objection. As a result, Lead Plaintiff understands that none of the Non-Debtor Defendants are Released Parties, and thus none of the claims asserted against the Non-Debtor Defendants in the Securities Litigation will be released through or otherwise impacted by the Second Amended Plan.

11. For the further avoidance of any doubt and to prevent future unintended consequences, any order confirming the Second Amended Plan or any other chapter 11 plan for the Debtors (a “Confirmation Order”) should expressly provide as follows:

Notwithstanding anything to the contrary in this Plan, any Plan Document, 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.

**B. The Confirmation Order should make clear that Lead Plaintiff can pursue the Class Claims against the Debtors, solely to the extent of available insurance.**

12. 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 10 under the Second Amended Plan. Pursuant to the Second Amended Plan, claims in Class 10 “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 Second Amended Plan, Art. 4.10(a).

13. The Debtors’ existing directors’ and officers’ liability insurance policies (the “D&O Policies”) are left intact by the Second Amended Plan and deemed assumed to the extent they are executory contracts. See Second Amended Plan, Art. 8.7(b); ¶¶ 23-24 below. Because the Second Amended Plan is a plan of liquidation, the Debtors are not entitled to a discharge, see 11 U.S.C. § 1141(d)(3)(A). Thus, the Class Claims should remain unaffected to the extent a recovery is available from existing insurance, which would have no impact whatsoever on the Debtors’ estates and is fully consistent with the treatment that should be afforded to such claims notwithstanding section 510(b).

14. However, the Second Amended Plan does not indicate whether Lead Plaintiff, on behalf of himself and the Certified Class, will be able to pursue the Class Claims against Insys to the extent of any insurance coverage available under the D&O Policies. In fact, the treatment of Class 10 under the Second Amended Plan seems to imply the contrary. To the extent any insurance coverage and proceeds are available under the D&O Policies in connection with the Class Claims, failure to expressly preserve the rights of Lead Plaintiff and the Certified Class to pursue such coverage would unjustifiably provide the relevant insurers with a gratuitous, de facto release and the Debtors with a discharge to which they are not entitled. To resolve this issue, the Confirmation Order should expressly provide as follows:

Nothing in the Plan, any Plan Document, or this Confirmation Order shall prevent any holder of a Section 510(b) Subordinated Claim in Class 10 from pursuing such Claim solely to the extent of available coverage under any applicable Insurance Policies.

**C. The Confirmation Order should clarify that confirmation of the Second Amended Plan does not expand or otherwise alter the rights of any party with respect to the D&O Policies.**

15. On December 30, 2019, the Debtors filed the *Notice of Filing of Plan Supplement Pursuant to the Second Amended Joint Plan of Liquidation Proposed by Insys Therapeutics, Inc. and its Affiliated Debtors* (the “Plan Supplement”) [D.I. 1049]. The Plan Supplement includes, among other things:

- a schedule (the “Assumed Contracts Schedule”) [D.I. 1049 Ex. C] of executory contracts and leases to be assumed by the Debtors and assigned to either the Insys Liquidation Trust (the “ILT”) or the Victims’ Restitution Trust (the “VRT”) to be created under, and on the effective date of (the “Effective Date”), the Second Amended Plan,
- agreements pursuant to which certain assets of the Debtors will be transferred to the ILT and the VRT on the Effective Date (respectively, the “ILT Asset Transfer Agreement”

and the “VRT Asset Transfer Agreement” and collectively, the “Asset Transfer Agreements”) [D.I. 1049 Exs. G and K].

16. Pursuant to the VRT Asset Transfer Agreement, all contracts on the Assumed Contracts Schedule “related to Products Liability Insurance Policies” will vest in the VRT on the Effective Date. See VRT Asset Transfer Agreement, § 1(b). Pursuant to the ILT Asset Transfer Agreement, “all Assumed and Assigned Contracts (other than those including or related to Products Liability Insurance Policies)” will vest in the ILT on the Effective Date. See ILT Asset Transfer Agreement, § 1(d). Seven of the D&O Policies (as defined below) are listed on the Assumed Contracts Schedule. See Assumed Contracts Schedule at 2. The D&O Policies do not fit the definition of “Products Liability Insurance Policies” and thus, it appears that the Debtors intend for some or all of the D&O Policies to vest in the ILT through the ILT Asset Transfer Agreement on the Effective Date.<sup>7</sup>

17. In addition, the ILT Asset Transfer Agreement provides for “any and all of the Debtors’ Insurance Rights (other than the Products Liability Insurance Rights and Products Liability Insurance Proceeds)” to vest in the ILT on the Effective Date. Id. § 1(a). The Second Amended Plan defines “Insurance Rights” as follows:

any and all rights, titles, privileges, interests, claims, demands, or entitlements of the Debtors to any proceeds, payments, benefits, Causes of Action, choses in action, defense or indemnity arising under, or attributable to, any and all Insurance Policies, other than the Products Liability Insurance Rights, now existing or hereafter arising, accrued or unaccrued, liquidated or unliquidated, matured or unmatured, disputed or undisputed, fixed or contingent. For the avoidance of doubt, “Insurance Rights” include Insurance Proceeds.”

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<sup>7</sup> To the extent any of the D&O Policies vest in the VRT, the issues set forth in this Limited Objection apply equally with respect thereto.



Second Amended Plan at 13.<sup>8</sup>

18. Upon information and belief, any rights the Debtors may have to coverage under the D&O Policies (assuming those policies are similar in form to substantially all directors' and officers' liability insurance policies issued to U.S.-based public companies in approximately the past 20 years) are contractually subordinated, through "priority of payments" clauses, to the rights of the Non-Debtor Defendants and any other individuals insured thereunder to receive coverage. Because the ILT would obtain *only the rights of the Debtors* with respect to the D&O Policies, see id., the ILT will have no greater rights than the Non-Debtor Defendants (and thus, by extension, Lead Plaintiff and the Certified Class) to any coverage under or proceeds of the D&O Policies (and, in fact, will have at best a subordinated right to pursue coverage only after all claims against the Non-Debtor Defendants are paid in full).

19. Again, to avoid any confusion that may be created by the assignment of any D&O Policies to the ILT and to make clear that confirmation of the Second Amended Plan and vesting in the ILT of any Insurance Rights with respect to the D&O Policies does not, as it should not, grant the ILT (or anyone else) any greater rights than any other party with claims covered by D&O Policies, the Confirmation Order should expressly provide as follows:

Nothing in the Plan, any Plan Document, or this Confirmation Order (a) expands or otherwise alters any rights of any Person or Entity under any directors' and officers' liability Insurance Policies ("D&O Policies"), (b) constitute a finding or stipulation that any proceeds of the D&O Policies are property of the Estate or that the Insys Liquidating Trust has any priority with respect to such proceeds, or (c) otherwise modify or supersede any provision (including but not limited to any priority of payments provision) of any D&O Policies. For the avoidance of doubt, the Insys Liquidation Trust and the Victims Restitution Trust, as applicable,

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<sup>8</sup> "Insurance Proceeds" is defined as "any proceeds recovered from an Insurance Company, not including the Products Liability Insurance Proceeds, for the Insys Liquidation Trust." Second Amended Plan at 12.

shall have no greater rights under any D&O Policies than the Debtors had prior to the Effective Date.

**D. The Confirmation Order should require the VRT and the ILT to preserve evidence potentially relevant to the Securities Litigation until the conclusion of the Securities Litigation.**

20. Insys was named as a defendant in the Securities Litigation prior to the filing of the Chapter 11 Cases. At this time, Insys remains a defendant (subject to the automatic stay). However, assuming the District Court grants the Motion to Dismiss, Insys will eventually be dismissed from the Securities Litigation and Lead Plaintiff will be able to pursue the Class Claims solely through the bankruptcy claims process. 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)). There exists no valid basis to absolve Insys of that duty prior to the conclusion of the Securities Litigation, particularly while the Class Claims remain pending in connection with these Chapter 11 Cases.

21. Notwithstanding the Debtors’ duty to preserve evidence that is potentially relevant to the Securities Litigation, the Second Amended Plan does not require the Debtors, the ILT, or the VRT to take any action to preserve evidence potentially relevant to the Securities Litigation through the conclusion thereof (including the resolution of the Class Claims).

22. Lead Plaintiff has completed fact discovery in the Securities Litigation. However, any deficiency in the Debtors’ prior document production, or future events in the District Court or this Court, 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 and the Class Claims. Accordingly, the Confirmation Order must require the Debtors, the ILT, and the VRT 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 Confirmation Order should include the following provision:

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"), notwithstanding anything in the Plan, any Plan Document, or this Confirmation Order, the Debtors, the trustees or administrators of the Insys Liquidation Trust and the Victims Restitution Trust, 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.

#### **RESERVATION OF RIGHTS**

23. For the avoidance of doubt, this Limited 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.

24. **For the avoidance of doubt, Lead Plaintiff, on behalf of himself 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 himself and the Certified Class and the members thereof, further reserves all rights to assert that the Court lacks constitutional adjudicatory authority pursuant to Stern v. Marshall, 564 U.S. 462 (2011), and its progeny to approve the Third-Party Release.**

#### **CONCLUSION**

25. For all of the foregoing reasons, any Confirmation Order entered by the Court should contain each of the curative provisions set forth in this Limited Objection.

[ *signature page follows* ]

Dated: January 6, 2020

**CROSS & SIMON, LLC**

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*Counsel to Lead Plaintiff and the Certified Class*

**CERTIFICATE OF SERVICE**

I, Christopher P. Simon, hereby certify that on January 6, 2020, I caused a true and correct copy of *Limited Objection of Securities Lead Plaintiff to Confirmation of the Second Amended 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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