IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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In re	Chapter 11
INSYS THERAPEUTICS, INC. *et al.*,[1]	Case No. 19-11292 (KG)
	Jointly Administered
Debtors.	Objection Deadline: January 6, 2020 at 4:00 p.m. Hearing Date: January 16, 2020 at 9:00 a.m.

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LIMITED OBJECTION OF THE SECURITIES AND EXCHANGE COMMISSION TO CONFIRMATION OF THE DEBTORS' SECOND AMENDED JOINT CHAPTER 11 PLAN OF LIQUIDATION

The United States Securities and Exchange Commission ("Commission"), a statutory party to these proceedings[2] and the federal agency responsible for regulating and enforcing compliance with the federal securities laws, objects to approval of the Second Amended Joint Chapter 11 Plan of Liquidation (the "Plan") [Docket No. 955] of Insys Therapeutics, Inc. ("Insys") and its affiliated debtors (collectively, the "Debtors"), pursuant to Sections 524(e) and 1123(a)(4) of 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code") and applicable law. In support of its limited objection, the Commission respectfully states as follows:

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[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 3100 West Way Rd., Suite 201, Chandler, Arizona 85226.

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

INTRODUCTION

The Commission objects to the Plan because it would release the liability of, and permanently enjoin actions against, non-debtor third parties in contravention of Sections 524(e) and 1123(a)(4) of the Bankruptcy Code. As a general matter, nondebtor third party releases contravene Section 524(e) of the Bankruptcy Code, which provides that only debts of the debtor are affected by Chapter 11 discharge provisions. Such releases have special significance for public investors, such as holders of Class 13 Equity Interests, because they may enable nondebtors to benefit from a debtor's bankruptcy by obtaining their own releases with respect to past misconduct, including violations of the federal securities laws or breaches of fiduciary duty under state law.

While such releases may be allowed if parties expressly consent to them in exchange for consideration from each released party and the releases do not result in disparate treatment among similarly situated class members, those circumstances are not present here. Nor are there exceptional circumstances that would support non-consensual releases. The Commission has similar concerns regarding an exculpation clause in the Plan that provides that the exculpated parties shall have no liability for any acts or omissions taken in connection with the Chapter 11 case, which could include certain prepetition conduct, but excluding criminal acts, fraud, gross negligence, or willful misconduct. In addition, the injunction set forth at Section 10.4(b) of the Plan is overlybroad as it would prevent "all Persons" from asserting claims against the released parties, not just those persons who have consented to the releases. Plan at 71.

Thus, the release and exculpation provisions should be deleted from the Plan or the Plan should be amended to provide: (i) that Class 13 Equity Interests be carved out of the release, or be required to "opt in" to the release rather than having to affirmatively "opt out" of the release;

and (ii) that the exculpation clause will be narrowly tailored to exclude prepetition conduct. In addition, the Plan should clarify that, with respect to the releases, the injunction only applies to parties that have provided affirmative consent to such releases.

BACKGROUND

The Debtors were a specialty pharmaceutical company that developed and commercialized drugs and drug delivery systems. [Docket No. 956, hereinafter ("Discl. Stmt.") at 26]. Over the last several years, the Debtors faced substantial litigation relating to the opioid crisis. (Discl. Stmt. at 28-33). Some of the litigation is based on particular alleged activities of the Debtors' former executives, many of whom either pleaded guilty to or were convicted after trial of federal criminal activity relating to such activities. (*Id*. at 29). Many of these inquiries and lawsuits against the Debtors (and certain of their former employees, officers, and directors) have focused on the marketing of the Debtors' drugs and issues related to potential violations of the Anti-Kickback Statute and the Food, Drug & Cosmetic Act. (*Id*.). The Department of Justice brought civil and criminal actions/investigations against the Debtors. (*Id*. at 29-31).

Insys, along with certain former officers, is also a defendant in three pending federal securities litigation proceedings in federal courts in Arizona and New York, and certain of the Debtors' former officers and directors are defendants in derivative actions pending in Delaware and Arizona. (Discl. Stmt. at 34).

On June 10, 2019, the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Insys is a publicly traded company with its shares formerly listed on the NASDAQ Global Market LLC under the ticker symbol INSY. On June 24, 2019, The Nasdaq Stock Market LLC filed a Form

25 relating to the delisting and deregistration of Insys's common stock under Section 12(b) of the Securities Exchange Act. Insys's common stock now trades on the OTC Pink Sheets Market.

Since the Petition Date, the Debtors have been engaged in the liquidation of all of their assets, through Section 363 sales approved by the bankruptcy court. (Discl. Stmt. at 43-47). On September 17, 2019, the Debtors filed the Chapter 11 Plan and Disclosure Statement, as amended. Pursuant to the Plan, public shareholders and holders of Section 510(b) claims[3] are deemed to reject the Plan and will not receive any distribution. (Discl. Stmt. at 76). On December 4, 2019 [Docket No. 952], this Court approved the Disclosure Statement but preserved until confirmation the issues regarding third party releases.

The Plan contains provisions that seek to release and permanently enjoin actions against numerous nondebtor third parties (the "Third Party Release") in a manner that we believe contravenes Section 524(e) of the Bankruptcy Code and applicable law. The Third Party Release purports to release third parties, including the Debtors' and the Committee's and its members': (a) predecessors, successors, permitted assigns, subsidiaries, and controlled affiliates; (b) officers and directors, principals, members, employees, financial advisors, attorneys, accountants, investment bankers, consultants, 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; and (c) respective heirs, executors, estates, and nominees, in each case in their capacity as such; *provided*, *however*, that no Person listed on the Non-Released Party Exhibit (as such term is defined in the Plan)

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[3] Section 510(b) of the Bankruptcy Code provides that "[f]or the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, [or] for damages arising from the purchase or sale of such a security . . . shall be subordinated to all claims or interests that are senior to or equal to the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock." 11 U.S.C. § 510(b).

shall be a released party. (Plan at 18-19, defining the "Released Parties"). On December 30, 2019, the Debtors filed the Non-Released Party Exhibit, which includes fourteen individuals [Docket No. 1049, Exhibit E]. According to the exhibit, "[i]f no action has been instituted against a party on this list within one (1) year of the Effective Date of the Plan, such party shall be released in accordance with the Plan." (*Id.* at n.1). The Third Party Release is for any and all claims and causes of action and a wide range of other obligations, but excludes claims arising from fraud, gross negligence, or willful misconduct. (Plan at 74-75).

The Third Party Release binds holders of claims and interests who: (i) vote in favor of the Plan or are unimpaired under the Plan; (ii) vote to reject the Plan but fail to opt out of the Third Party Release; (iii) are entitled to vote on the Plan but abstain from voting on the Plan and fail to opt out of the Third Party Release; (iv) are deemed to reject the Plan but fail to opt out of the Third Party Release; and (v) all other holders of Claims and Interests to the maximum extent permitted by law. (Plan at 74).[4]

In addition, the Debtors have sought a waiver of "the strict notice rule and [to be] excuse[d] . . . from mailing Solicitation Packages to addresses from which the Debtors received mailings returned as undeliverable, unless the Debtors are provided with a new mailing address before the Voting Deadline." [Docket No. 715 at ¶ 49; Docket No. 952 at ¶ 17]. The Debtors have not clearly stated whether they will carve out of the Third Party Release those parties to whom they do not mail Solicitation Packages or whose solicitation packages were returned as undeliverable. And although the Debtors state that "the third-party releases apply to 'holders of all Claims and Interests *who were given notice of the opportunity to opt out* of granting the

[4] This language could be interpreted as an attempt to bind holders of Claims and Interests even if they opt out of the Third Party Release, or to bind parties that previously held Claims or Interests in the Debtors.

releases set forth herein but did not opt out," [Docket No. 932, Exhibit C at 2] (emphasis in original), the Debtors appear to be seeking to bind holders of claims and interests through publication notice.

DISCUSSION

I. The Third Party Release is not consensual and does not satisfy the standard to be approved as a nonconsensual release.

A. The Third Party Release is Not Consensual.

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

The Commission has historically taken an interest in this issue because the release of nondebtors can have a detrimental impact on public investors.[5] Investors and creditors could be blocked by such provisions from bringing suits against nondebtor parties under the federal securities laws or for breach of fiduciary duty under state law. Nonetheless, courts in this circuit have allowed releases in favor of nondebtors in Chapter 11 cases if the affected parties have individually *consented* to them, and case law addresses the manner in which valid consent can be established. *See, e.g., In re Washington Mutual*, 442 B.R. 314, 355 (Bankr. D. Del. 2011); *In re Zenith Electronics Corp*., 241 B.R. 92, 111 (Bankr. D. Del. 1999).

In the Commission's view, releases should be considered to be consensual only if the affected parties provide affirmative consent. Here, by contrast, the Class 13 Equity Interests are

[5] On its face, the Third Party Release could also apply to tort and personal injury claimants for negligence claims against the Debtors' directors and officers who continued to be employed post-petition.

bound unless they affirmatively opt out of the Third Party Release. Bankruptcy courts in this Circuit have generally held that an opt-out mechanism is not sufficient to support a third party release, particularly with respect to those who do not return a ballot. *See In re Emerge Energy Services LP,* No. 19-11563, Slip Op. at 23 (Bankr. D. Del. Dec. 5, 2019) ("[T]he Court cannot on the record before it find that the failure of a creditor or equity holder to return a ballot or Opt-Out Form manifested their intent to provide a release. Carelessness, inattentiveness, or mistake are three reasonable alternative explanations.").

Thus, simply abstaining from voting or voting to reject a plan but failing to opt out of the releases does not constitute "consent." *In re Washington Mutual*, 442 B.R. 314, 355 (Bankr. D. Del. 2011) ("Failing to return a ballot is not a sufficient manifestation of consent to a third party release"); *cf. In re Exide Techs*., 303 B.R. 48, 74 (Bankr. D. Del. 2003) (court found nondebtor releases consensual and binding only on creditors and interest holders voting to accept the plan); *In re Spansion, Inc.*, 426 B.R. 114, 144-45 (Bankr. D. Del. 2010) (court found releases consensual only with respect to parties voting to accept the Plan, and unimpaired creditors deemed to have accepted the Plan). *But see In re Indianapolis Downs, LLC*, 486 B.R. 286, 306 (Bankr. D. Del. 2013) (in nonpublic company case, nondebtor releases deemed consensual with respect to both impaired creditors who abstained from voting on the Plan, and those who voted to reject the plan and did not otherwise opt out of the releases).

Here, the Plan deems the consent of holders of Class 13 Equity Interests to the Third Party Release to be established by silence or failure to opt out. This is inconsistent with basic contract principles. *Emerge Energy,* Slip Op. at 23 ("For the Court to infer consent from the nonresponsive creditors and equity holders, the Debtors must show under basic contract principles that the Court may construe silence as acceptance"); *In re SunEdison, lnc.*, 576 B.R.

453, 458 (Bankr. S.D.N.Y. 2017) ("Courts generally apply contract principles in deciding whether a creditor consents to a third party release.") (citing *In re Washington Mutual, Inc*., 442 B.R. at 352). The Restatement of Contracts makes clear that silence or failure to act cannot be deemed consent under the facts of this case.

Under the Restatement, silence can be deemed to be acceptance only:

> (1)
>
> (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
>
> (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
>
> (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.
>
> (2) An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.

Restatement (Second) of Contracts, § 69; *see also Jacques v. Solomon & Solomon P.C.*, 886 F. Supp. 2d 429, 433 n.3 (D. Del. 2012) ("Merely sending an unsolicited offer does not impose upon the party receiving it any duty to speak or deprive the party of its privilege of remaining silent without accepting."); *see also Klaassen v. Allegro Dev. Corp*., 106 A.3d 1035, 1045-48 (Del. 2014).

None of the situations enumerated in the Restatement apply here. The Debtors cannot rely on the silence of holders of Class 13 Equity Interests, who are not even entitled to vote on the

Plan, as a manifestation of their acceptance of the Third Party Releases. As the court in *In re Emerge Energy Services, LP* recently observed:

> The Class 6 creditors and Class 9 equity holders are receiving no distribution under the Plan and no previous dealings between the parties are in evidence. Moreover, while the Debtors included on the ballot and Opt-Out Form notice to the recipients of the implications of a failure to opt-out, the Court cannot on the record before it find that the failure of a creditor or equity holder to return a ballot or Opt-Out Form manifested their intent to provide a release. Carelessness, inattentiveness, or mistake are three reasonable alternative explanations . . . . A party's receipt of a notice imposing an artificial opt-out requirement, the recipient's *possible* understanding of the meaning and ramifications of such notice, and the recipient's failure to opt-out simply do not qualify [as consent].

Emerge Energy, Slip. Op. at 23-24 (emphasis in original).

Here, as many of the securities are held in street name, it is quite possible that an equity holder may not receive a beneficial holder ballot from its broker, or may receive inadequate notice of the opt-out form from the broker. Under these circumstances, the Court should not assume that each Class 13 member who does not submit an opt-out form knowingly opts to consensually give up rights against third parties. *See Cloud Peak Energy Inc.*, Case No. 19-11047 (Bankr. D. Del. Dec. 5, 2019) (Gross, J.) [Docket No. 868] (declining to approve opt out release for public shareholders who were deemed to reject the Plan).

Moreover, the Debtors have not stated whether they will carve-out of the Third Party Release those parties to whom they do not mail Solicitation Packages or whose solicitation packages were returned as undeliverable. In fact, the Debtors appear to seek to bind such parties unless they can show they were not aware of the Plan or Third Party Release through publication

notice or otherwise. Under these circumstances, the Debtors cannot rely on the silence of any voting or non-voting party as a manifestation of that party's consent to the Third Party Release.[6]

B. The Third Party Release does not satisfy the standard to be approved as a nonconsensual release because it is not: (i) fair to the releasing parties; (ii) necessary to the reorganization; and (iii) supported by the facts of this case.

The Third Circuit has held that allowing nonconsensual non-debtor releases is an "extraordinary remedy" that should be used only sparingly. *See In re Continental Airlines*, 203 F.3d 203, 211-12 (3d. Cir. 2000); *see also In re Millennium Lab Holdings II, LLC,* ---F3d---, No. 18-3210, 2019 WL 6904684 at *9 (3d Cir. Dec. 19, 2019). In order to bind all of the affected parties without their consent, the Debtors would need to show that the impacted classes received fair consideration and that the Release is necessary to the Debtors' reorganization. *See Continental Airlines*, 203 F.3d at 215;[7] *In re Spansion, Inc.*, 426 B.R. 114, 144-45 (Bankr. D. Del. 2010). In particular, the Third Circuit in *Continental* focused on whether the releases were given in exchange for reasonable financial consideration, separate and apart from the consideration to which the class was entitled as creditors under the Plan. *Continental Airlines*, 203 F.3d at 215. Courts in Delaware consider a number of factors, including whether: "(i) the

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[6] Further, the Plan provides that the Debtors seek to bind all other Holders of Claims and Interests "to the maximum extent permitted by law." (Plan at 74). Accordingly, it is unclear whether the Debtors seek to bind even those parties that have opted out of the Third Party Release on a non-consensual basis.

[7] In *Continental Airlines*, the Third Circuit rejected a plan provision that released and permanently enjoined shareholder lawsuits against present and former officers and directors who were not in bankruptcy. The court held that the release and injunctive provisions fell squarely into the Section 524(e) prohibition because they amounted to nothing more than a lockstep discharge of nondebtor liability. The Court held open the possibility that "there are circumstances under which [it] might validate a non-consensual release that is both necessary and given in exchange for fair consideration," *Id.* at 214, n.11, but made this comment in light of releases and permanent injunctions issued in such extraordinary cases as *Robins*, *Manville* and *Drexel*; *see Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir. 1989); *Drexel Burnham Lambert Trading Corp. v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285 (2d Cir. 1992); *see also Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143 (2d Cir. 2005) (the Second Circuit held a "nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to the success of the plan . . . .").

non-consensual release is necessary to the success of the reorganization; (ii) the releases have provided a critical financial contribution to the debtor's plan; (iii) the releasees' financial contribution is necessary to make the plan feasible; and (iv) the release is fair to the non-consenting creditors, i.e., whether the non-consenting creditors received reasonable compensation in exchange for the release." *Spansion*, 426 B.R.at 144-145.

When applying the *Continental* factors to the facts of this case, it is clear that the Third Party Release contravenes Bankruptcy Code Section 524(e) and applicable Third Circuit law. To the contrary, under the facts of this case, it is critical that the Third Party Release *not* be approved. First, as the Debtors are liquidating, the Third Party Release is not necessary to any *reorganization*. Second, there is no evidence that fair consideration was provided specifically in exchange for the release of claims against nondebtors or that all of the nondebtor Released Parties made contributions to the Plan. The "Released Parties" include not just the Debtors and the Committee, but also those parties' current officers, directors, employees, professionals, and others who may not have contributed anything to the Plan or restructuring beyond their normal responsibilities, and for which they have already been compensated.

Indeed, the *only* contributions identified by the Debtors are the Released Parties' "service" to facilitate the liquidation of the Debtors and implementation of the trust formation documents, and participation in negotiations regarding the plan, settlement, mediation, and sale process. (Discl. Stmt. at 133, Plan at 74); *see In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 729 (2019) (Bankr. S.D.N.Y. Apr. 8, 2019) ("[T]he directors did what they were paid to do, and that does not mean they are entitled to releases of third-party claims, particularly when those releases really are not necessary or important to the accomplishment of the restructuring transactions.").

And, third, the Debtors filed for bankruptcy due to the substantial litigation they were facing relating to the opioid crisis. (Discl. Stmt. at 28-33). Some of the litigation is based on particular alleged activities of the Debtors' former executives, many of whom either pleaded guilty to or were convicted after trial of federal criminal activity relating to such activities. (Discl. Stmt. at 29). The Department of Justice brought civil and criminal actions/investigations against the Debtors. (Discl. Stmt. at 29-31). Yet, the Debtors' and the Committee's and its members' current officers, directors, and others are attempting to use the Debtors' bankruptcy to obtain an involuntary release of claims against them, which could include breach of fiduciary duty and other non-scienter based claims.[8]

Based on the above, it is the Commission's position that Class 13 Equity Interests should be carved out from the Third Party Release entirely, or they should only be bound if they opt into the Third Party Release. Similarly, the injunction set forth at Section 10.4(b) should be amended to clarify that only those parties that have opted into the Third Party Release, not "all Persons," are prevented from asserting claims against the Released Parties. (Plan at 72). And, the exculpation clause in the Plan should be expressly limited to conduct that occurred on and after the petition date. *See Washington Mutual*, 442 B.R. at 350.

II. The Third Party Release results in disparate treatment of similarly situated class members in contravention of Section 1123(a)(4) of the Bankruptcy Code.

Section 1123(a)(4) of the Bankruptcy Code requires that a plan "[m]ust provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or

[8] Although a list of 14 individuals who are not entitled to the Third Party Release has been filed by the Debtors with the input of the Committee and the SMT Group Representatives, these parties do not represent Class 13 Equity Interests, and their interests may diverge.

interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). Here, holders of Class 13 Equity Interests who opt out of the Third Party Release will receive the same consideration as holders of Class 13 Equity Interests who fail to opt out of the Third Party Release. This is particularly troubling because the class is deemed to reject the Plan and its members have no financial incentive to scrutinize the Plan. This constitutes unequal treatment of similarly situated class members under Section 1123(a)(4) of the Bankruptcy Code, which renders the Plan unconfirmable.[9]

RESERVATION OF RIGHTS

The Commission reserves the right to object if, among other things, a Commission carve out to the Third Party Release is not added to the proposed confirmation order that is acceptable to the Commission.

[9] This Court may lack jurisdiction or Constitutional authority to grant the Third Party Release as there has been no showing that the release is central to any reorganization. *Cf. In re Millennium Lab,* ---F3d---, No. 18-3210, 2019 WL 6904684, *7-8 (3d Cir. Dec. 19, 2019) (concluding that bankruptcy court had authority to grant releases where released parties had agreed to pay $325 million to, among things, settle claims and observing that without such payment, "liquidation, not reorganization, would have been [debtor's] sole option."). Here, there has been no such showing, particularly given that the Debtors are in the process of liquidating rather than reorganizing.

CONCLUSION

For all of the foregoing reasons, the Commission requests that the Third Party Release and exculpation provisions be deleted from the Plan, or the Plan be amended to provide that: Class 13 Equity Interests are carved out of the Third Party Release and injunction, or be required to opt in rather than having to affirmatively opt out of the Third Party Release; and the exculpation clause expressly exclude prepetition conduct.

Dated: January 6, 2020
Washington, DC

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

By: */s/ Therese A. Scheuer*

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

- -x	
In re	Chapter 11
INSYS THERAPEUTICS, INC. *et al*.,	Case No. 19-11292 (KG)
Debtors.	Jointly Administered
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 6, 2020, she caused a true and correct copy of the following document to be served upon all interested parties through the Court's CM/ECF system and upon the parties listed on the attached service list via first class mail.

- *Limited Objection of the United States Securities and Exchange Commission to Confirmation of the Debtors' Second Amended Joint Chapter 11 Plan of Liquidation.*

Dated: January 6, 2020

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

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