

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

In re:

INSYS THERAPEUTICS, INC., *et al.*,

Liquidating Debtors.¹

Chapter 11

Case No. 19-11292 (JTD)

(Jointly Administered)

INSYS LIQUIDATION TRUST, by and
through WILLIAM H. HENRICH, as
LIQUIDATING TRUSTEE,

Plaintiff,

v.

JOHN N. KAPOOR,

Defendant.

Adversary No. _____

ORIGINAL COMPLAINT

William H. Henrich, as liquidating trustee (the “Trustee”) of the Insys Liquidation Trust (the “Liquidation Trust”), the successor-in-interest to the above-captioned debtors (collectively, the “Debtors”), brings this action against John N. Kapoor (“Kapoor”), and alleges as follows:

NATURE OF THE ACTION

1. In this adversary proceeding, the Trustee seeks: (a) to establish that Debtor Insys Therapeutics, Inc. (“Insys Therapeutics”) and its wholly owned and controlled subsidiary, Debtor Insys Pharma, Inc. (“Insys Pharma”), had no obligation to advance defense costs or pay legal fees on Kapoor’s behalf; and (b) to avoid over \$10,287,846.37 in transfers made by those Debtors

¹ The Liquidating 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).

(collectively, “Insys”) to pay Kapoor’s legal fees in his criminal proceeding as fraudulent transfers or preferential transfers under 11 U.S.C. §§ 544(b), 547(b), and 548(a)(1).

2. Kapoor was the founder, controlling shareholder, Executive Chairman, and, for a time, Chief Executive Officer of Insys. He was one of the masterminds in a scheme perpetrated by himself and other corrupt Insys personnel to bribe medical practitioners into prescribing, and defraud insurers into providing coverage for, unnecessary prescriptions of Insys’s fentanyl product, as alleged below. Kapoor was indicted in October 2017, and convicted by a jury in May 2019, for engaging in a racketeering conspiracy with other Insys executives. Despite Kapoor’s criminality and his lack of any enforceable legal right to such payments, Insys made at least \$10,287,846.37 in payments to Kapoor’s criminal counsel from July 2016 until January 2019. The Trustee seeks to avoid those payments as fraudulent transfers.

JURISDICTION AND VENUE

3. This Court has original jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b) because it arises under the Bankruptcy Code and/or relates to these bankruptcy cases. Venue is proper in this district pursuant to 28 U.S.C. § 1409(a).

4. This Court has personal jurisdiction over Kapoor in this proceeding because he has sufficient contacts with the United States of America to be subject to nationwide service of process under Federal Rule of Bankruptcy Procedure 7004.

5. This proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(H) and (O). Pursuant to Bankruptcy Local Rule 7008-1, the Trustee consents to the entry of final orders or judgments by this Court.

PARTIES

6. The Liquidation Trust was created, and the Trustee was appointed, pursuant to the Second Amended Joint Chapter 11 Plan of Liquidation of Insys Therapeutics, Inc. and Its

Affiliated Debtors (the “Plan”), which this Court confirmed in an order entered January 16, 2020 (the “Confirmation Order”). Under the Plan and Confirmation Order, the Debtors retained certain causes of action, including the claims asserted in this proceeding, for prosecution by the Liquidation Trust as a post-confirmation representative of the bankruptcy estate pursuant to 11 U.S.C. § 1123(b)(3). The Liquidation Trust, therefore, has standing to bring the claims asserted in this proceeding.

7. Defendant Kapoor is an individual who is currently an inmate in federal prison. Kapoor may be served with process at Register Number: 82262-408, FPC Duluth, Federal Prison Camp, P.O. Box 1000, Duluth, MN 55814.

FACTUAL BACKGROUND

A. Insys Develops and Launches Subsys for Breakthrough Cancer Pain.

8. Insys operated a specialty pharmaceutical company that developed and commercialized innovative drugs and novel drug delivery systems of therapeutic molecules that purported to improve patients’ quality of life. Insys’s primary operations included research and development, manufacturing, marketing, and sales in support of certain drugs and drug delivery systems for targeted therapies.

9. Insys developed two pharmaceutical products that were commercialized: (a) SUBSYS® (“Subsys”), a proprietary sublingual fentanyl spray indicated for the management of breakthrough cancer pain, and (b) SYNDROS® (“Syndros”), a proprietary, orally administered formulation of dronabinol for the treatment of nausea and vomiting associated with cancer chemotherapy and anorexia and weight loss associated with AIDS. Syndros was a relatively insignificant product for the business. Indeed, Insys’s consolidated annual sales revenue excluding Subsys never exceeded \$4 million.

10. Subsys was the primary source of Insys’s revenue. Insys successfully completed clinical trials for Subsys in 2011, after years of development. In January 2012, the FDA approved Subsys for the narrow indication of the management of breakthrough cancer pain in adult cancer patients who were already receiving and tolerant to around-the-clock opioid therapy for their underlying persistent cancer pain. Under 21 U.S.C. § 301 *et seq.* and 42 U.S.C. § 262 *et seq.* and their implementing regulations, Insys was permitted to market Subsys only for this specific, on-label use. Subsys was specifically contraindicated for use in the management of acute or postoperative pain, headaches or migraines, and dental pain, because of the risks posed by the drug, which contained fentanyl as the active pharmaceutical ingredient.

11. Insys launched Subsys on March 26, 2012. Upon its commercial launch, Subsys was the sixth product in the class of Transmucosal Immediate-Release Fentanyl (“TIRF”) drugs to be sold and marketed, but the first fentanyl sublingual (under the tongue) spray.² The product was inherently prone to abuse and potential overdose. First, TIRF drugs can be particularly potent because of the quick release of the drug into the bloodstream. Second, Fentanyl—a synthetic opioid that is 50 times more powerful than heroin and 100 times more powerful than morphine—is highly potent and classified as a Schedule II controlled substance with high potential for abuse and dependence. Given the substantial risks inherent to a TIRF product, the FDA-approved prescribing information for Subsys provided that “[t]he initial dose of SUBSYS to treat episodes of breakthrough cancer pain” was “always” to be 100 mcg—the smallest available dose.

12. In March 2013, Insys Therapeutics completed its initial public offering (“IPO”) and became a publicly traded company on the NASDAQ stock exchange under the ticker symbol “INSY.” Kapoor was the company’s controlling stockholder and sole investor before the IPO and

²² Other TIRF drugs include Actiq (a lozenge or lollipop), Fentora (effervescent buccal tablet), Onsolis (buccal soluble film), Abstral (sublingual tablet), and Lazanda (nasal spray).

remained the company's majority and controlling stockholder until February 2018, when his stock was placed in a voting trust.

B. Kapoor and Babich Implement an Illegal Sales and Marketing Strategy.

13. Kapoor founded Insys in 1990. He was Insys Therapeutics's largest shareholder and served on its board of directors from the company's formation until October 2017, the same month he was indicted by the U.S. Department of Justice ("DOJ") for numerous felonies, including racketeering conspiracy and conspiracy to violate the Anti-Kickback Statute. In November 2010, Kapoor appointed Michael Babich—who had little pharmaceutical experience but previously worked at a venture capital firm controlled by Kapoor—as Insys's President. Babich then became Insys's Chief Executive Officer in March 2011, and served in both of those roles until November 2015, just over a year before he was indicted for various felonies, including racketeering conspiracy and conspiracy to violate the Anti-Kickback Statute.

14. The criminality giving rise to those charges began shortly after Subsys was launched in March 2012. Kapoor, Babich, and certain members of Insys management acting at their direction (collectively, the "Corrupt Insiders"), implemented an aggressive marketing strategy for Subsys that sought to capture 10% of the market by targeting existing prescribers of competing drugs, such as Actiq (a fentanyl lozenge) and Fentora (a fentanyl tablet). Insys was able to use pharmacy data acquired from third parties to identify practitioners who either prescribed high volumes of such rapid-onset opioids or who had demonstrated a capacity to prescribe large volumes of rapid-onset opioids.

15. By May 2012, Subsys's market share had already reached 3% of the total prescriptions of TIRF drugs. But Kapoor was still dissatisfied with the level of sales of Subsys and, according to Babich, called it "the worst f[***]ing launch in pharmaceutical history he's ever seen." Consequently, the Corrupt Insiders undertook an illegal sales strategy premised on bribing

healthcare professionals to prescribe Subsys and defrauding insurers to pay for it.

i. The Scheme to Bribe Doctors

16. As an initial step, Insys Therapeutics hired Alec Burlakoff—formerly a sales representative with Cephalon, Inc. (“Cephalon”)—to lead the company’s struggling Southeast region. Cephalon, the manufacturer of Actiq, had previously come under fire from the DOJ due to its illegal sales and marketing scheme, which resulted in a \$425 million settlement with the federal government in 2008. Burlakoff was involved in Cephalon’s misconduct and, as referenced in a *qui tam* complaint against Cephalon, had ordered his staff to organize speaker program events to promote off-label sales of its fentanyl drug.

17. Soon after starting as the Southeast Regional Sales Manager for Insys Therapeutics, Burlakoff created a non-compliant atmosphere that rewarded Specialty Sales Professionals (“SSPs”) and other personnel who “moved-in” with potential high prescribers, often called “whales”—who “agreed in a very clear and concise manner that they are up for the deal, which is they will be compensated based on the number of prescriptions of Subsys they write.” For instance, Burlakoff instructed his team of SSPs to identify the “whales” and to “reciprocate by showing your utter appreciation.” And he applauded an SSP who dog-sat for a target and remarked that the SSP was “scratching [the target’s] back so she can return the favor!”

18. When Burlakoff interviewed with Kapoor and Babich, he laid out his strategy for improving sales by using a sham “speaker program” to pay doctors to prescribe Subsys. Although speaker programs can serve a legitimate purpose when experienced physicians lecture peers about a particular medicine, Burlakoff sought to use the program merely as a means to pay doctors to prescribe large quantities of Subsys, similar to what he had previously done at Cephalon. As Burlakoff stated, “it’s most important that you just give the doctor the money.” Kapoor and Babich

were supportive of the speaker program strategy and directed Burlakoff to pilot it in the Southeast region. Kapoor instructed Burlakoff to increase sales by doing “whatever it took,” including the utilization of “pill mill” doctors.

19. Subsys prescriptions and sales increased in the Southeast region and, in September 2012, Burlakoff was promoted to Vice President of Sales for the entire company. Per Babich’s instructions, Burlakoff prepared a business plan that included building a sales team “upon a ‘win at all cost’ foundation” and referenced an intent to “[a]nalyze return on investment from speaker programs and entertainment budget,” and “[r]e-allocate remaining 2012 and future 2013 funds based on where we have seen the most significant ROI.” Burlakoff later testified that he included the return-on-investment analysis in the business plan at Kapoor’s request.

20. With support from Kapoor and Babich, Burlakoff began to hire “poor, hungry [and] driven/dumb” sales personnel—or “PhDs,” as Burlakoff dubbed them—who he believed would be willing and capable of executing his sales tactics. For example, one of the first sales representatives that Burlakoff hired was Sunrise Lee, an exotic dancer he met at a strip club. Lee would entertain targeted physicians at restaurants and night clubs and served as a “closer” to make prescribers commit to Subsys. Burlakoff also hired former Cephalon sales representatives, including Joseph Rowan and Richard Simon, who had existing relationships with high-prescribing pain management doctors. One such relationship was with Dr. Xiuliu Ruan and his partner Dr. John Couch, who frequently prescribed pain medicines, including Subsys, in 19 different states. Ruan and Couch received over \$270,000 in speaker fees from Insys between 2012 and 2015 and were later convicted of federal charges with lengthy prison sentences.

21. As the speaker program grew, Kapoor became concerned about whether the amount of money spent was justified by the corresponding increase in Subsys prescriptions. Accordingly,

Kapoor demanded—over objections as to its illegality—a return-on-investment (“ROI”) analysis for which he sought at least a 2:1 ROI, *i.e.*, that for every dollar Insys spent on a speaker, the speaker needed to generate at least two dollars in revenue. As Kapoor demanded, in December 2012, an Insys employee created a document that tracked ROI for each speaker between launch and December 6, 2012. The analysis showed that doctors who participated in the speaker program, in fact, generated six times as much revenue as doctors who were not paid speakers. Doctors who did not deliver prescriptions in exchange for speaker fees were phased out of the speaker program. The so-called “whales,” on the other hand, were gifted more speaking opportunities if they wrote more Subsys prescriptions. Kapoor, Babich, Burlakoff, and other Corrupt Insiders frequently discussed these “whales” on management calls, which occurred daily at 8:30 a.m.

22. Indeed, the speaker program was nothing more than a pretense to put money in the pockets of prescribers in exchange for their agreement to prescribe more Subsys to their patients. The speaker events had little or no attendance, and the practitioner would often only participate with the sales representative and a friend or family member. Many speakers were lavished with honoraria, expensive meals, drinks, and travel reimbursements, as inducements for the speakers to write more and more Subsys prescriptions. And, in many instances, sales representatives expressly required practitioners to write a minimum number of Subsys prescriptions in order to continue to receive the kickbacks. In other instances, doctors participating in the speaker programs were not even required to attend the events themselves, and sales representatives were directed to fabricate attendance sheets to provide the necessary documentation.

ii. The Effective Dose Scheme

23. In addition to the speaker program, Kapoor and Babich implemented a so-called “effective dose” scheme, in which Insys sales representatives were under extreme pressure to get

practitioners to prescribe higher doses of Subsys, which were more profitable to the company. Upon Kapoor's direction, Babich instructed the company's regional sales managers that "[o]ur number 1 goal right now is effective dose and having reps promote 60 units of the low strength is not going to cut it." Indeed, SSPs were informed each time a healthcare practitioner wrote a prescription for a 100mcg or 200mcg dose and were required to report back to headquarters within 24 hours as to why the practitioner had prescribed the low dose and how the SSP planned to "titrate" the patient to a so-called effective dose.

24. The Corrupt Insiders utilized bonuses and other incentive compensation to encourage sales representatives to get prescribers to titrate up to higher doses. For instance, Babich personally emailed the entire salesforce that the "top 5 ssp's who have the highest number of UNITS written for 600 mcg or higher will receive an extra \$1500 and the overall winner will get \$2000." Sales representatives who did not convince prescribers to prescribe higher doses received emails threatening their jobs if they could not justify their inability to do so.

iii. The Insurance Fraud Scheme

25. Kapoor and Babich understood that the success of Insys depended not only on doctors prescribing Subsys, but also on insurers approving payment for Subsys. In 2012, Kapoor and Babich were concerned that Subsys was not being sufficiently covered by insurers. When Subsys launched, Insys used a third-party company called Apricot to process prior authorizations, which managed only a 30–35% success rate for prior authorizations. Accordingly, Kapoor and the Corrupt Insiders implemented a scheme to mislead insurance companies into approving payments for Subsys through the use of the Insys Reimbursement Center ("IRC")—an in-house department dedicated to obtaining prior authorization for payment directly from insurers and pharmacy benefit managers.

26. The IRC pilot program launched in November 2012, led by Vice President Michael Gurry and newly hired Elizabeth Gurrieri, and had early results of a 65% to 70% success rate. Insys then formally launched the IRC in January 2013 and promoted Gurrieri to Manager of Reimbursement Services. The IRC consisted of a team of Insys employees with the title of “prior authorization specialists” who placed telephone calls to insurers with the goal of obtaining insurance coverage approval for as many Subsys prescriptions as possible.

27. The IRC, which was regularly discussed by Kapoor, Babich, and Gurry on the daily 8:30 a.m. call, was rife with misconduct—an unsurprising fact given that Kapoor demanded approval rates that were upwards of 90%. To achieve that goal, Kapoor (with Babich’s full awareness) requested that the IRC compile information on what each insurer required to approve a prior authorization. Over time, the IRC developed strategies to mislead insurers into approving prior authorizations for Subsys. Kapoor and Babich were briefed on and approved these misleading strategies, many of which were discussed on the daily 8:30 a.m. management call.

28. For instance, efforts were made to conceal the fact that prior authorization specialists were Insys employees instead of employees from a physician’s office. Gurry instructed that IRC employees tell insurers that they were calling “from” a particular physician’s office and to say “reimbursement center” instead of “Insys reimbursement center” when they would answer the phone. At no point did prior authorization specialists reveal to insurers that they were calling from or on behalf of Insys. And the IRC building had no signage to indicate that it was an Insys building.

29. IRC employees also used a script of false and misleading representations about patient diagnoses to secure approval of Subsys by the insurance provider. Because insurers would deny coverage for off-label uses, such as prescriptions to patients who did not have cancer or had

not tried other medications, Gurry instructed that Gurrieri “maneuver through the questions about cancer” and “find ways to answer questions in a manner that would gain approval,” stressing the philosophy that they should always “ride the gray line” between telling the truth and lying. And Gurry instructed employees to hang up if it seemed like the insurer was going to deny the prior authorization request in the hope of a different outcome in the next call.

30. In response to Gurry’s instructions, Gurrieri developed a “question-and-answer” list (the “Q&A List”) for the prior authorization specialists, which contained questions commonly asked by insurers with answers designed to lead to approval. The Q&A List was used from 2012 to 2015 and, although it was revised at various points, its purpose was always to convince insurers that a Subsys prescription was for the treatment of breakthrough cancer pain, even when it was not. For instance, when asked whether Subsys was being prescribed to treat breakthrough cancer pain, prior authorization specialists were instructed to give a response referred to as the “spiel”: “Yes, this patient does have breakthrough pain” or “The physician has stated that Subsys is approved for treating breakthrough cancer pain, so he is treating that breakthrough pain under [insert diagnosis code].” According to Babich, the spiel was discussed on the daily management calls that he and Kapoor regularly attended.

31. Additionally, in order to satisfy insurer guidelines, prior authorization specialists were directed by Gurry and Gurrieri to mislead insurers into believing that patients had tried certain other less-costly medications that proved unsuccessful. In fact, prior authorization specialists were provided with a list of “tried and failed” medications, referred to as the “Humana list,” that they were supposed to use with the insurance companies.

32. The implementation of the speaker program, the effective dose strategy, and the IRC initially appeared to be successful. By February 2014, Subsys had captured 41.6% of the

market for rapid onset opioids and was the most prescribed rapid onset opioid in the country. But only 1% of these prescriptions were written by oncologists; the vast majority of these prescriptions were not for the sole FDA-approved use of Subsys, *i.e.*, breakthrough pain for cancer patients.

C. Insys Incurs Massive Criminal and Civil Liabilities.

33. On December 10, 2013, Insys received a subpoena from the United States Department of Health and Human Services Office of Inspector General (the “HHS Subpoena”) requesting documents related to the sale and marketing of Subsys. Shortly thereafter, Insys hired Skadden, Arps, Slate, Meagher & Flom LLP to represent the company in connection with the HHS Subpoena and related matters, including an internal investigation.

34. The governmental inquiries intensified in the subsequent years. For instance, in 2014 and 2015, Insys received or was the subject of subpoenas or civil investigative demands from the U.S. Attorney’s Offices for the District of Massachusetts, the Eastern District of Michigan, the District of Rhode Island, the Middle District of Florida, the District of Connecticut, the District of New Hampshire, and the Southern District of Alabama and from the state attorney general offices for Arizona, Illinois, Massachusetts, New Hampshire, New Jersey, and Oregon.

35. In May 2014, government officials raided the offices of one of Insys’s prescribing “whales,” Dr. Gavin Awerbuch. Later that month, Awerbuch was arrested and charged with illegally prescribing Subsys and insurance fraud. Undeterred, the Corrupt Insiders largely continued their aggressive and illegal sales activities.

36. The governmental scrutiny grew in June 2015, when Heather Alfonso, a nurse practitioner in Connecticut, pleaded guilty to one count of accepting \$83,000 in kickbacks from Insys between January 2013 and March 2015, admitting that the money she received influenced her prescribing of Subsys. Soon thereafter, in July 2015, the State of Oregon sent Insys a Notice of Violation—the Oregon Department of Justice’s official notice of intent to file suit—describing

allegations related to unlawful trade practices. Insys settled with Oregon later that year by paying \$1,100,000 and agreeing to enhanced controls. Insys acknowledged in its Form 10-K filed with the U.S. Securities & Exchange Commission for the fiscal year ending December 31, 2015 that an unfavorable outcome related to the various governmental proceedings was “reasonably possible” but that an estimate of loss was “not determinable at these early stages.”

37. In December 2016, as a result of the federal investigations, several of Insys’s officers and employees were indicted in a criminal action filed by the DOJ (the “Criminal Action”) for various charges, including fraud and racketeering. Specifically, the indictment in the Criminal Action included Babich (former Chief Executive Officer), Burlakoff (former Vice President), Simon (former National Sales Director), Lee (former Regional Sales Director), Rowan (former Regional Sales Director), and Gurry (former Vice President). In October 2017, Kapoor was also indicted in the Criminal Action. The federal government continued its investigations into Insys for both criminal and civil violations.

38. Meanwhile, Insys’s legal woes were mounting on other fronts. Insys was the subject of myriad lawsuits filed by state governments, insurance companies, hospitals, and personal injury victims. Many of the opioid-related complaints by various municipalities, counties, states, third-party payors, and others were consolidated into multidistrict litigation in the U.S. District Court for the Northern District of Ohio (“MDL 2804”). Insys was also the subject of class action securities lawsuits and stockholder derivative suits, including *Di Donato v. Insys Therapeutics, Inc.*, Case No. 2:16-cv-00302 (D. Ariz.); *In re Insys Therapeutics, Inc. Derivative Litigation*, Case No. 12696-JTL (Del. Ch.); and *Currier v. Insys Therapeutics, Inc.*, Case No. 1:17-cv-01954-PAC (S.D.N.Y.).

39. Moreover, the federal government and numerous individual states intervened in *qui*

tam actions filed against Insys alleging violations of the False Claims Act, 31 U.S.C. § 3729 *et seq.* The federal government’s complaint, which was unsealed on May 11, 2018, brought claims on behalf of the Office of Inspector General for the U.S. Department of Health and Human Services (the “HHS-OIG”), the Centers for Medicare & Medicaid Services, and the Defense Health Agency (the “DOJ Civil Action”). Additionally, HHS-OIG considered a potential action to exclude Insys from participation in certain federal health programs, such as Medicare and Medicaid (the “HHS-OIG Potential Action”).

40. The dominoes began to fall in 2019. In January 2019, Babich pleaded guilty to multiple counts of fraud. On May 2, 2019, the jury in the Criminal Action found Kapoor, Simon, Lee, Rowan, and Gurry guilty of a racketeering conspiracy.

41. On June 5, 2019, after months of negotiation, Insys entered a global resolution to settle the federal government’s civil and criminal investigations for \$225 million. Specifically, Insys Therapeutics resolved the DOJ Civil Action by entering into a settlement agreement, pursuant to which Insys Therapeutics agreed to a \$195 million restitution payment, with \$5 million to be paid within one day of the execution of the agreement. In connection with the Criminal Action, Insys Pharma entered into a plea agreement (the “Plea Agreement”) in which it pleaded guilty to five counts of mail fraud and agreed to pay a \$2 million fine and \$28 million in forfeiture, and Insys Therapeutics entered into a deferred prosecution agreement (the “DPA”) in which it agreed, *inter alia*, that it was jointly and severally liable for the money owed by Insys Pharma pursuant to the plea agreement. Additionally, the Plea Agreement also provided that the federal government would seek court authority to solicit criminal restitution requests from Insys’s potential criminal victims. Finally, to resolve the HHS-OIG Potential Action, Insys Therapeutics and certain subsidiaries entered into a corporate integrity agreement with HHS-OIG, in which the

company agreed, *inter alia*, to establish and maintain an extensive compliance program and to cease the marketing and promotion of Subsys within 90 days or divest Subsys entirely.

42. Only five days later, Insys Therapeutics, Insys Pharma, and the other Debtors collapsed under the weight of billions of dollars in liabilities, filing the above-captioned bankruptcy cases on June 10, 2019 (the “Petition Date”). As of the date of the Disclosure Statement filed December 4, 2019, the Debtors had been sued in approximately 1,000 lawsuits pending in state and federal courts in 32 states. (D.I. 956).

D. Insys’s Crippling Criminal and Civil Liabilities Render It Insolvent.

43. As a result of the misconduct perpetrated by the Corrupt Insiders, Insys incurred massive criminal and civil monetary liabilities to governmental entities (federal, state, municipal), insurers and health plans, investors, and personal injury victims.

44. By 2019, Insys faced billions of dollars of potential liability for which Insys Therapeutics and Insys Pharma were jointly and severally liable. The sum of these actual and contingent liabilities (even applying an appropriate probabilistic discount) far exceeded the fair value of each company’s assets and the Debtors’ combined assets on a consolidated basis by the beginning of 2017 and thereafter. The fair value of Insys’s assets never materially exceeded the book values reported in its consolidated financial statements, reported as \$356 million as of December 31, 2016, \$279 million as of December 31, 2017, and \$192.5 million as of December 31, 2018. The bulk of the reported assets consisted of cash, accounts receivable, and other current assets that were not worth more than book value.

45. On an enterprise value basis, the value of Insys’s assets depended almost entirely on its sales of Subys because, as alleged above, the combined sales of its other products were minimal (\$1.3 million in fiscal year 2015, \$0 in fiscal year 2016, \$1.4 million in fiscal year 2017, and \$3.3 million in fiscal year 2018). The overwhelming majority of sales of Subsys were

improper due to associated illicit off-label prescriptions (purposes other than breakthrough pain for cancer patients or improper dosage), inducement to doctors through kickbacks paid through the speaker program, and/or fraudulent reporting to insurers. Indeed, up to 90% of Subsys revenue was earned through insurance reimbursements for illegal off-label prescriptions.³ Insys made thousands of kickback payments totaling millions of dollars.

46. When the speaker program was wound down and as other illicit activity came under further scrutiny, Subsys sales plummeted from a peak of \$301 million in 2015, to \$217 million in 2016, to \$120 million in 2017, to \$71.3 million in 2018. Even then, the 2018 sales of Subsys were inflated and not reflective of the true, legitimate prospects for the product. Legitimate sales of Subsys were a small fraction of the amounts reported, and Insys would have had far fewer sales and much less enterprise value if not for illicit activity to pump sales of the product. Tellingly, the U.S. rights to Subsys were sold without any direct purchase price paid during the bankruptcy cases, with the purchaser merely agreeing to pay a percentage of future profits as royalties and assuming responsibility for costs, fees, taxes, and liabilities incurred after the closing date of the transaction. (D.I. 641).⁴ The rights to Subsys in the Republic of Korea, Japan, China, Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Timor-Leste, and Vietnam sold for just \$1.2 million. (D.I. 767).

47. Those same illicit activities, along with personal injuries suffered by victims of illegally prescribed Subsys, gave rise to exposure to criminal and civil fines, restitution against Insys's cash reserves and other assets traceable to illegal conduct, and massive liability. Indeed,

³ See, e.g., U.S. Senate Homeland Security & Government Affairs Committee, Ranking Member's Office, *Fueling an Epidemic: Insys Therapeutics and the Systematic Manipulation of Prior Authorization* (Sept. 6, 2017), <https://www.hsdl.org/?view&did=803959>.

⁴ The Debtors estimated that the net present value of those royalties expected over a 15-year period was approximately \$22 million. (D.I. 956).

every dollar of illicit revenue and every kickback payment resulted in liability to Insys under one or more statutes and common-law doctrines, including the following:

- **Anti-Kickback Statute:** Every time Insys offered to pay or paid a kickback, and every time it misrepresented medical records to induce payment by government healthcare providers, Insys incurred a fine of up to \$200,000. 42 U.S.C. §§ 1320a-7a, 1320a-7b(b). The estimated liabilities arising under the Anti-Kickback Statute exceed \$1.376 billion.
- **False Claims Act:** Insys violated the FCA every time it induced a government health care provider to pay for an illegal, off-label Subsys prescription. 31 U.S.C. § 3729, *et seq.* Insys also violated the FCA every time it violated the Anti-Kickback Statute. 42 U.S.C. § 1320a-7b(g). Each violation of the FCA results in a fine of up to \$11,181 and is subject to treble damages. The estimated liabilities arising under the FCA exceed \$929 million.
- **RICO and other conspiracy and insurance fraud statutes:** Insys's pattern of causing false and misleading insurance claim information to be presented to health insurance companies constitutes a pattern of fraud subjecting it to treble damages under the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961, *et seq.*) and state law conspiracy and insurance fraud statutes (*e.g.*, 18 Pa. C.S.A § 4117, *et seq.*). The estimated liabilities arising under these and similar statutes exceed \$1.490 billion.
- **Criminal restitution and forfeiture:** Insys committed mail and/or wire fraud every time it falsified or misrepresented medical information to induce insurers across state lines to pay for non-covered Subsys prescriptions. 18 U.S.C. §§ 1341 & 1343. Victims of mail and wire fraud are entitled to restitution (18 U.S.C. § 3571), and the government may order forfeiture of all ill-gotten proceeds (18 U.S.C. § 981(a)(1)(D)(v)-(iv)). The estimated liabilities arising under these statutes exceed \$497 million.
- **Wrongful death, negligence, product liability, and other claims related to the opioid crisis:** Insys has been sued hundreds of times for wrongful death, negligence, product liability, and harm caused to governmental entities stemming from the opioid crisis. Many of these actions were consolidated in MDL 2804, and several bellwether cases are progressing towards trial. But approximately 200 governmental entity actions were filed outside of the MDL, and at least 10 states' offices of the attorney general pursued litigation as well. In addition, over 27 personal injury lawsuits were filed against Insys, including some seeking certification as class actions. The estimated liabilities on such claims likely exceeds hundreds of millions of dollars.

48. The aggregate amount of resulting liability for Insys exceeds \$5.5 billion. Even

applying a probabilistic discount, the total sum of the contingent liabilities exceeded \$1 billion throughout the relevant time period for the claims asserted in this proceeding. As the fair value of Insys's assets (when adjusting for illegal sales revenue and profits) never exceeded that amount, it follows that Insys was balance-sheet insolvent during the relevant time period.

E. Insys Pays Kapoor's Legal Fees Despite No Obligation to Do So.

49. The Insys Therapeutics bylaws generally required the company to advance expenses to its directors or officers in any legal proceeding to which the director or officer was a party by reason of the fact that the person is or was a director or officer of Insys. However, such advances of legal expenses for officers and directors, consistent with Delaware law, were permissible "only upon delivery to the corporation of an undertaking, by or on behalf of such indemnitee, to repay all amounts so advanced if it shall ultimately be determined by final [non-appealable] judicial decision" that the director or officer is not entitled to indemnification, *i.e.*, if found to have acted in bad faith or with reasonable cause to believe that his conduct was unlawful.

50. On April 11, 2013, months after he and Babich had begun implementing their criminal scheme to bribe doctors and defraud insurers, Kapoor purported to enter an indemnity agreement (the "Indemnity Agreement") with Insys Therapeutics. To make matters worse, Babich—Kapoor's co-conspirator, fellow insider, and longtime confidant—signed the Indemnity Agreement, purporting to act on behalf of Insys Therapeutics. The Indemnity Agreement provided that Insys Therapeutics would advance Kapoor's legal fees for any legal proceeding related to his position at Insys. This purported advancement obligation was subject to the condition that Kapoor provide "an undertaking to repay the advancement of expenses if and to the extent that it is ultimately determined by a court of competent jurisdiction in a final judgment, not subject to appeal, that [Kapoor] is not entitled to be indemnified by the Company," *i.e.*, if Kapoor was found to have acted in bad faith or with reasonable cause to believe that his conduct was unlawful. Such

an undertaking was required under the Insys Therapeutics bylaws and Delaware General Corporation Law § 145(e).

51. When Kapoor and Babich executed the Indemnity Agreement, they had already engaged in extensive criminal conduct through their implementation of the bribery scheme, the effective dose scheme, and the insurance fraud scheme. For example:

- The day after Subsys launched in March 2012, Kapoor called the “messaging . . . f[***]ing terrible” and labeled the event “the worst f[***]ing launch in pharmaceutical history,” and began speaking with Babich six or seven times each day about implementing a new, illegal marketing strategy.
- On August 29, 2012, Kapoor emailed Babich and others: “[W]e need to move patients to higher doses from 100mcg We will monitor on a daily basis, based on the report from Sean [Yu] the success of our effective dose message” The same day, Babich emailed all regional sales managers and blind-copied Kapoor: “Our number 1 goal right now is effective dose and having reps promote 60 units of the low strength is not going to cut it.”
- In September 2012, Kapoor ordered a hold on all speaker programs, because “[h]e was irate to see that [Insys] had people speaking who had not written Subsys.” Kapoor and Babich then had a detailed conversation with Burlakoff expressing their objective that “paying the doctors w[ould] result in an increase in prescriptions.” Thereafter in 2012, Kapoor, with Babich’s support, demanded that Insys track and analyze the ROI for each speaker participating in the speaker program. One Insys employee protested to Babich that “we’re all going to go to jail [and] that he should have never ran the return on investment report,” but Babich nonetheless instructed the employee to continue with the analysis, because that is what Kapoor wanted. Kapoor and Babich used the metrics in the ROI analysis to reward practitioners who wrote a high volume of prescriptions and penalize those who did not.
- Kapoor and Babich regularly discussed and analyzed prescribing “whales” on their daily 8:30 a.m. management calls. At the direction of Kapoor and Babich, sales personnel were directed to give speaker programs to high prescribers and “hold them accountable” for prescribing more Subsys. For instance, on November 9, 2012, Babich emailed Burlakoff and others that a high-decile prescriber “needs to start crankin or he gets taco bell.”
- In late 2012 and early 2013, Kapoor and Babich directed the launch and expansion of the IRC. Kapoor, in particular, demanded approval rates that were upwards of 90% and requested IRC employees to compile information as to what information each insurer required before it would approve a prior authorization. Deceptive strategies to increase approval were discussed on the

daily management calls, which Kapoor and Babich regularly attended.

52. Nearly three years later, after Kapoor's perpetration of a massive criminal scheme, on February 29, 2016, Kapoor and his closely held company, EJ Financial Services, Inc. ("EJ Financial"), retained a leading Am Law 100 firm ("Law Firm A") to represent them in connection with the DOJ's investigation of Insys. Kapoor agreed to pay Law Firm A on an hourly basis.

53. On April 11, 2017, Kapoor retained another Am Law 100 firm ("Law Firm B") to represent him with respect to the DOJ's ongoing investigation by the U.S. Attorney's Office in Boston, Massachusetts. Kapoor agreed to pay Law Firm B on an hourly basis. The engagement letter with Law Firm B further provided that Insys would pay the legal fees incurred by Kapoor.

54. On October 24, 2017, Kapoor was indicted in a superseding indictment for one count of violating 18 U.S.C. § 1962(d) (racketeering conspiracy), two counts of violating 18 U.S.C. § 1349 (mail fraud conspiracy and wire fraud conspiracy for scheme to defraud insurers), and one count of violating 18 U.S.C. § 371 (conspiracy to violate the Anti-Kickback Statute). *See United States v. Babich et al.*, No. 1:16-cr-10343-ADB (D. Mass.) (the "Superseding Indictment"). Five days later, on October 29, 2017, the Insys Board accepted Kapoor's resignation. As part of his resignation, Kapoor agreed that he would place his shares of Insys Therapeutics (representing approximately 59% of the outstanding shares of Insys Therapeutics common stock) into an independent trust.

55. In or around November 2017, Kapoor retained a well-known boutique law firm ("Law Firm C") and a third prominent Am Law 100 firm ("Law Firm D") to represent him in the trial of the Criminal Action. Kapoor agreed to pay significant monthly flat fees to Law Firm C and Law Firm D for their services.

56. Kapoor did not provide any undertakings to Insys related to his representation by Law Firm A, Law Firm B, Law Firm C, or Law Firm D.

57. On February 27, 2018, Kapoor, EJ Financial/NEO Management, L.P., the John N. Kapoor Trust, Insys Therapeutics, and Bessemer Trust of Delaware, N.A., executed a Voting Trust Agreement, which placed Kapoor's (and his beneficiaries') 42,536,080 shares of Insys Therapeutics common stock into an independent trust and restricted Kapoor's ability to vote or direct a sale of his stock.

58. Kapoor, nevertheless, remained an "insider" of Insys Therapeutics, as defined in 11 U.S.C. § 101(31). The John N. Kapoor Trust was an "affiliate" of Insys because it owned over 20% of the company's outstanding voting shares. Kapoor, in turn, was an "insider" of the John N. Kapoor Trust because he served as its trustee and exercised complete control over it. Kapoor therefore, was an "insider" of Insys Therapeutics because he was an "insider" of its "affiliate," the John N. Kapoor Trust.

59. On May 2, 2019, Kapoor was convicted by a jury for violating 18 U.S.C. § 1962(d) by engaging in a racketeering conspiracy by devising a scheme to bribe doctors to unnecessarily prescribe Subsys and defraud insurers to cover the cost of Subsys prescriptions.

60. The Court's post-trial decision denying Kapoor's motion for acquittal or a new trial confirmed that Kapoor's criminal conduct pre-dated the April 2013 Indemnity Agreement. Indeed, the Court relied on Kapoor's actions in 2012 throughout its decision.

61. On January 23, 2020, Kapoor was sentenced to 66 months in prison, three years of supervised release, a fine of \$250,000, restitution of \$59.7 million, and forfeiture of \$1.9 million. Kapoor is currently serving his prison sentence.

62. Despite no binding and enforceable contractual or other obligations to make such payments, Insys Pharma made the following payments to Kapoor's criminal counsel on his behalf (collectively, the "Pharma Transfers"):

| PHARMA TRANSFERS | | | |
|-------------------------|--------------------------|-----------------------|-------------|
| Date | Method of Payment | Amount | Firm |
| 04/09/18 | Wire transfer | \$1,200,000.00 | C |
| 05/25/18 | Check (#15096) | \$26,911.42 | C |
| 06/05/18 | Wire transfer | \$1,229,815.39 | C |
| 06/05/18 | Wire transfer | \$1,785,406.75 | D |
| 01/02/19 | Wire transfer | \$1,800,000.00 | C |
| TOTAL | | \$6,042,133.56 | |

63. Despite having no enforceable contractual or other obligation to make such payments, Insys Therapeutics made the following payments to Kapoor’s criminal counsel on his behalf (collectively, the “Therapeutics 4-Year Transfers”):

| THERAPEUTICS 4-YEAR TRANSFERS | | | |
|--------------------------------------|--------------------------|-----------------------|-------------|
| Date | Method of Payment | Amount | Firm |
| 07/08/16 | Wire transfer | \$590,406.15 | A |
| 07/29/16 | Wire transfer | \$176,291.89 | A |
| 08/22/16 | Wire transfer | \$1,333,270.14 | A |
| 09/23/16 | Wire transfer | \$94,885.67 | A |
| 10/28/16 | Check (#954) | \$74,048.48 | A |
| 11/18/16 | Check (#1022) | \$118,000.63 | A |
| 01/20/17 | Check (#1203) | \$118,569.59 | A |
| 02/03/17 | Check (#1257) | \$156,857.65 | A |
| 02/24/17 | Check (#1367) | \$39,425.61 | A |
| 03/24/17 | Check (#1469) | \$13,156.21 | A |
| 04/21/17 | Check (#1564) | \$209,129.50 | A |
| 06/02/17 | Check (#1787) | \$76,446.29 | B |
| 06/02/17 | Wire transfer | \$247,364.66 | A |
| 07/07/17 | Check (# 1925) | \$78,124.36 | B |
| 08/09/17 | Check (#2066) | \$83,671.68 | A |
| 08/29/17 | Check (# 2132) | \$93,207.26 | B |
| 09/22/17 | Check (#2223) | \$70,230.60 | B |
| 10/13/17 | Check (#2348) | \$59,899.50 | B |
| 12/28/17 | Wire transfer | \$612,726.94 | B |
| TOTAL | | \$4,245,712.81 | |

Some of those payments of Kapoor’s legal fees were made within two years of the Petition Date (collectively, the “Therapeutics 2-Year Transfers”):

| THERAPEUTICS 2-YEAR TRANSFERS | | | |
|--------------------------------------|--------------------------|---------------------|-------------|
| Date | Method of Payment | Amount | Firm |
| 07/07/17 | Check (# 1925) | \$78,124.36 | B |
| 08/09/17 | Check (#2066) | \$83,671.68 | A |
| 08/29/17 | Check (# 2132) | \$93,207.26 | B |
| 09/22/17 | Check (#2223) | \$70,230.60 | B |
| 10/13/17 | Check (#2348) | \$59,899.50 | B |
| 12/28/17 | Wire transfer | \$612,726.94 | B |
| TOTAL | | \$997,860.34 | |

64. The Trustee now seeks to avoid the more than \$10,287,846.37 in transfers made by the Debtors to Kapoor's counsel on his behalf as fraudulent transfers. The Trustee also seeks to avoid a \$1,800,000.00 transfer to Kapoor's counsel on his behalf as a preferential transfer.

CAUSES OF ACTION

Count 1

Avoidance of the Pharma Transfers and Therapeutics 2-Year Transfers as Constructively Fraudulent Transfers Pursuant to 11 U.S.C. § 548(a)(1)(B)

65. The Trustee re-alleges the allegations set forth in the above paragraphs.

66. The Pharma Transfers and Therapeutics 2-Year Transfers were transfers of interests of the Debtors in property.

67. The Pharma Transfers and Therapeutics 2-Year Transfers were made within two years before the Petition Date.

68. Insys Pharma and Insys Therapeutics received less than reasonably equivalent value in exchange for the Pharma Transfers and Therapeutics 2-Year Transfers, respectively. Insys Pharma and Insys Therapeutics received no quantifiable benefit from paying: (a) legal fees incurred by Kapoor, the criminal mastermind who caused their collapse; and (b) legal fees incurred by EJ Financial, a holding company affiliated with Kapoor that provided no goods or services to Insys. Moreover, Insys Therapeutics and Insys Pharma did not benefit from contributing over \$10

million to a legal defense where Kapoor (and EJ Financial) independently incurred tens of millions of dollars in additional legal fees. In other words, paying \$10 million on top of already unreasonable and excessive fees did not confer a benefit to Insys Therapeutics and Insys Pharma.

69. Nor did Insys Pharma and Insys Therapeutics receive value in exchange for the Pharma Transfers and Therapeutics 2-Year Transfers, respectively, in the form of repayment of any antecedent debt for one or more of the following reasons.

70. First, neither Insys Pharma nor Insys Therapeutics had an obligation under any contract, Delaware law, or any applicable bylaws to advance any legal fees to EJ Financial. Yet several of the Pharma Transfers and/or Therapeutics 2-Year Transfers were payments for legal fees incurred by EJ Financial itself.

71. Second, Insys Pharma was not a signatory or party to the Indemnity Agreement. And neither Delaware law nor any applicable bylaws obligated Insys Pharma to make any of the Pharma Transfers.

72. Third, Kapoor never provided an undertaking in connection with any of the Pharma Transfers or Therapeutics 2-Year Transfers. Thus, Insys Therapeutics had no obligation to advance defense costs to the extent that an undertaking was required under the Indemnity Agreement, Insys Therapeutics's bylaws, and/or Delaware law (including Delaware General Corporation Law § 145).

73. Fourth, the Indemnity Agreement did not give rise to any binding and enforceable obligations of Insys Therapeutics to advance defense costs or pay legal fees on Kapoor's behalf. The Trustee has not located any formal authorization by Insys Therapeutics and its board of directors for Babich to sign the Indemnity Agreement or otherwise act on Insys Therapeutics's behalf with respect to that agreement. Nor did Babich and Kapoor disclose their ongoing

fraudulent and criminal activity to Insys Therapeutics’s board of directors prior to when the Indemnity Agreement was signed. The Indemnity Agreement is void or voidable for many reasons, including: (a) it was an agreement with a controlling stockholder and director; (b) Kapoor did not disclose his prior, ongoing, and planned future criminal misconduct prior to the execution of that agreement; and/or (c) Babich acted in bad faith and lacked authority to bind Insys Therapeutics under that agreement.

74. Fifth, even if valid, the purported obligation to advance defense costs under the Indemnity Agreement was limited to those “reasonably incurred” by Kapoor. The total legal fees incurred by Kapoor were excessive and unreasonable, totaling tens of millions of dollars.

75. At the time that the Pharma Transfers and Therapeutics 2-Year Transfers were made, Insys Therapeutics and Insys Pharma were balance-sheet insolvent. Much of the illicit activity giving rise to their more than \$5 billion in contingent liabilities had already occurred by that date, and the sum of those liabilities (even applying a probabilistic discount) and their other debts exceeded the fair value of their assets. Accordingly, the Pharma Transfers and Therapeutics 2-Year Transfers are avoidable pursuant to 11 U.S.C. § 548(a)(1)(B) as constructively fraudulent transfers.

Count 2
**Avoidance of the Pharma Transfers and Therapeutics 4-Year Transfers
as Constructively Fraudulent Transfers
Pursuant to 11 U.S.C. § 544(b) and Other Applicable Law**

76. The Trustee re-alleges the allegations set forth in the above paragraphs.

77. The Pharma Transfers and Therapeutics 4-Year Transfers (collectively, the “Transfers”) were transfers of interests of the Debtors in property.

78. The Pharma Transfers and the Therapeutics 4-Year Transfers were made within four years before the Petition Date.

79. Insys Pharma and Insys Therapeutics received less than reasonably equivalent value in exchange for the Pharma Transfers and Therapeutics 4-Year Transfers, respectively. Insys Pharma and Insys Therapeutics received no quantifiable benefit from paying: (a) legal fees incurred by Kapoor, the criminal mastermind who caused their collapse; and (b) legal fees incurred by EJ Financial, a holding company affiliated with Kapoor that provided no goods or services to Insys. Moreover, Insys Therapeutics and Insys Pharma did not benefit from contributing over \$10 million to a legal defense where Kapoor (and EJ Financial) independently incurred tens of millions of dollars in additional legal fees. In other words, paying \$10 million on top of already unreasonable and excessive fees did not confer a benefit to Insys Therapeutics and Insys Pharma.

80. Nor did Insys Pharma and Insys Therapeutics receive value in exchange for the Pharma Transfers and Therapeutics 4-Year Transfers, respectively, in the form of repayment of any antecedent debt for one or more of the following reasons.

81. First, neither Insys Pharma nor Insys Therapeutics had an obligation under any contract, Delaware law, or any applicable bylaws to advance any legal fees to EJ Financial, yet several of the Pharma Transfers and/or Therapeutics 4-Year Transfers were payments for legal fees incurred by EJ Financial itself.

82. Second, Insys Pharma was not a signatory or party to the Indemnity Agreement. And neither Delaware law nor any applicable bylaws obligated Insys Pharma to make any of the Pharma Transfers.

83. Third, Kapoor never provided an undertaking in connection with any of the Pharma Transfers or Therapeutics 4-Year Transfers. Thus, Insys Therapeutics had no obligation to advance defense costs to the extent that an undertaking was required under the Indemnity Agreement, Insys Therapeutics's bylaws, and/or Delaware law (including Delaware General

Corporation Law § 145).

84. Fourth, the Indemnity Agreement did not give rise to any binding and enforceable obligations of Insys Therapeutics to advance defense costs or pay legal fees on Kapoor's behalf. The Trustee has not located any formal authorization by Insys Therapeutics and its board of directors for Babich to sign the Indemnity Agreement or otherwise act on Insys Therapeutics's behalf with respect to that agreement. Nor did Babich and Kapoor disclose their ongoing fraudulent and criminal activity to Insys Therapeutics's board of directors prior to when the Indemnity Agreement was signed. The Indemnity Agreement is void or voidable for many reasons, including: (a) it was an agreement with a controlling stockholder and director; (b) Kapoor did not disclose his prior, ongoing, and planned future criminal misconduct prior to the execution of that agreement; and/or (c) Babich acted in bad faith and lacked authority to bind Insys Therapeutics under that agreement.

85. Fifth, even if valid, the purported obligation to advance defense costs under the Indemnity Agreement was limited to those "reasonably incurred" by Kapoor. The total legal fees incurred by Kapoor were excessive and unreasonable, totaling tens of millions of dollars.

86. At the time that the Pharma Transfers and Therapeutics 4-Year Transfers were made, Insys Therapeutics and Insys Pharma were balance-sheet insolvent. Much of the illicit activity giving rise to their more than \$5 billion in contingent liabilities had already occurred by that date, and the sum of those liabilities (even applying a probabilistic discount) and their other debts exceeded the fair value of their assets.

87. One or more of Insys Therapeutics's and/or Insys Pharma's creditors could have avoided each of the Transfers made by the respective transferring Debtor as of the Petition Date. Those creditors include the United States government, the named plaintiffs in pending opioid

multi-district litigation, and the numerous state and local governmental actors that have filed proofs of claim in the above-captioned bankruptcy cases. Specifically, such creditors include: (a) the U.S. Department of the Treasury; (b) Pima County, Arizona; (c) Apache County, Arizona; (d) Pinal County, Arizona; (e) City of Tucson, Arizona; (f) City of Phoenix, Arizona; (g) Bullhead City, Arizona; (h) City of Prescott, Arizona; (i) City of Surprise, Arizona; (j) City of Glendale, Arizona; and (k) City of La Paz, Arizona.

88. Accordingly, the Transfers are avoidable as constructively fraudulent transfers pursuant to 11 U.S.C. § 544(b) and other applicable law, including, but not limited to, the Uniform Fraudulent Transfer Act (the “UFTA”), as enacted in Delaware and Arizona.

Count 3

Avoidance of the Transfers as Actual Fraudulent Transfers Pursuant to 11 U.S.C. § 548(a)(1)(A) and/or 11 U.S.C. § 544(b) (and other applicable law)

89. The Trustee re-alleges the allegations set forth in the above paragraphs.

90. The Transfers were transfers of interests of the Debtors in property.

91. The Transfers were made within four years before the Petition Date.

92. The Transfers were made with the actual intent to hinder, delay, or defraud creditors of Insys Therapeutics and Insys Pharma. Specifically, each of the Transfers manifested several statutory and common-law “badges of fraud.” First, each of the Transfers was made for the benefit of an insider, Kapoor, at a time when he was a director and/or affiliate of Insys Therapeutics (and, by extension, a statutory insider of Insys Pharma). Second, each of the Transfers was made in exchange for a lack of reasonably equivalent value (as alleged above). Third, each of the Transfers was made at a time when Insys Therapeutics and Insys Pharma were balance-sheet insolvent (as alleged above).

93. More broadly, at the time each of the Transfers was made, those transfers were

substantially certain to hinder, delay, or defraud creditors by depleting cash reserves available to victims of Kapoor's and his fellow Corrupt Insiders' criminal and tortious acts. Insys Therapeutics and Insys Pharma faced billions of dollars of litigation exposure and had no prospect of satisfying all their liabilities for conduct that had already occurred by the time that the Transfers were made. Yet solely in order to assist those responsible (Kapoor and the Corrupt Insiders) in mitigating their own personal criminal exposure, tens of millions of dollars otherwise available for payment to Insys's victims were squandered on legal fees for the criminal perpetrators.

94. One or more of Insys Therapeutics's and/or Insys Pharma's creditors could have avoided each of the Transfers made by the respective transferring Debtor as of the Petition Date. Those creditors include the United States government, the named plaintiffs in pending opioid multi-district litigation, and the numerous state and local governmental actors that have filed proofs of claim in the above-captioned bankruptcy cases. Specifically, such creditors include: (a) the U.S. Department of the Treasury; (b) Pima County, Arizona; (c) Apache County, Arizona; (d) Pinal County, Arizona; (e) City of Tucson, Arizona; (f) City of Phoenix, Arizona; (g) Bullhead City, Arizona; (h) City of Prescott, Arizona; (i) City of Surprise, Arizona; (j) City of Glendale, Arizona; and (k) City of La Paz, Arizona.

95. Accordingly, the Transfers are avoidable as actual fraudulent transfers pursuant to 11 U.S.C. § 548(a)(1)(A) and/or 11 U.S.C. § 544(b) and other applicable law, including, but not limited to, the UFTA, as enacted in Delaware and Arizona.

Count 4
Avoidance of Any Purported Obligation
Pursuant to 11 U.S.C. § 548(a)(1) and/or 11 U.S.C. § 544(b)

96. The Trustee re-alleges the allegations set forth in the above paragraphs.

97. Pursuant to Federal Rule of Civil Procedure 8(d), as made applicable by Federal Rule of Bankruptcy Procedure 7008, the Trustee alleges Count 4 solely in the alternative that the

Indemnity Agreement gave rise to some valid and enforceable obligation for Insys Therapeutics or Insys Pharma to make any of the Transfers.

98. To the extent that the Indemnity Agreement obligated Insys Therapeutics or Insys Pharma to make any of the Transfers or to pay any fees to Kapoor's criminal counsel (the "Alternative Obligation"), that obligation is itself avoidable under 11 U.S.C. § 548(a) and/or 11 U.S.C. § 544(b) and applicable other law.

99. The Alternative Obligation was incurred to or for the benefit of Kapoor. Kapoor, as an insider of Insys's affiliate, the John N. Kapoor Trust, was an insider of Insys under 11 U.S.C. § 101(31)(E).

100. To the extent that any Alternative Obligation to advance defense costs under the Indemnification Agreement was incurred on or after June 10, 2017 (*i.e.*, upon submission of invoices from Kapoor or EJ Financial), such obligation was incurred within two years before the Petition Date.

101. Insys Therapeutics and Insys Pharma did not receive reasonably equivalent value in exchange for incurring any Alternative Obligation. Kapoor did not provide a valid undertaking in connection with any of the legal proceedings giving rise to legal fees paid through the Transfers. Nor did Kapoor provide any other value to Insys Therapeutics and Insys Pharma. Kapoor's agreement to serve as an Insys Therapeutics director did not confer any quantifiable economic benefit on Insys Therapeutics or Insys Pharma. Rather, Kapoor exposed Insys Therapeutics and Insys Pharma to billions of dollars of liability due to his perpetration of several criminal schemes.

102. To the extent that any Alternative Obligation was incurred on or after June 2016, Insys Therapeutics and Insys Pharma were balance-sheet insolvent. Much of the illicit activity giving rise to their more than \$5 billion in contingent liabilities had already occurred by that date,

and the sum of those liabilities (even applying a probabilistic discount) and the Debtors' other debts dwarfed the fair value of the Debtors' assets.

103. The Alternative Obligation hindered, delayed, or defrauded creditors. The surrounding circumstances manifest several "badges of fraud," as alleged above. The Alternative Obligation was substantially certain to hinder, delay, or defraud creditors by re-directing cash reserves that otherwise could have been used to pay victims on legal fees for Kapoor. And the Alternative Obligation was incurred in connection with the criminal scheme perpetrated by Kapoor and his partner in crime, Babich. Indeed, Babich signed the document, purporting to act on behalf of Insys Therapeutics, at a time when he and Kapoor were already actively engaged in perpetrating several criminal schemes involving the company.

104. One or more of Insys Therapeutics's and Insys Pharma's creditors could have avoided the Alternative Obligation as of the Petition Date. Those creditors include the United States government, the named plaintiffs in pending opioid multi-district litigation against Insys, and the numerous state and local governmental actors that have filed proofs of claim in the above-captioned bankruptcy cases. Specifically, such creditors include: (a) the U.S. Department of the Treasury; (b) Pima County, Arizona; (c) Apache County, Arizona; (d) Pinal County, Arizona; (e) City of Tucson, Arizona; (f) City of Phoenix, Arizona; (g) Bullhead City, Arizona; (h) City of Prescott, Arizona; (i) City of Surprise, Arizona; (j) City of Glendale, Arizona; and (k) City of La Paz, Arizona.

105. Accordingly, the Alternative Obligation is avoidable as an actual and/or constructively fraudulent transfer pursuant to 11 U.S.C. § 548(a)(1) (to the extent such obligation is deemed to have been incurred on or after June 10, 2017) and/or 11 U.S.C. § 544(b) and other applicable law, including, but not limited to, the UFTA, as enacted in Delaware and Arizona.

Count 5
Avoidance of a Preferential Transfer
Pursuant to 11 U.S.C. § 547(b)

106. The Trustee re-alleges the allegations set forth in the above paragraphs.

107. Pursuant to Federal Rule of Civil Procedure 8(d), as made applicable by Federal Rule of Bankruptcy Procedure 7008, the Trustee alleges Count 5 solely in the alternative that the Indemnification Agreement gave rise to some valid and enforceable obligation for Insys Pharma to make any advances for Kapoor's legal fees.

108. On January 2, 2019, Insys Pharma made a \$1,800,000.00 wire transfer to Law Firm C (the "Preferential Transfer") on Kapoor's behalf. The Preferential Transfer constituted a transfer of Insys Pharma's interest in property.

109. To the extent that Insys Pharma had any antecedent obligation to advance defense costs or pay legal fees on behalf of Kapoor, the Preferential Transfer was made pursuant to such obligation.

110. The Preferential Transfer was made for the benefit of an insider, Kapoor, within one year before the Petition Date. Specifically, Kapoor's status as an insider of Insys's affiliate, the John N. Kapoor Trust, qualifies him as an insider of Insys under 11 U.S.C. § 101(31)(E).

111. At the time that the Preferential Transfer was made on January 2, 2019, Insys Pharma was balance-sheet insolvent. Much of the illicit activity giving rise to its more than \$5 billion in contingent liabilities had already occurred by that date, and the sum of those liabilities (even applying a probabilistic discount) and its other debts exceeded the fair value of its assets.

112. The Preferential Transfer enabled Law Firm C to receive more than it would have received if: (a) the Preferential Transfer had not been made; and (b) Law Firm C had received payment of the underlying debt pursuant to chapter 7 of the Bankruptcy Code.

113. Accordingly, the Preferential Transfer is avoidable as a preference pursuant to 11 U.S.C. § 547(b).

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, the Trustee respectfully requests that the Court enter judgment in favor of the Trustee and against Kapoor as follows:

- a. avoiding the Transfers under 11 U.S.C. § 548(a)(1)(A), 11 U.S.C. § 548(a)(1)(B), and/or 11 U.S.C. § 544(b) and other applicable law, including the UFTA;
- b. avoiding the Alternative Obligation under 11 U.S.C. § 548(a)(1) and/or 11 U.S.C. § 544(b) and other applicable law, including the UFTA;
- c. avoiding the Preferential Transfer under 11 U.S.C. § 547(b);
- d. awarding reasonable attorney's fees and expenses, together with all costs of court; and
- e. granting such other and further relief, at law or equity, as this Court deems just and proper.

Dated: June 10, 2021

**MORRIS, NICHOLS, ARSHT &
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