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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Richard Di Donato, Individually and On
Behalf of All Others Similarly Situated,

Plaintiff,

v.

Insys Therapeutics, Inc.; Michael L. Babich;
Darryl S. Baker; and John N. Kapoor,

Defendants.

No. 16-cv-00302-NVW

CLASS ACTION

**LEAD PLAINTIFF'S CONSENT
MOTION TO VOLUNTARILY
DISMISS INSYS
THERAPEUTICS, INC. FROM
THIS ACTION WITH
PREJUDICE, SUBJECT TO
PROVISION OF CLASS NOTICE
UNDER FEDERAL RULE OF
CIVIL PROCEDURE 23(e) AND
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT**

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1 Lead Plaintiff and Court-appointed Class Representative, Clark Miller (“Lead
2 Plaintiff”), respectfully submits this Memorandum of Points and Authorities in support
3 of his Consent Motion to Voluntarily Dismiss Insys Therapeutics, Inc. (“Insys” or the
4 “Company”) from this Action with Prejudice, Subject to Provision of Class Notice under
5 Federal Rule of Civil Procedure 23(e) (the “Motion”).¹ Counsel for Lead Plaintiff has
6 conferred with counsel for Michael L. Babich, Darryl S. Baker, and John N. Kapoor
7 (collectively, the “Individual Defendants”), and they do not oppose the relief sought in
8 this Motion.

9 **I. PRELIMINARY STATEMENT**

10 Subject to the notice requirements of Federal Rule of Civil Procedure 23(e), Lead
11 Plaintiff files this Motion to dismiss Insys from this case (the “Action”) with prejudice,
12 while preserving Lead Plaintiff’s right to seek to continue to protect the Class’s interests
13 *solely* through Insys’ ongoing bankruptcy proceedings.

14 As the Court is aware, Insys filed for voluntary bankruptcy protection under
15 Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) in the United
16 States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”) on June
17 10, 2019. Litigation against the Company was automatically stayed pursuant to 11 U.S.C.
18 § 362 of the Bankruptcy Code (the “Automatic Stay”). *See* Doc. 234.² A hearing on
19 confirmation of Insys’ proposed chapter 11 plan of liquidation is scheduled for January
20 16, 2020 in the Bankruptcy Court.

21 Dismissing Insys from this action with prejudice, subject only to the preservation
22 of all rights in the Bankruptcy Court in connection with the proofs of claim that Lead
23 Plaintiff filed against Insys in the Bankruptcy Court, will avoid any potential delays or
24 other impact that the Automatic Stay could cause to either Lead Plaintiff’s prosecution of

25 _____
26 ¹ Unless otherwise noted, all internal citations and quotations are omitted, and all
27 emphasis is added. As used herein, the “Class” has the same definition as in the Court’s
28 September 20, 2019 Order granting Lead Plaintiff’s Motion for Class Certification (Doc.
271) (“September 20, 2019 Order”).

² The Automatic Stay does not, however, apply to the Individual Defendants. *See* Doc.
258.

1 this matter against the Individual Defendants or to the Court’s consideration of the claims
2 against the Individual Defendants in this Action. The requested relief will enable this
3 Action to continue unimpeded, while still protecting the interests of both Lead Plaintiff
4 and the Class he represents. *See* Doc. 274 (October 7, 2019 Order denying Lead Plaintiff’s
5 Motion to Voluntarily Dismiss Insys Therapeutics, Inc. Without Prejudice (the “October
6 7, 2019 Order”) (stating that any motion to dismiss Insys from the Action should be “with
7 prejudice, or with prejudice to reviving this litigation anywhere except in the Bankruptcy
8 Court”).

9 **II. FACTUAL BACKGROUND**

10 This action was originally filed on February 2, 2016. Doc. 1. On August 1, 2017,
11 the Court issued an Order (Doc. 107) granting in part and denying in part Defendants’ (as
12 defined herein) joint motion to dismiss the operative complaint, which is the Second
13 Amended Complaint for Violation of the Federal Securities Laws, filed on December 22,
14 2016 (Doc. 77). In its Order, the Court sustained, in part, Lead Plaintiff’s claims against
15 Insys and the Individual Defendants. Doc. 107.

16 On May 31, 2018, the Court entered a Case Management Order (the “CMO”)
17 setting a schedule in this action. Doc. 147. Pursuant to the CMO, fact discovery concluded
18 on June 28, 2019, and expert discovery concluded on November 22, 2019.

19 On June 5, 2019, Insys and its operating subsidiary, Insys Pharma, Inc., resolved
20 then-pending civil and criminal charges with the United States government, which
21 included Insys’ admission that it fraudulently marketed Subsys from at least August 2012
22 through at least June 2015.³ Among the illegal sales practices to which Insys admitted
23 engaging during this time period were: (i) paying “bribes to certain practitioners as part
24 of a scheme to defraud patients and insurers, including Medicare”;⁴ (ii) paying “bribes to
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27 ³ *See United States of America v. Insys Therapeutics, Inc.*, No. 1:19-cr-10191-RWZ (D.
28 Mass.) (the “Criminal Action”), Docs. 1-3.

⁴ Criminal Action, Doc. 3, ¶ 8.

1 certain practitioners to prescribe Subsys through . . . [Insys’] Speaker Program”;⁵ and (iii)
2 that “the executive chairman of Insys’s Board of Directors [Defendant Kapoor] expressly
3 required a practitioner to write a minimum number of Subsys prescriptions, write
4 prescriptions at a minimum dosage, and write prescriptions for a minimum number of
5 units of Subsys, in order for the speaker to continue receiving the bribe.”⁶

6 On June 10, 2019, Insys filed for voluntary bankruptcy protection under the
7 Bankruptcy Code. Doc. 230. That case remains pending in the Bankruptcy Court. *See*
8 *generally In re Insys Therapeutics, Inc.*, No. 19-11292-KG (Bankr. D. Del.) (the
9 “Bankruptcy Action”); *see also* Doc. 234. Insys’ bankruptcy filing triggered the
10 Automatic Stay, which does not apply to any of the Individual Defendants. Doc. 258; *see*
11 *also, Ingersoll-Rand Fin. Corp. v. Miller Mining Co., Inc.*, 817 F.2d 1424, 1427 (9th Cir.
12 1987) (“stays pursuant to section 362(a) are limited to debtors and do not include non-
13 bankrupt co-defendants”); *Sweet v. City of Mesa*, 2019 WL 2372243, at *1 (D. Ariz. June
14 5, 2019) (same); *see also Baker v. D.A.R.A. II, Inc.*, 2008 WL 11339636, at * 1 (D. Ariz.
15 Aug. 13, 2008) (“the extension of § 362 does not occur automatically . . . , but requires
16 the filing of an appropriate adversary proceeding under § 105 and § 362 to achieve the
17 desired result.”) (alteration in original).

18 On August 23, 2019, Lead Plaintiff filed a motion to voluntarily dismiss Insys
19 from the Action without prejudice (Doc. 264), which the Court denied on October 7, 2019
20 (Doc. 274). In its Order denying Lead Plaintiff’s motion, the Court directed that “[i]f
21 voluntary dismissal were allowed, the Court would require dismissal with prejudice, or
22 with prejudice to reviving this litigation anywhere except in the Bankruptcy Court.” Doc.
23 274 at 2.

24 On September 16, 2019, Lead Plaintiff filed with the Bankruptcy Court a Proof of
25 Claim (Claim No. 0000010585) on behalf of the Class and a separate Proof of Claim on
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27 ⁵ Criminal Action, Doc. 3, ¶ 10.

28 ⁶ Criminal Action, Doc. 3, ¶ 13.

1 his own behalf (Claim No. 0000010586) (together, the “Proofs of Claim”). On September
2 17, 2019, Insys, on behalf of itself and the other debtors, filed its Joint Chapter 11 Plan
3 of Liquidation of Insys Therapeutics, Inc. and Its Affiliated Debtors (Bankruptcy Action,
4 Doc. 612) (the “Plan”) and the accompanying disclosure statement (*Id.*, Doc. 613) (the
5 “Disclosure Statement”).

6 Although it is unlikely that Lead Plaintiff or any other Class member will receive
7 any distributions from Insys under the Plan, Lead Plaintiff determined that it was
8 necessary to object to certain aspects of the Plan and Disclosure Statement to protect the
9 Class’s interests. In particular, the third-party release set forth in the Plan and described
10 in the Disclosure Statement was ambiguous, and risked being construed as releasing Class
11 members’ claims against certain Individual Defendants in this Action. Accordingly, on
12 November 4, 2019, Lead Plaintiff filed the Objection of Securities Lead Plaintiff to
13 Approval of Disclosure Statement for Joint Chapter 11 Plan of Liquidation Proposed by
14 Insys Therapeutics, Inc. and Its Affiliated Debtors (Bankruptcy Action, Doc. 843) (the
15 “Objection”).

16 As a result of the Objection, following negotiations with Insys’ bankruptcy
17 counsel, Insys agreed to certain revisions to the third-party release set forth in the Plan.
18 These revisions were reflected in the Second Amended Joint Chapter 11 Plan of
19 Liquidation of Insys Therapeutics, Inc. and Its Affiliated Debtors (Bankruptcy Action,
20 Doc. 928) (the “Second Amended Plan”) and the Disclosure Statement for Second
21 Amended Joint Chapter 11 Plan of Liquidation Proposed by Insys Therapeutics, Inc. and
22 Its Affiliated Debtors (Bankruptcy Action, Doc. 929) (the “Second Amended Disclosure
23 Statement”), which Insys filed with the Bankruptcy Court on November 29, 2019. The
24 revisions to the Second Amended Plan eliminate any potential ambiguity, making clear
25 that the Individual Defendants in this Action will not be released from any claims asserted
26 against them in this Action. On December 4, 2019, the Bankruptcy Court approved the
27 Second Amended Disclosure Statement and procedures for Insys to solicit votes on the
28

1 Second Amended Plan. Bankruptcy Action, Docs. 952 & 958. The Bankruptcy Court also
2 scheduled a hearing for January 16, 2020 to consider confirmation of the Second
3 Amended Plan (the “Confirmation Hearing”). Lead Plaintiff intends to seek to protect the
4 Class’s interests in the Bankruptcy Court through, at least, the time of the Confirmation
5 Hearing.

6 **III. LEGAL STANDARD**

7 Federal Rule of Civil Procedure (“Rule”) 41(a)(2) provides that a plaintiff may
8 voluntarily dismiss its action against a defendant on terms that the court considers proper.
9 In ruling on a motion for voluntary dismissal, “the Court must make three separate
10 determinations: (1) whether to allow dismissal; (2) whether the dismissal should be with
11 or without prejudice; and (3) what terms and conditions, if any, should be imposed.”
12 *Williams v. Peralta Cmty. Coll. Dist.*, 227 F.R.D. 538, 539 (N.D. Cal. 2005) (citing
13 *Burnette v. Godshall*, 828 F. Supp. 1439, 1443 (N.D. Cal. 1993), *aff’d sub nom. Burnette*
14 *v. Lockheed Missiles & Space Co.*, 72 F.3d 766, 767 (9th Cir. 1995).

15 The court should grant a motion for voluntary dismissal “unless a defendant can
16 show that it will suffer some plain legal prejudice as a result.” *Smith v. Lenches*, 263 F.3d
17 972, 975 (9th Cir. 2001). “[L]egal prejudice” in this context “is just that—prejudice to
18 some legal interest, some legal claim, some legal argument,” such as “the loss of a federal
19 forum, or the right to a jury trial, or a statute-of-limitations defense” or inability to conduct
20 sufficient discovery to enable the remaining parties to defend themselves. *Westlands*
21 *Water Dist. v. United States of America*, 100 F.3d 94, 97 (9th Cir. 1996). Here no
22 Individual Defendant opposes the Motion.

23 Finally, because the Court certified this Action as a class action under Rule 23 in
24 the Court’s September 20, 2019 Order, the Class must receive notice of this Motion and
25 the opportunity to object. *See Fed. R. Civ. P. 23(e)(1)*.

1 **IV. ARGUMENT**

2 **A. The Court Should Grant Lead Plaintiff’s Request to Dismiss Insys**
3 **From This Action With Prejudice, While Preserving Lead Plaintiff’s**
4 **Ability to Protect the Class’s Interests in the Bankruptcy Court**

5 Rule 41 provides district courts with authority to order dismissal on a plaintiff’s
6 motion “on terms that the court considers proper.” Fed. R. Civ. P. 41(a)(2); *see also Lau*
7 *v. Glendora Unified Sch. Dist.*, 792 F.2d 929, 930 (9th Cir. 1986). District courts enjoy
8 “broad discretion” in fashioning these terms. *Capon v. Ladenburg, Thalman Co. Inc.*, 92
9 F. App’x 400, 401 (9th Cir. 2004). Here, the Court itself observed at the August 9, 2019
10 Status Conference that, rather than dismissing Insys without prejudice, “[p]erhaps the
11 better way to do it would be without prejudice to processing the claims in bankruptcy but
12 with prejudice to bringing new claims in this Court,” which is precisely what Lead
13 Plaintiff seeks through this Motion.⁷

14 Accordingly, dismissing Insys from this Action with prejudice subject to the
15 proposed “carve-out” for preserving claims against Insys in the Bankruptcy Court
16 addresses the Court’s concerns of respecting the Automatic Stay while ensuring that this
17 Action proceeds towards final resolution against the Individual Defendants with
18 expedience. Furthermore, dismissal of Insys from this Action with prejudice ensures that
19 Insys will not (and cannot) be brought back into this Action as a defendant. *See* October
20 7, 2019 Order at 2 (“In no circumstance would this Court agree to allow Plaintiff to bring
21 the Insys claims back into this Court after a delay.”)⁸

22 For the foregoing reasons, and as reflected in the accompanying [Proposed] Order,
23 Lead Plaintiff requests that the Court dismiss Insys from this Action with prejudice but
24 with a “carve-out” provision that expressly preserves Lead Plaintiff’s right to prosecute

25 _____
26 ⁷ Doc. 260 at 12:17-19.

27 ⁸ Ninth Circuit law makes clear that this course would not violate the Automatic Stay.
28 *See, e.g., O’Donnell v. Vencor Inc.*, 466 F.3d 1104, 1110 (9th Cir. 2006) (dismissal of
debtor does not violate the Automatic Stay because it does not amount to the
“continuation” of a proceeding against the debtor).

1 the Proofs of Claim in the Bankruptcy Court on behalf of the Class and to take any other
2 steps to protect Class members' interests in the Bankruptcy Court.

3 **B. The Court Should Defer Acting On This Motion Until After**
4 **Expiration of the Objection Period Set Forth in the Notice to the**
5 **Class**

6 Rule 23(e) provides that “[t]he claims, issues, or defenses of a certified class . . .
7 may be settled, voluntarily dismissed, or compromised only with the court’s approval,”
8 and Rule 23(e)(1) provides that notice of a proposal to voluntarily dismiss the claims of
9 a certified class must be provided to the affected class “in a reasonable manner.” Fed. R.
10 Civ. P. 23(e). Lead Plaintiff has filed its separate Motion to Approve the Form and
11 Manner of Class Notice concurrently with this Motion. As described in those
12 submissions, the proposed Notice, Summary Notice, and Postcard Notice filed therewith
13 and discussed therein describe this Motion to voluntarily dismiss Insys with prejudice
14 from this Action and inform Class members how to object to this Motion.

15 To comply with Rule 23(e)(1), the Court should not act upon this Motion until
16 after the deadline for Class members to object to this Motion has expired. After Class
17 Notice has issued, and the deadline for objecting to this Motion has expired, Lead Plaintiff
18 will file promptly with the Court a status report informing the Court as to whether any
19 Class member has objected to this Motion.⁹

20 **V. CONCLUSION**

21 For the reasons stated above, Lead Plaintiff respectfully requests that the Court
22 dismiss Insys from this Action with prejudice, but with the “carve-out” provision
23 discussed above and set forth in the accompanying [Proposed] Order that preserves Lead
24
25

26 ⁹ If any Class member objects to the Motion, Lead Plaintiff will file such objections with
27 the Court, together with Lead Plaintiff’s response to such objections and a revised
28 [Proposed] Order. Lead Plaintiff proposes making such submissions within ten (10) days
of the expiration of the deadline for Class members to object to the Motion.

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2019, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to those persons who are CM/ECF registrants:

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