IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: INSYS THERAPEUTICS, INC., *et al.*, Liquidating Debtor.[1]	Chapter 11 Case No. 19-11292 (JTD) (Jointly Administered)
INSYS LIQUIDATION TRUST, by and through WILLIAM HENRICH, as LIQUIDATING TRUSTEE, Plaintiff, - against - MCKESSON CORPORATION d/b/a RXCROSSROADS BY MCKESSON and RELAYHEALTH PHARMACY SOLUTIONS, and MCKESSON SPECIALTY ARIZONA, INC., Defendants.	Adversary No. 21-50176 (JTD)

[1] The Liquidating Debtors in these cases, along with the last four digits of each Debtors' federal tax identification number, 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, the "Debtors")

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MOTION TO DISMISS COMPLAINT TO AVOID AND RECOVER PREFERENTIAL TRANSFERS AND OBJECT TO CLAIMS

Defendants McKesson Corporation d/b/a RXCrossRoads by McKesson ("McKesson"), RelayHealth Pharmacy Solutions ("RelayHealth") and McKesson Specialty Arizona, Inc.[2] ("MSAZ," collectively, with McKesson and RelayHealth, the "McKesson Entities"), by and through its undersigned counsel, hereby submit this motion to dismiss with prejudice (the "Motion") the Complaint to Avoid and Recover Preferential Transfers and Object to Claims (the "Complaint") pursuant to Federal Rules of Civil Procedure ("FRCP") 8, 9 and 12(b)(6), made applicable herein by Federal Rules of Bankruptcy Procedure ("FRBP") 7008, 7009, and 7012, and for the reasons set forth below respectfully requests this Court enter an order substantially in the form attached hereto as **Exhibit A** dismissing the Complaint [ADV. D.I. 1] with prejudice.

I. Introduction

1. The Complaint is an effort by the Insys Liquidation Trust (the "Trust"), by and through William Henrich as Liquidating Trustee (the "Trustee," collectively with the Trust, "Plaintiff") to reverse the Debtors' court-approved treatment of the McKesson Entities as a "critical customer." At the outset of these cases, Debtors advised this Court and all parties in interest that the various services the McKesson Entities provided were critical to the ongoing value of the estates, the then sale process, and generating funds to pay creditors. As part of Debtors' first day motions, Debtors filed the Motion of Debtors Pursuant to 11 U.S.C. §§ 105(a) and 363(b) for Authority to (I) Maintain and Administer Prepetition Customer Programs, Promotions, and Practices and (II) Pay and Honor Related Prepetition Obligations (the "Customer Motion"), which explicitly named the McKesson Entities as a critical customer and requested Court authorization to pay *all* pre-petition amounts owed in order to continue the necessary services provided by the McKesson Entities. [D.I. 9]. The Court agreed and entered an interim order [D.I. 53] granting the

[2] MSAZ's complete name was McKesson Specialty Arizona, Inc. d/b/a McKesson Patient Relationship Solutions, which was recently merged into RxC Acquisition Company, also a wholly-owned subsidiary of McKesson.

Customer Motion, and later entered the Final Order Pursuant to 11 U.S.C. §§ 105(a) and 363(b) for Authority to (I) Maintain and Administer Prepetition Customer Programs and (II) Pay and Honor Related Prepetition Obligations (the "Customer Order"). [D.I. 232]. As the Debtors stated in their Disclosure Statement, the Customer Motion (along with the other first day motions): "This relief was designed to ensure a seamless transition between the Debtors' prepetition and postpetition business operations, facilitate expedited Chapter 11 Cases, and minimize any disruptions to the Debtors' operations to preserve value." [D.I. 956, § 5.1, p. 39].

2. Under Third Circuit law, the Customer Order is the law of the case and Plaintiff cannot avoid any transfers that were—or would have been—authorized by the Customer Order and then paid by the Debtors. *Friedman's Liquidating Trust v. Roth Staffing Cos. LP* (*In re Friedman's Inc.*), 738 F.3d 547, 560-561 (3d Cir. 2013); *Official Comm. of Unsecured Creditors v. Med. Mut. Of Ohio* (*In re Primary Health Sys.*), 275 B.R. 709, 710-11 (Bankr. D. Del. 2002). The Customer Order binds Plaintiff. By virtue of the Customer Order, Plaintiff cannot allege facts to state a prima facie case under 11 U.S.C. §§ 547, 548, or 549. Accordingly, Plaintiff cannot state a claim for recovery of the transfers and the Complaint must be dismissed with prejudice pursuant to FRCP 12(b)(6).

3. Even ignoring the fundamental flaw in the Complaint, the imprecise and formulaic nature of the Complaint make it impossible to determine the factual underpinnings of the various causes of action. McKesson, as a separate corporation with its own claim against the Debtors' estates, is a defendant—yet is not the recipient of any of the transfers at issue. The Complaint fails to connect the dots and allege plausible facts as to why McKesson is included in the Complaint or even whether Plaintiff disputes McKesson's individual claim. It is precisely this lack of clarity FRCP 8(a) seeks to avoid by requiring heightened pleading requirements.

4. Plaintiff cannot correct these failures by amendment. The Customer Order and the timing of the transfers at issue prevent Plaintiff from alleging necessary facts to state claims for recovery of the transfers and disallowance of the McKesson Entities' claims. To the extent Plaintiff makes the argument it is "speculation" that Debtors would have paid the McKesson

Entities pursuant to the Customer Order and the Court declined to grant this Motion on that basis, then the McKesson Entities request the opportunity to take immediate and limited discovery of the Debtors' person with most knowledge (PMK) on this discrete issue.[3] Based on the Customer Motion, the McKesson Entities are confident that the Debtors' PMK will acknowledge the obvious—the McKesson Entities would have been paid under the Customer Order both for the amounts actually owed as of the Petition Date *and* the amounts actually paid to the McKesson Entities during the 90 days prior to the Petition Date had those payments not been made.

5. Without recovery of the transfers, Plaintiff has no basis to dispute the claims held by the McKesson Entities. Accordingly, as discussed in further detail below, the McKesson Entities are entitled to dismissal of each cause of action in the Complaint with prejudice for Plaintiff's failure to state a claim upon which relief can be granted. FRCP 12(b)(6).

II. Jurisdiction and Venue

6. Pursuant to Delaware Local Bankruptcy Rule ("LBR") 7012-1, the McKesson Entities consent to the entry of final orders or judgments by the Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

III. Factual Background

7. Debtors were a specialty pharmaceutical company that developed and commercialized certain drugs and novel drug delivery systems for targeted therapies. As of the Petition Date, Debtors had two commercially marketed products: SUBSYS® ("Subsys") and SYNDROS® ("Syndros"). [D.I. 11, ¶ 8]. And, as the Debtor's then CEO Andrew Long stated in his first day declaration:

[3] McKesson presumes the PMK will be Andrew G. Long, the Debtors' prior Chief Executive Officer. Mr. Long submitted the only declaration in support of the first day motions, including the Customer Motion. [D.I. 11].

> The majority of the Debtors' sales of Subsys and Syndros are to wholesale pharmaceutical distributors and specialty retail pharmacies. Wholesale pharmaceutical distributors, in turn, sell the products to pharmacies, hospitals, and other customers, whereas specialty retail pharmacies sell the products directly to patients. For the year ended December 31, 2018, three wholesale pharmaceutical distributors, AmerisourceBergen Corporation, McKesson Corporation, and Cardinal Health, Inc., individually comprised approximately 33%, 15%, and 10%, respectively, and two specialty retail pharmacies individually comprised 18% and 21%, of the total gross sales of Subsys and Syndros. [D.I. 11, ¶ 31].

8. The McKesson Entities had multiple agreements with the Debtors.[4] On or about January 3, 2012, Debtor Insys Therapeutics, Inc. entered into a multi-party Services Agreement with MSAZ, as subsequently amended (the "Multi Party Agreement"). Pursuant to the Multi Party Agreement, MSAZ provided Risk Evaluation and Mitigation Strategies ("REMS") programs on behalf of the companies to the Multi Party Agreement, including Debtors. The Food and Drug Administration ("FDA") determined that a REMS program is necessary to mitigate the risk, misuse, abuse, addiction, overdose, and serious complications due to medication errors. Pursuant to the Multi Party Agreement, MSAZ assisted Debtors in the development, operationalization, and maintenance of the REMS Program as related to Subsys and Syndros.

9. On or about February 20, 2013, Debtor Insys Therapeutics, Inc. entered into a Services Agreement with RelayHealth (the "Services Agreement"). Pursuant to the Services Agreement, RelayHealth would implement Debtors' eVoucher co-payment program (the "Co-Pay Program"). The Co-Pay Program provided automatic point-of-sale electronic co-pay savings to patients being prescribed Syndros at participating pharmacies. Under the Services Agreement, to implement the discount features in the Co-Pay Program, RelayHealth advanced millions of dollars

[4] Two of the McKesson Entities' contracts (those with MSAZ and RelayHealth) are listed in the Debtor Insys Therapeutics, Inc.'s Bankruptcy Schedules. [D.I. 363, Schedule G (Executory Contracts and Unexpired Leases), Items 2.59-2.65]. The Distribution Agreement (defined below) is not listed in the Bankruptcy Schedules. But, it is described in the Customer Motion. See Customer Motion, ¶ 12: "The Debtors' relationships with their Distributors are governed by Distribution Service Agreements []. …"

each week to pharmacies and hospitals dispensing Debtors' products, with reimbursements from Debtors.

10. On or about May 23, 2013, Debtor Insys Therapeutics, Inc. entered into a Regional Distribution Center and Core Distribution Agreement with McKesson, as subsequently amended (the "Distribution Agreement"). Pursuant to the Distribution Agreement, McKesson purchased pharmaceutical products, including Subsys and Syndros, from Debtors. The Distribution Agreement entitled McKesson to return products that it purchased from Debtors under certain circumstances. The Distribution Agreement further entitled McKesson to other credits including, but not limited to, chargebacks, deals income, item substitutions, and service level penalties.

11. On June 10, 2019 (the "Petition Date"), Debtors commenced their cases by filing voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") with the United States Bankruptcy Court for the District of Delaware (the "Court"). On June 11, 2019, the Court signed an order granting Joint Administration under the lead Debtor Insys Therapeutics, Inc.'s case no. 19-11292 (KG) [D.I. 45].

12. As part of Debtors' first day motions, Debtors filed the Customer Motion [D.I. 9], supported by the declaration of Andrew Long, the Debtors' then CEO [D.I. 11, ¶¶ 128-132]. The Customer Motion is a standard first day motion filed in almost every pharmaceutical bankruptcy case with products being sold through the national drug distribution network.[5]

13. Pursuant to the Customer Motion, Debtors requested authority to "(a) maintain and administer pre-petition customer programs, promotions, and practices, and (b) pay and otherwise

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[5] From 2018 through 2020, in this District alone, there were nearly one dozen Chapter 11 pharmaceutical bankruptcy cases. Similar customer motions were filed and approval orders were entered in most of the cases. *See In re Valeritas Holdings, Inc.*, Case No. 20-10290 (Judge Silverstein), Doc. Nos. 79, 167; *In re Melinta Therapeutics, Inc.*, Case No. 19-12748 (Judge Silverstein), Doc. Nos. 13, 54, 224; *In re Pernix Sleep, Inc.*, Case No. 19-10323 (Judge Sontchi), Doc. Nos. 12, 57, 182; *In re Egalet Corp.*, Case No. 18-12438 (Judge Shannon), Doc. Nos. 50, 95, 159. In the *Mallinckrodt* bankruptcy cases, which this Court is now handling, there are similar customer motion and orders. *In re Mallinckrodt PLC*, Doc. Nos. 3, 214, 460.

This lawsuit is the ***only*** instance in which a pharmaceutical customer and an intended beneficiary of what is an industry-standard customer motion has been sued for preferential transfer after court-approval of a customer motion.

honor their obligations to customers relating thereto, whether arising prior to or after the Petition Date (as defined herein), each in the ordinary course of business and consistent with past practice . . . ." *Id.* at ¶ 1. Debtors noted that their "customers are primarily (i) wholesale pharmaceutical distributors (the "Distributors") that sell the Products directly to pharmacies, hospitals, and organizations subject to governmental contracts (discussed below) and (ii) specialty pharmacies that sell directly to patients (the "Specialty Pharmacies," and collectively with the Distributors, the "Customers")." *Id.* at ¶ 9. The purpose of the Customer Motion was "[t]o preserve the Debtors' critical relationships with their Customers and maximize Customer loyalty, in the ordinary course of business, the Debtors provide certain incentives, discounts, and other accommodations to their Customers." *Id.* Debtors specifically identified the McKesson Entities as significant Customers subject to the Customer Motion. *Id.*

14. Inclusive within the Customer Motion, Debtors sought to maintain and administer Customer programs including (i) Discount and Fee Programs; (ii) Product Return Policies; (iii) Rebate Programs; (iv) Patient Assistance Programs; (v) Chargeback Programs; and (vi) Data Fees related to REMS Programs. [*See generally* D.I. 9].

15. On June 11, 2019, the Court conducted a hearing on the first day motions including the Customer Motion (the "First Day Hearing").[6] The McKesson Entities appeared, through counsel, at the First Day Hearing. When the Customer Motion was addressed, the McKesson Entities (through its counsel) requested clarification. The McKesson Entities' counsel explained that "McKesson has two subsidiaries running copay programs." [D.I 68 at 54:22-23]. He further explained, "On a daily basis, there will be new purchases, new accounts receivables generated against which the intermediaries, the distributors, and the specialty pharmacies have recoupment rights under our contracts." [D.I. 68 at 55:16-19]. He then requested clarification from the Debtors

[6] The pages from the Transcript of the First Day Hearing [D.I. 68] covering the Customer Motion are attached as **Exhibit B**.

that the Customer Motion sought to continue copay programs—such as the Co-Pay Program—pursuant to the Customer Motion. [D.I. 68 at 56:24-57:4].[7]

16. Debtors responded, "[I]f the question is whether the debtors are continuing all of their existing programs, copay programs, we're not aware of any pre-petition programs that we are not continuing." [D.I. 68 at 57:11-14]. The McKesson Entities noted "I think that clarifies, it Your Honor. If there are active programs, so that's good. It was a little unclear as to whether they were all being continued or they were being selectively continued. Okay. That's helpful for me to know and for McKesson to know as well." [D.I. 68 at 57:16-21].

17. The Court granted the Customer Motion on an interim basis at the First Day Hearing. [D.I. 68 at 58:20].

18. On July 3, 2019, the Court entered the Customer Order, which granted the Customer Motion on a final basis and authorized Debtors "to maintain and administer the Customer Programs and honor any related pre-petition obligations in the ordinary course of business and consistent with past practice, as necessary and appropriate in the Debtors' business judgment." [D.I. 232].

19. On July 9, 2019, Debtors filed the "Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Sale" (the "Cure Notice"). [D.I. 263]. The Cure Notice included Debtors' Agreements with the McKesson Entities. The Cure Notice listed a $0 cure amount for the Distribution Agreement. The Cure Notice also listed a $201,224 cure amount for the Multi Party Agreement.

20. On July 23, 2019, the McKesson Entities filed the Reservation of Rights of McKesson Corporation to (1) Motion for Sale of Property Free and Clear of Liens; and (2) Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Sale ("Reservation of Rights"). [D.I. 339]. The Reservation of Rights

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[7] "They have a deposit to secure the pre-petition obligations, but we want to make sure that program—one, we want to know whether that program is continuing, and number two, if that program is continuing that the debtor has the right to continue to pay as those charges run through the system." [D.I. 68 at 56:24-57:4].

noted, "[I]n the ordinary course of business and as permitted by the Customer Motion, McKesson is entitled to recoup these amounts against any accounts payable owed by McKesson to Insys (which currently exceed the amounts owed by McKesson to Debtors.)" *Id.* at ¶ 4.

21. On July 30, 2019, Debtors filed their bankruptcy schedules, including Schedule F. [D.I. 363]. Included within Schedule F is MSAZ's claim against Debtor Insys Therapeutics, Inc. as Claim Number 3.1186 for $201,223.56 (the "MSAZ Claim"). [D.I. 363 at 264].

22. On September 9, 2019, the McKesson Entities filed their Joinder to Limited Objections of AmerisourceBergen Drug Corporation and Cardinal Health (the "Joinder"). [D.I. 570]. The Joinder supplemented the Reservation of Rights. The Joinder requested that any order approving the sale "be modified as necessary to preserve recoupment, application rights, setoff and other payment defenses" in part because "[a]t the inception of the bankruptcy cases, the Debtors sought and obtained approval to maintain certain business relationships uninterrupted, including product distribution and customer programs." *Id.* at 1-2.

23. On September 9, 2019, the McKesson Entities filed their Proof of Claim for $792,247.60 (the "Proof of Claim," collectively with the MSAZ Claim, the "McKesson Claims"). Specifically, the Proof of Claim was for inventory purchased from Debtors at Wholesale Acquisition Cost ("WAC"), recouped, and reduced against the value that Debtors owed the McKesson Entities at the time of filing the Proof of claim. The Proof of Claim explicitly noted that it was separate and supplemental to the MSAZ Claim. Moreover, the McKesson Entities explicitly made their rights as to potential recoupment credits clear, stating "McKesson is entitled to certain claims and credits (the "Distribution Credits") under the Distribution Agreements including, but not limited to, prompt pay discounts, distribution fees, chargebacks, rejected inventory claims, inventory shortage claims, inventory price discrepancy claims, and returned product claims."

24. On January 16, 2020, the Court confirmed the Second Amended Joint Chapter 11 Plan of Liquidation of Insys Therapeutics, Inc. and its Affiliated Debtors (the "Plan"). [D.I. 1115].

25. Pursuant to the Plan, Debtors appointed the Trustee as trustee of the Trust [D.I. 1115 at 10].

26. On February 23, 2021, Plaintiff filed the Complaint against the McKesson Entities that asserts six causes of action. The Complaint seeks to (i) avoid certain transfers made to the McKesson Entities and recover the value of those transfers pursuant to 11 U.S.C. §§ 547, 548, 549 and/or 550 and (ii) object to the McKesson Claims. [ADV. D.I. 1, ¶ 1]. Specifically, the Complaint seeks to avoid $15,524.17 pre-petition transfers to RelayHealth (the "RelayHealth Transfers") and $139,296.90 in pre-petition transfers to MSAZ (the "MSAZ Transfers," collectively with the RelayHealth Transfers, the "Transfers"). [ADV. D.I. 1, Exs. 1, 2].

IV. Legal Argument

27. This Motion is brought under FRCP 8(a), 9(b), and 12(b)(6), made applicable herein by FRBP 7008, 7009, and 7012. A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FRCP 8(a)(2). The statement must provide "the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 45 (1957). If a complaint alleges fraud, "a party must state with particularity the circumstances constituting fraud or mistake." FRCP 9(b).

28. Pursuant to FRCP 12, a court must dismiss a complaint for "failure to state a claim upon which relief can be granted." FRCP 12(b)(6). When evaluating a motion to dismiss, a court must "accept all factual allegations in the complaint as true." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). However, the factual allegations must be plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678. The factual allegations must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555; *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008). In order to survive a motion to dismiss, a plaintiff must plead "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element[s]" of a particular cause of action. *Phillips*, 515 F.3d at 234. Moreover, "if the allegations of [the]

complaint are contradicted by documents made a part thereof, the document controls and the Court need not accept as true the allegations of the complaint." *In re Premier Int'l Holdings, Inc.*, 443 B.R. 320, 330 n.47 (Bankr. D. Del. 2010). Similarly, a court can rely on "the law of the case" to determine that a complaint can be dismissed. *See e.g. In re Primary Health Sys.*, 275 B.R. at 710-11.

29. The Third Circuit articulated a two-part analysis to evaluating a complaint. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, the court "must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." *Id.* at 210-11. Second, the court must determine "whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Id.* at 211.

30. Pursuant to the *Fowler* test and the FRCP, the Court must dismiss the Complaint with prejudice in its entirety because Plaintiff has not and cannot allege sufficient facts to show a plausible claim for relief under any of the six causes of action.

A. The First Cause of Action Should Be Dismissed With Prejudice Because the Customer Order is the Law of the Case and Protects the Transfers from a Section 547 Challenge

31. The First Cause of Action is for recovery of alleged preferential transfers. Due to the Customer Motion and Customer Order, Plaintiff cannot state a plausible claim for relief for recovery of the Transfers. Subject to certain defenses, the Bankruptcy Code provides:

> The trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made on or within 90 days before the date of filing the petition; . . . and

> (5) that enables such creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

32. As the Third Circuit has noted, the "policy underlying § 547 is that of 'equal distribution amongst *similarly situated creditors*.'" *In re Friedman's Inc.*, 738 F.3d at 560 (quoting *In re First Jersey Sec., Inc.*, 180 F.3d 504, 511 (3d Cir. 1999)) (emphasis in original). In *Friedman's*, the Third Circuit found certain creditors—such as critical vendors or preferred customers—"can similarly be given preferred treatment under § 105 and § 363. A critical vendor who provided new value during the preference period need not be treated the same as another creditor who provided new value but is not considered by the debtor and the bankruptcy court to be a critical vendor post-petition. They are not similarly situated." *Id.* at 560-61; *AFA Inv. Inc. v. Trade Source, Inc.* (*In re AFA Inv. Inc.*), 538 B.R. 237, 243 (Bankr. D. Del. 2015) (citing *In re Kiwi Int'l Air Lines, Inc.*, 344 F.3d 311, 321 (3d Cir. 2003)) ("The Third Circuit has held that an unsecured creditor whose claim is paid in full post-petition pursuant to a court order, or a court-approved stipulation, cannot then be compelled in a preference action to turn over amounts related to pre-petition payments.") The Third Circuit noted, "If we allowed payments made pursuant to the Wage Order to increase [creditor's] preference liability, . . . we would be giving with one hand and taking away with the other. The intended goal of the Order . . . would not be served if the Debtor sought and obtained permission to pay wages to Appellee one week, but then sued Appellee for a preference the next." *In re Friedman's Inc.*, 738 F.3d at 561.

33. This case is patently similar to *In re Primary Health Systems*. In *Primary Health*, a creditor moved to dismiss a preference complaint due to the entry of a benefits order providing the debtors with authority to continue making premium and benefits payments because "the relief requested is essential to the continued operation of the Debtors' businesses and is in the best

interest of the Debtors and their estates, creditors and equity security holders." 275 B.R. at 710. The *Primary Health* court determined this to be an appropriate question for a motion to dismiss because "resolution of the motion to dismiss does not depend on a factual finding but on interpretation of the Benefits Order." *Id.* at 711. The court determined that the benefits order became "the law of the case" and "[i]f the payment falls within the authorization granted by the Benefits Order, it is protected from the Committee's § 547 challenge." *Id.*

34. Similar to the *Primary Health* order, the Customer Order is the law of this case. *See id.* at 710. At the First Day Hearing, the Court overruled the objection of the State of Florida and noted, "The programs under the customer programs and the like are certainly significant." [D.I. 68 at 58:21-59:2]. The Customer Order was not appealed and is a final order. [D.I. 232]. Accordingly, it is the "law of the case" and any payments to the McKesson Entities that were—or could have been—made under the authorization of the Customer Order are shielded from preference liability. *In re Primary Health Systems*, 275 B.R. at 711.

35. Moreover, unlike the *Zenith Indus. Corp. v. Longwood Elastomers, Inc.* (*In re Zenith Indus. Corp.*), 319 B.R. 810 (Bankr. D. Del. 2005) case (which the McKesson Entities expect Plaintiff to cite), it is not "too speculative to determine" that the McKesson Entities would have been paid pursuant to the Customer Order if the Transfers had not occurred pre-petition. In reaching its decision, the *Zenith Indus*. court found it was pure speculation the preference defendant was covered by the critical vendor motion and order, when the defendant was not named in the critical vendor motion *and* the preference payment at issue was over $500,000 more than the $1,000,000 critical vendor cap. *Id.* at 817-818. The *Zenith Indus*. court ruled the preference defendant could not establish that (i) it was an essential vendor as contemplated by the essential vendor motion; (ii) absent the pre-petition payment the debtor would have included the preference payment in the essential vendor motion; and (iii) that the court would have approved such a motion. *Id.* at 817.

36. This case is entirely inapposite to *Zenith Indus*. Unlike the *Zenith Indus.* defendant, the Customer Motion explicitly listed the McKesson Entities ***and*** Debtors' counsel confirmed at

the First Day Hearing that the Customer Motion contemplated all of the McKesson Entities' programs would be included as part of the Customer Motion. *Compare* [D.I. 9, ¶ 9] *and* [D.I. 68 at 57:11-14] *with* 319 B.R. at 817. The critical vendor motion order in *Zenith Indus*. encompassed approximately fifty vendors. 319 B.R. at 817. In this, the Customer Motion identified the three critical customers to the Debtors' business operations: the McKesson Entities; AmerisourceBergen Corporation, and Cardinal Health, Inc. [D.I. 9, ¶ 9].

37. Additionally, the analysis in *Zenith Indus.* largely turned on the amount of the pre-petition transfer in comparison with the relief granted by the essential vendor order. *Id.* at 818 ("It is important to note the significance of the $506,035 transaction relative to the relief granted by the Essential Vendor Order.") The court evaluated the trade vendors that appeared to be relevant to the essential vendor order and noted "[a]ssuming that some or all of those eleven trade creditors received essential vendor payments, the individual amounts going to the remaining fifty vendors would be very small." Accordingly, the *Zenith Indus.* court found that "It is obvious that adding the $506,035 claim would materially alter the facts upon with the Essential Order is based."

38. Unlike *Zenith Indus.*, the Customer Motion specifically contemplated complete payment to the McKesson Entities based on outstanding fees owed as of the Petition Date, including: (i) $162,000 for data fee programs [D.I. 9, ¶ 18]; (ii) $162,000 for product return policies [D.I. 9, ¶ 20]; (iii) $3,338,000 for Medicaid rebates programs [D.I. 9, ¶ 26]; $149,000 for Medicare Part D rebates programs [D.I. 9, ¶ 28]; (iv) $2,501,000 for private-insurer rebates programs [D.I. 9, ¶ 32]; (v) $384,000 for compliance services [D.I. 9, ¶ 33]; (vi) $723,000 for copay card programs [D.I. 9, ¶ 38]; (vii) $197,000 for CPAP [D.I. 9, ¶ 43]; and (viii) $34,000 for chargeback programs [D.I. 9, ¶ 47]. Just for the interim period, Debtors sought authorization to pay $5,507,000. *Id.* at Ex. A. It is not "speculation" that the Transfers—which total only $154,794.07—would have been included within Debtors' calculations in the Customer Motion, had those amounts not been paid during the 90-day preference period. Moreover, it is not speculation that the Court would have supported the Debtors' business judgment to include them.

At the First Day Hearing, the Court found the Customer Motion to be well within the goals of Chapter 11 cases and to be within Debtors' sound business judgment as the Court stated:

> [O]ne of the goals of Chapter 11 is, obviously, to maximize value for all creditors. And therefore, as much as possible on the first day, at least, to maintain the status quo of what has happened . . . . The programs under the customer programs and the like are certainly significant. The critical vendors are a little more sensitive, but nonetheless, the court, again, will rely upon the debtors' business judgment to make the appropriate payments. . . . I will grant the motions, and I will be pleased to enter them.

[D.I. 58:11-59:2].

39. The Transfers fall within the authorization of the Customer Order. In the Customer Motion, the Debtors explicitly listed the McKesson Entities as customers subject to the Customer Motion. [D.I. 9, ¶ 9]. While the Customer Motion explicitly lists programs related to the Multi Party Agreement and the Distribution Agreement, the Debtors confirmed at the First Day Hearing that co-pay programs, such as the RelayHealth Co-Pay Program, were included in the Customer Motion. [D.I. 68 at 57:11-14]. The Debtors determined in their business judgment that maintaining the various Customer Programs, pursuant to the Agreements, was "critical to Debtors' ongoing operations" and that Debtors risked "losing their current market share, negatively impacting their future business and revenue growth, and adversely affecting the sale process to be implemented in the Chapter 11 Cases" if the Debtors did not satisfy pre-petition obligations. [D.I 9, at ¶ 10]. Pursuant to the Complaint, the Transfers consisted of amounts owed to MSAZ and RelayHealth under the Multi Party Agreement and the RelayHealth Agreement, respectively. [Adv. D.I. 1, Exs. 1, 2]. Accordingly, had these payments not been made pre-petition, they would have been authorized under and paid pursuant to the Customer Order. [D.I. 232]. Thus, the law of the case binds Plaintiff and Plaintiff cannot avoid the Transfers. *In re Primary Health Systems*, 275 B.R. at 711.

40. Plaintiff cannot allege facts that demonstrate that the McKesson Entities received more because of the Transfers than they would have in a hypothetical chapter 7 liquidation. *See* § 547(b)(5). Pursuant to the Customer Order, the McKesson Entities would have received

payment of its pre-petition claims. [D.I. 232]. Accordingly, Plaintiff cannot satisfy a prima facie element of his claim. *See AFA, Inv.*, 538 B.R. at 243 (denying a debtors motion for summary judgment for failure to satisfy § 547(b)(4) where "had the alleged preferential payment not been made pre-petition, Trade Source would have received that payment post-petition" due to a critical vendor order). In *AFA, Inv.*, the Court determined that the debtors could not establish the element of § 547(b)(5) where the creditor was identified in the critical vendor motion and the alleged preference was "a mere fraction of the critical vendor cap." *Id.* at 244. In addition to the McKesson Entities being explicitly included in the Customer Motion, the interim Customer Order authorized the Debtors to "maintain and administer the Customer Programs and honor any related pre-petition obligations in the ordinary course of business and consistent with past practice, as necessary and appropriate in the Debtors' business judgment, in an aggregate amount not to exceed $5,507,000." [D.I. 53, ¶ 2]. Here, the Transfers total $154,821.07, which is a "mere fraction" of the aggregate $5,507,000 authorized. *See AFA, Inv.*, 538 B.R. at 244. Thus, similar to *AFA Inv.*, Plaintiff cannot state a claim for relief pursuant to section 547 because it cannot plead plausible facts under section 547(b)(5).

41. The rulings in *Primary Health* and *AFA Inv.* align with the Third Circuit's policy set forth in *In re Friedman's Inc.* 738 F.3d at 561. The Customer Order sought to pay Debtors' critical customers in order to maximize value for the estates. [D.I. 232]. The purpose of that final order is irreparably frustrated if Plaintiff claws back payments authorized by a final order of this Court. *In re Friedman's Inc.*, 738 F.3d at 561; *AFA Inv.*, 538 B.R. at 243; *In re Primary Health Systems*, 275 B.R. at 711. Accordingly, the Complaint fails include plausible facts to support a claim for relief under section 547. FRCP 8(a)(2); 12(b)(6)

42. Additionally, Plaintiff failed to plead a separate cause of action for recovery of any of the Transfers. To the extent transfers are avoided, the Bankruptcy Code provides:

> The trustee may recover, for the benefit of the estate, the property transferred, or if the court so orders, the value of such property from the initial transferee of such transfer or the entity for whose benefit

> such transfer was made; or any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a)

43. Even if Plaintiff properly pleaded a cause of action for recovery under section 550, the Complaint would fail to state a claim for which relief could be granted. Section 550 only applies to transfers properly avoided under sections 547, 548, and 549. As discussed above, Plaintiff cannot avoid the Transfers pursuant to section 547 because the Customer Order authorized the Transfers and binds Plaintiff. Accordingly, Plaintiff cannot recover the Transfers under section 550.

44. To the extent the Court finds that there is speculation that the Transfers would have been paid pre-petition under the Customer Motion and Customer Order, the McKesson Entities request the opportunity to take limited discovery of Debtors' PMK. The McKesson Entities are confident that based on the Customer Motion Debtors' PMK will acknowledge that the Transfers would have been made under the Customer Motion had those Transfers not been paid during the 90-day preference period.

45. For the foregoing reasons, the Court should dismiss the First Cause of Action with prejudice for failure to contain a "short and plain statement of the claim" and "failure to state a claim upon which relief can be granted." FRCP 8(a)(2); 12(b)(6); *In re Friedman's Inc.*, 738 F.3d at 561.

B. The Second Cause of Action Should Be Dismissed With Prejudice Because the Customer Order is the Law of the Case and Plaintiff Did Not Allege Facts Establishing a Lack of Reasonably Equivalent Value for the Services Provided Under the Agreements

46. The Complaint's Second Cause of Action is for a fraudulent transfer. Once again, Plaintiff fails to state a claim upon which relief can be granted. FRCP 12(b)(6). Section 548(a) of the Bankruptcy Code provides:

> The trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily made such transfer or incurred such obligation with actual intent to hinder, delay, or

> defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (i) received less than a reasonably equivalent value in exchange for such transfer or obligation;
>
> (I) and was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured. . . ."

11 U.S.C. § 548(a).

47. Section 548 allows a trustee to avoid fraudulent transfers based on claims of actual fraud or constructive fraud. § 548(a)(1)(A), (B). A transfer is avoidable if it was either actually fraudulent in that it "(i) had at its purpose an intent to hinder, delay or defraud the debtor's creditors," or that it was constructively fraudulent in that the transfer "(ii) was made while the debtor was in a precarious financial condition, and the transaction did not provide the debtor with a reasonably equivalent value in exchange for the item transferred." 5 Collier on Bankruptcy § 548.01 (16th ed. 2019).

48. As discussed above, in the Customer Motion and during the first day hearing on that motion, the Debtors acknowledged their agreements with the McKesson Entities and the outstanding amounts then owed under those agreements. Here, Plaintiff fails to allege facts sufficient to show a plausible claim for relief for a fraudulent transfer.

49. While FRCP 9(b) governs pleading under § 548(a)(1)(A), FRCP 8 governs pleading requirements under section 548(a)(1)(B). *Burtch v. Huston* (*In re USDigital, Inc.*), 443 B.R. 22, 38 (Bankr. D. Del. 2011). The Complaint fails to satisfy the requisite pleading standards to support a cause of action under section 548(a)(1)(B). Plaintiff merely mirrors the elements of section 548(a)(1)(B) without asserting any actual allegations to show that relief is possible—particularly in light the Debtors' admissions in the Customer Motion and the Customer Order.

Iqbal, 556 U.S. at 678 ("Threadbare recitals of the elements . . . do not suffice."); *In re USDigital, Inc.*, 443 B.R. at 39 ("Conclusory or bare-bones allegations no longer suffice to survive a motion to dismiss.") Further, Plaintiff pleads this claim in the alternative, making it impossible for the McKesson Entities to determine the factual underpinning of Trustee's claim. *See Twombly*, 550 U.S. at 555 (requiring the factual allegations in a complaint to "raise a right to relief above the speculative level"). On its face, Plaintiff's Second Cause of Action is defective and should be dismissed. FRCP 12(b)(6). Plaintiff did not—and cannot—plead "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element[s]" of a claim under section 548. *Phillips*, 515 F.3d at 234.

50. Specifically, Plaintiff failed to plead facts to show that the Debtors did not receive "reasonably equivalent value" as required by section 548(a)(1)(B)(i). Moreover, Plaintiff cannot allege facts to support the necessary elements of section 548(a)(1)(B). In the case of constructively fraudulent transfers, the Bankruptcy Code defines "value" as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor." § 548(d)(2)(A). The Bankruptcy Code does not define "reasonably equivalent value." *Peltz v. Hatten*, 279 B.R. 710, 736 (D. Del. 2002). The Third Circuit uses a two-step approach to determine whether a debtor received reasonably equivalent value in exchange for a transfer or obligation. *Pension Transfer Corp. v. Beneficiaries under the Third Amend. To Fruehauf Trailer Corp. Ret. Plan No. 003* (*In re Fruehauf Trailer Corp.*), 444 F.3d 203, 212 (3d Cir. 2006). The first prong is that "a court must consider whether, 'based on the circumstances that existed at the time' of the transfer, it was 'legitimate and reasonable' to expect some value accruing to the debtor." *Id.* (quoting *Mellon Bank, N.A. v. Official Comm. of Unsecured Creditors of R.M.L., Inc.* (*In re R.M.L., Inc.*), 92 F.3d 139, 152 (3d Cir. 1996). If the court find that the debtor received *any* value, then it turns to the second prong: namely, a fact-driven analysis between the value and the transfer at issue to determine "whether the debtor got roughly the value it gave." *Id.* at 212-13. In evaluating the second-prong, the court should consider "the good faith of the parties, the difference between the amount paid and the

market value, and whether the transaction was at arms-length." *In re Evergreen Energy, Inc.*, 546 B.R. 549, 563 (Bankr. D. Del. 2016).

51. Without further explanation, a transfer made by a debtor to reimburse a creditor for a pre-existing obligation under the terms of an arm's length commercial agreement does not show a lack of reasonably equivalent value. *In re USDigital, Inc.*, 443 B.R. at 39; *Elway Co., LLP v. Miller* (*In re Elrod Holdings Corp.*), 421 B.R 700, 714 (Bankr. D. Del. 2010) (finding that a transfer that results in a "[r]eduction of a pre-existing obligation" is for reasonably equivalent value unless the trustee can show the value was not sufficient). Generally, when a contract exists, as here, the contract rate is the reasonable value of the services provided to the bankruptcy estate. *See e.g., In re Smurfit-Stone Container Corp*., 425 B.R. 735, 741 (Bankr. D. Del. 2010) (citing *In re Bethlehem Steel Corp*., 291 B.R. 260, 264 (Bankr. S.D.N.Y. 2003)) (compelling payment of an administration expense). And, if a trustee or debtor seeks to challenge the reasonable value of those services, it bears the burden of proof by providing convincing evidence to the contrary. *See In re ID Liquidation One, LLC*, 503 B.R. 392, 399-400 (Bankr D. Del. 2013) ("Under the *Bildisco* 'reasonable value of services' standard, there is a presumption that the contract terms and rate represents the reasonable value of the services or goods provided under the contract. This presumption can be overcome if the objecting party provides 'convincing evidence to the contrary.'") (internal citations omitted).

52. Here the Transfers are related to amounts owed to the McKesson Entities pursuant to the Agreements—specifically the Multi Party Agreement and the RelayHealth Agreement. The Agreements provide certain contract rates for the services the McKesson Entities provided Debtors pursuant to those Agreements. The McKesson Entities then invoiced the Debtors based on the services provided under the Agreements—according to the contract rates in the Agreements. A direct dollar-for-dollar reduction in the Debtors' liability to the McKesson Entities is "exactly equivalent consideration" for the services provided to Debtors. *See In re USDigital, Inc.*, 443 B.R. at 40 (dismissing cause of action under § 548(a)(1)(B) for failure and inability to allege facts to satisfy the "reasonably equivalent value" element). The Complaint does not include any facts to

assert that the Transfers "show a lack of reasonably equivalent value." *See id.* at 39-40. Further, Plaintiff provides no facts to overcome the presumption that the contract terms under the Agreements represent the reasonable value of the services the McKesson Entities provided to the Debtors. Accordingly, the Complaint fails "to state a claim upon which relief can be granted" as to the Second Cause of Action. FRCP 12(b)(6).

53. Plaintiff failed to plead a separate cause of action for recovery of any of the Transfers. Even if Plaintiff had pleaded a cause of action for recovery under section 550, the Complaint would fail to state a claim for which relief could be granted. Section 550 only applies to transfers properly avoided under sections 547, 548, and 549. As discussed above, the Transfers cannot be avoid pursuant to section 548. Accordingly, Plaintiff cannot recover the Transfers under section 550. Accordingly, the Second Cause of Action should be dismissed with prejudice for failure to contain a "short and plain statement of the claim" and "failure to state a claim upon which relief can be granted." FRCP 8(a)(2); 12(b)(6).

C. The Third Cause of Action Should Be Dismissed Because the Trustee Has Not Alleged Any Post-Petition Transfers as Required by Section 549

54. Plaintiff's Third Cause of Action is for recovery of unauthorized post-petition transfers. As to post-petition transfers, the Bankruptcy Code provides "The trustee may avoid a transfer of property of the estate that occurs after the commencement of the case; and that is authorized only under section 303(f) or 542(c) of this title; or that is not authorized under this title or by the court." 11 U.S.C. § 549(a).

55. "To sufficiently plead a claim for avoidance of a postpetition transfer, the plaintiff must at least plead the existence of a transfer made after the commencement of the bankruptcy case." *Gavin Solmonese, LLC v. Shyamsundar* (*In re AmCad Holdings, LLC*), 579 B.R. 33, 42 (Bankr. D. Del. 2017). The Transfers all occurred pre-petition. *See* [Adv. D.I. 1, Exs. 1, 2]. The Complaint does not allege any post-petition transfers. Accordingly, the Complaint "fails to state a claim upon which relief can be granted" under section 549. FRCP 12(b)(6).

56. Moreover, any post-petition transfers—none of which are the subject of this Complaint—were authorized by the Customer Order. [D.I. 232]. Thus, Plaintiff cannot amend the Complaint to plead a plausible cause of action for recovery of unauthorized post-petition transfers. *See generally, Fowler*, 578 F.3d at 211

57. Plaintiff failed to plead a separate cause of action for recovery of any of the Transfers. Even if Plaintiff properly pleaded a cause of action for recovery under section 550, the Complaint would fail to state a claim for which relief could be granted. *See* FRCP 12(b)(6). Section 550 only applies to transfers properly avoided under sections 547, 548, and 549. As discussed above, the Transfers cannot be avoid pursuant to section 549. Therefore, there are no facts to state a plausible claim for relief. *Fowler*, 578 F.3d at 211. Accordingly, Plaintiff cannot recover the Transfers under section 550. Accordingly, the Third Cause of Action should be dismissed with prejudice for failure to contain a "short and plain statement of the claim" and for "failure to state a claim upon which relief can be granted." FRCP 8(a)(2); 12(b)(6).

D. The Fourth Cause of Action Should Be Dismissed Because the Transfers Are Not Recoverable and the McKesson Claims Cannot be Disallowed Pursuant to Section 502(d)

58. The Fourth Cause of Action is for disallowance of the McKesson Claims. The Bankruptcy Code provides that a court "shall disallow any claim of any entity from which property is recoverable . . . or that is a transferee of a transfer avoidable . . . unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable." 11 U.S.C. § 502(d).

59. Once again, Plaintiff failed to state a claim for which relief can be granted under section 502(d). FRCP 12(b)(6). As discussed thoroughly above, Plaintiff cannot avoid the Transfers pursuant to sections 547, 548, or 549. Thus, Plaintiff has not and cannot allege any facts—much less plausible facts—that the McKesson Entities are transferee[s] of avoidable transfers, as required by section 502(d). *Iqbal*, 556 U.S. at 679. Consequently, the McKesson Entities are not "entit[ies] from which property is recoverable" under section 550. Thus, no relief

can be granted pursuant to section 502(d). On that basis alone, the Fourth Cause of Action should be dismissed with prejudice as to all of the McKesson Entities.

60. Further, The Complaint only explicitly lists the MSAZ Claim as a claim at issue. However, the Complaint defines "claims" as the MSAZ Claim "along with any other claim the Debtors scheduled on behalf of Defendant or claims the Defendant filed." [Adv. D.I. 1, ¶ 10]. Pursuant to that definition, the Complaint appears to seek to disallow all of the McKesson Claims, including the Proof of Claim filed by McKesson as an individual corporation. The Complaint alleges no facts to demonstrate that Plaintiff has a plausible claim for disallowance of the Proof of Claim. *Fowler*, F.3d at 211.

61. The Complaint lists McKesson, as a separate corporation, as a Defendant. The Complaint does not allege that McKesson received any pre-petition transfers subject to avoidance. Accordingly, McKesson is not an "entity from which property is recoverable" or the transferee of avoidable transfers. *See* § 502(d). The Transfers involve transactions between the Debtors and MSAZ and RelayHealth under their respective Agreements. The Transfers do not involve transactions between Debtors and McKesson, yet the Complaint conflates the McKesson Entities and the McKesson Claims. The Proof of Claim is solely for amounts owed by Debtors to McKesson under the Distribution Agreement. Plaintiff cannot disallow a separate entities claim in his quest to recover potentially avoidable or fraudulent transfers. No facts have been alleged, much less facts that "raise a right to relief above the speculative level," for disallowance of the Proof of Claim under section 502(d). *See Twombly*, 550 U.S. at 555; *Fowler*, F.3d at 211.

62. For the foregoing reasons, the Fourth Cause of Action should be dismissed with prejudice for failure to contain a "short and plain statement of the claim" and "failure to state a claim upon which relief can be granted." FRCP 8(a)(2); 12(b)(6).

E. The Fifth Cause of Action Should Be Dismissed Because Plaintiff Has Not Alleged Plausible Facts to Dispute the McKesson Claims

63. Similarly, the Fifth Cause of Action seeks to object to the McKesson Claims pursuant to language in the Plan. Section 7.2 of the Plan states, "Notwithstanding any other

provision in the Plan, if any portion of a Claim is Disputed, no payment or Distribution provided under the Plan shall be made on account of such Claim unless and until such Disputed Claim becomes an Allowed Claim." [D.I. 1115-1 at 71].

64. As discussed thoroughly in this Motion, Plaintiff has not alleged a factual basis to disallow the McKesson Claims. Section 502(d) only allows a claim to be disallowed pursuant to repayment in full of transfers avoided pursuant to sections 547, 548, and 549. The Complaint does not contain facts to state a claim for relief for avoidance of the Transfers under sections 547, 548, and 549. Without facts to support a claim for avoidable transfers, Plaintiff fails to state any additional facts as to why the McKesson Claims are Disputed and therefore subjection to Section 7.2. The Complaint fails to plead plausible facts to show that the McKesson Claims are in dispute. *See Iqbal*, 556 U.S. at 679; *Fowler*, 578 F.3d at 210.

65. Further, as in the Fourth Cause of Action, the Complaint conflates the MSAZ Claim and the Proof of Claim. As addressed above, Plaintiff pleads no facts to allege that the Proof of Claim is in dispute—either by the terms of the Plan or the Complaint. The Complaint does not allege that McKesson is the transferee of any avoidable transfers. Accordingly, the Proof of Claim cannot be disallowed pursuant to section 502(d). The Complaint fails to include "a short and plain statement of the claim showing that the pleader is entitled to relief" as to the Proof of Claim. FRCP 8(a)(2). Accordingly, Plaintiff pleaded no facts to entitle the Trustee to withhold distributions under the Proof of Claim. *See Twombly*, 550 U.S. at 555; *Fowler*, F.3d at 211.

66. For the foregoing reasons, the Fifth Cause of Action should be dismissed in its entirety and with prejudice for failure to contain a "short and plain statement of the claim" and "failure to state a claim upon which relief can be granted." FRCP 8(a)(2); 12(b)(6).

F. The Sixth Cause of Action Should Be Dismissed Because Plaintiff Has Not Alleged Any Facts to Establish a Plausible Setoff Right

67. Finally, the Sixth Cause of Action contends that Plaintiff is entitled to setoff against the McKesson Claims. Section 6.15 of the Plan provides:

> Subject to Section 2.2. and Sections 10.4 through 10.7 of the Plan, the Liquidating Trustee may, but shall not be required to, setoff against, or recoup from, any Claim and from any payments to be made pursuant to the Plan with respect to such Claim any claims of any nature whatsoever (to the extent permitted by applicable law) that the Debtors or the Liquidating Debtors may have against the claimant, but neither the failure to do so nor the allowance of any Claim hereunder shall constitute a waiver or release by the Debtors, the Liquidating Debtors, or the Liquidating Trustee of any such Claim it may have against the claimant.

[D.I. 1115-1 at 69].

68. Plaintiff only pleads that pursuant to the Plan and "applicable bankruptcy and non-bankruptcy law" that it is entitled to setoff any recovery from the preceding cause of action against the McKesson Claims. [Adv. D.I. 1, ¶ 46]. As discussed thoroughly above, Plaintiff cannot avoid the Transfers and therefore has no right to disallow the MSAZ Claim pursuant to section 502(d). Thus, the Debtors made the Transfers to MSAZ and RelayHealth and not McKesson and therefore the Trustee has no right to disallow the Proof of Claim under section 502(d). Therefore, without the ability to recover the Transfers, Plaintiff has not alleged any facts to demonstrate that he is entitled to relief. *See* FRCP 8(a)(2).

69. Plaintiff does not allege that it has any setoff rights against the McKesson Entities under the Agreements. Nor does Plaintiff allege any other substantive setoff right beyond the recovery of the Transfers. If the Trustee is asserting additional setoff rights beyond the recovery of the Transfers, the Complaint fails to provide "fair notice" of the Trustee's setoff claim and "the grounds upon which it rests." *Conley*, 355 U.S. at 45. Without any facts to support Trustee's setoff right, the Complaint fails to allege a plausible claim for relief and fails the *Fowler* test. *Fowler*, 578 F.3d at 211. Accordingly, the Sixth Cause of Action should be dismissed with prejudice for failure to contain a "short and plain statement of the claim" and "failure to state a claim upon which relief can be granted." FRCP 8(a)(2); 12(b)(6).

Wherefore, the for the foregoing reasons, the McKesson Entities respectfully request that the Court dismiss the Complaint in its entirety for failure to state a claim upon which relief can be granted with prejudice. In the alternative, the McKesson Entities respectfully request that the

Court allow the McKesson Entities to conduct limited discovery on Debtors' PMK as to the issue of whether Debtors intended to repay the McKesson Entities' pre-petition amounts owed pursuant to the Customer Motion.

Dated: May 21, 2021

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Counsel for McKesson Corporation, RelayHealth Pharmacy Solutions, and RxC Acquisition Company, successor by merger to McKesson Specialty Arizona, Inc. d/b/a McKesson Patient Relationship Solutions

Exhibit A

Proposed Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: INSYS THERAPEUTICS, INC., *et al*., Liquidating Debtor.[1]	Chapter 11 Case No. 19-11292 (JTD) (Jointly Administered)
INSYS LIQUIDATION TRUST, by and through WILLIAM HENRICH, as LIQUIDATING TRUSTEE, Plaintiff, - against - MCKESSON CORPORATION d/b/a RXCROSSROADS BY MCKESSON and RELAYHEALTH PHARMACY SOLUTIONS, and MCKESSON SPECIALTY ARIZONA, INC., Defendants.	Adversary No. 21-50176 (JTD)

[PROPOSED] ORDER GRANTING THE MOTION TO DISMISS COMPLAINT TO AVOID AND RECOVER PREFERENTIAL TRANSFERS AND OBJECT TO CLAIMS

[1] The Liquidating Debtors in these cases, along with the last four digits of each Debtors' federal tax identification number, 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, the "Debtors")

Upon the motion (the "Motion"),[2] dated May 21, 2021, of McKesson Corporation d/b/a RXCrossRoads, RelayHealth Pharmacy Solutions, and McKesson Specialty Arizona Inc.[3] (collectively, the "McKesson Entities"), as defendants in the above-captioned adversary proceeding, pursuant to sections 105(a), 502(d), 547, 548, 549, and 550 of title 11 of the United States Code (the "Bankruptcy Code"), Federal Rules of Civil Procedure ("FRCP") 8, 9, and 12(b)(6), made applicable herein by the Federal Rules of Bankruptcy Procedure ("FRBP") 7008, 7009, 7012 for entry of an order (the "Order") dismissing the Complaint to Avoid and Recover Preferential Transfers and Object to Claims (the "Complaint") with prejudice; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. § 157, 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and consideration of the Motion and the requested relief being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided; and such notice having been adequate and appropriate under the circumstances; and it appearing that no other further notice need be provided; and the Court having reviewed the Motion; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT

1. The Motion is granted.

2. The Complaint is dismissed with prejudice.

3. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, and/or enforcement of this Order.

---

[2] Capitalized terms used herein but not otherwise defined herein shall have the meaning ascribed to such terms in the Motion.

[3] McKesson Specialty Arizona's complete name was McKesson Specialty Arizona, Inc. d/b/a McKesson Patient Relationship Solutions, which was recently merged into RxC Acquisition Company, also a wholly-owned subsidiary of McKesson.

EXHIBIT B

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	Chapter 11
INSYS THERAPEUTICS, INC., *et al.*,	Case No. 19-11292 (KG)
	Courtroom No. 3 824 N. Market Street Wilmington, Delaware 19801
Debtor.	June 11, 2019 10:30 A.M.

TRANSCRIPT OF HEARING
BEFORE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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- and -

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For McKesson Corp:	Jeffrey Garfinkle, Esquire BUCHALTER, APC 18400 Von Karman Avenue Irvine, California 92612
For U.S. Trustee:	Jane Leamy, Esquire OFFICE OF U.S. TRUSTEE 844 King Street Wilmington, Delaware 19801

I also want to point out, Your Honor, that in these Chapter 11 cases in order for the debtors to realize the highest value for their creditors, the debtors must preserve the value of their assets and to be able to continue operating because to any potential purchaser of these assets, the value will be severely diminished if the debtors lose their customers or their vendors, including, you know, in this case, the market of products, Subsys and Syndros and with respect to the pipeline products.

Your Honor, I'm going to next proceed to the second item of the agenda which is number 15.

THE COURT: All right.

MS. PESHKO: And that is the debtors' customer programs motion filed at docket number 9.

In this motion, the debtors are seeking authority to maintain their existing prepetition customer programs and practices which programs and practices are standard in the debtors' industry. And in some cases, as with the rebates program, are required in order for these products to be covered under the Medicaid and Medicare programs and to be eligible for the Federal Supply Schedule as is described in the motion in detail.

Your Honor, the debtors expect that the maintenance of these customer programs may require payments of up to $5.5 million dollars as described in the motion and proposed order on an interim basis; however, Your Honor, the debtors are not seeking to pay any amounts they do not think are absolutely necessary.

And as a result, the debtors have amended the order originally filed with the motion to provide that if there's an existing executory contract where if any critical vendor accepts a payment that is subject to such contract and fails to perform or fails to perform which is generally with the regular requirements of the practices, the prepetition practices, then the debtors will be able to clawback such payments. The debtors do not intend to make any payments that are not absolutely necessary in order to continue their operations, Your Honor.

I also want to point out, Your Honor, with respect to customer programs that the debtors are not seeking to make payment on prepetition claims like they would for other contracts. Instead, here, the debtors are seeking authority to continue to honor their discount and fee programs where the debtors offer these programs and discounts to customers based on a contractor determined rates and account of certain distribution services.

Basically, the debtors are seeking authority to respect the pricing terms in the contracts with their customers. In certain cases, as I mentioned, those are required under the Medicaid and Medicare programs, Your

Honor.

I would next like to briefly respond to some of the objections.

First, Your Honor, with respect to the evidence of the debtors have offered, we believe that the declaration by Mr. Long filed in these cases is sufficient to show that relief requested under interim basis on an emergency basis is necessary here; however, Mr. Long is here and if the court has further questions after I'm finished, he can take the stand and answer any questions.

THE COURT: All right.

MS. PESHKO: Second, Your Honor, is the liquidity point that I briefly mentioned before. The objection filed by the state of Florida fails to consider a simple fact to continue to bring in revenue and to maintain liquidity until such time as the debtors are able to sell their pharmaceutical assets products, the debtors need to continue to comply with their obligations to the customers.

The debtors' customers have other options. They do not need to buy the debtors' products. If the debtors are not loyal to them, they do not need to remain loyal to the debtors, Your Honor.

Furthermore, I would like to point out that if the debtors' business shuts down as a result of the debtors not making critical vendor payments and not complying with their customer programs, the objecting parties will be left with no business and no value. The relief requested in these motions on an emergency basis, Your Honor, is in the best interest of all of the debtors' creditors including the ones that have objected here.

Your Honor, if you have any questions, I am happy to answer them as is Mr. Long.

THE COURT: Thank you. Thank you, Ms. Peshko.

Does anyone else wish to be heard with respect to these two motions?

MR. GARFINKLE: Yes, Your Honor, Jeff Garfinkle for McKesson.

THE COURT: Yes, sir.

MR. GARFINKLE: And it's always a pleasure to back in front of you. I will, of course, take care of the necessary *pro hac* once we figured that out. And, again, I appreciate the accommodation.

As the court knows, I've had a good deal of experience in front of you and other courts on pharmaceutical cases.

I have two issues with the customer motion. One is a point of clarification. McKesson has two subsidiaries running copay programs. I know the court is quite familiar with copay programs in light of the Orexigen case there. I was before the court last year on.

THE COURT: Yes.

MR. GARFINKLE: McKesson has one program in which it is still owed money. Just to reserve our rights that, as the court knows, the Orexigen decision is up on appeal and subject to our potential setoff rights. Those same setoff rights exist which ties into, I think, a misunderstanding of the state of Florida with respect to their customers.

The customers, as the court is quite familiar with, are the distributors primarily McKesson, Cardinal, and AmerisourceBergen who distributes the products and, according to the debtors' customer motion, two specialty pharmacies. On a daily basis, those intermediaries are pushing out product to the pharmacies in (indiscernible) end-user patients through a nationwide distribution panel, all governed by contract.

On a daily basis, there will be new purchases, new accounts receivables generated against which the intermediaries, the distributors, and the specialty pharmacies have recoupment rights under our contracts.

And the state of Florida doesn't appear to understand that that at any given point McKesson and the other distributors are buying product, generated an account payable to the debtor against which they have recoupment rights such as for distribution fees for product return and the like.

As I understand the customer motion, the debtor is merely saying those practices can continue allowing basically a deduction for against the account receivable and potentially out-of-pocket payment and to the extent that's required.

This is very customary. The court saw this in Orexigen, granted it in Orexigen, and I can give a list of cases where these customer motions in the pharmaceutical industry are very common. What we need clarification on, what the motion is a little bit unclear about, at page 12 at a customer motion is which of the copay programs are they asking to continue?

As the court may recall from Orexigen, McKesson and the debtor entered into a post-petition adequate protection arrangement to ensure that as McKesson reimbursed pharmacies for the or the McKesson subsidiary reimburses pharmacies for the continuation of the copay programs that there are sufficient funds available to make sure that will happen.

Now this case is unique and it doesn't have secured debt. There's $40 million dollars of cash. But on the copay programs, the McKesson division which is running one is called MPC Health or RelayHealth.

They have a deposit to secure the prepetition obligations, but we want to make sure that program -- one, we want to know whether that program is continuing and, number two, if that program is continuing that the debtor has the right to continue to pay as those charges run through the system.

THE COURT: All right, let me ask for that clarification, Ms. Peshko, if you have the answer.

She's consulting, Mr. Garfinkle.

MR. GARFINKLE: Thank you, Your Honor.

(Participating conferring)

THE COURT: Ms. Peshko, yes.

MS. PESHKO: Your Honor, if the question is whether the debtors are continuing all of their existing programs, copay programs, we're not aware of any prepetition programs that we are not continuing. Perhaps, if the question was clarified -- is there --

MR. GARFINKLE: Why I think that clarifies it, Your Honor. If there are active programs, so that's good. It was as little unclear as to whether they were all being continued or they were being selectively continued. Okay. That's helpful for me to know and for McKesson to know as well.

Going back to the point to respond to the state of Florida, we are in support of the customer motion. This is a very standard motion. It recognizes the recoupment rights which McKesson and the other distributors have in this

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triangular relationship whereby McKesson served as the intermediary between the manufacturer, this case Insys, and the pharmacies and the national Pharmaceutical supply chain.

THE COURT: All right. Thank you, Mr. Garfinkle.

Anyone else wish to be heard?

(No verbal response)

THE COURT: Well, I've heard the objection and I certainly understand it. And this is a sensitive case and it's an involved case. And the debtors don't have a tremendous amount of money, frankly, at this point.

But, you know, one of the goals of Chapter 11 is, obviously, to maximize value for all creditors. And, therefore, as much as possible on the first day, at least, to maintain the status quo of what has happened in the past and what will continue to happen in the future without their being any vast departure from what happened.

And the court obviously, to a large extent, relies upon the debtors to make good judgment and it's their judgment that really forms the basis for these motions. So, I'm going to grant the motions. These are interim motions. The programs under the customer programs and the like are certainly significant.

The critical vendors are a little more sensitive, but nonetheless, the court, again, will rely upon the debtors' business judgment to make the appropriate payments and so, I will overrule the objections. I will grant the motions, and I will be pleased to enter them.

MS. PESHKO: Thank you, Your Honor.

THE COURT: Yes.

MS. PESHKO: I will cede the floor back to my colleague, Ms. Arthur.

THE COURT: Ms. Arthur. Thank you. Thank you, Ms. Peshko. Ms. Arthur, yes.

MS. ARTHUR: Yes, thank you, Your Honor, and we do appreciate your commentary in connection with the judgment that the debtors will use in connection with those programs.

As you noted, we do fully intend to negotiate with the parties and preserve a liquidity profile to the best way that we can.

THE COURT: Okay.

MS. ARTHUR: So, we do appreciate Your Honor's ruling today and with respect to the motions.

THE COURT: It's a little bit of a latitude that the court is granting the debtors, but I think it's appropriate under the circumstances here, and I certainly have faith in the debtors and their counsel.

MS. ARTHUR: Thank you, Your Honor, we appreciate that.

Your Honor, the next item on the agenda, if we can go back for a moment, is the debtors' motion seeking approval

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 21, 2021, he caused the foregoing to be electronically filed with the Clerk of the Court using the ECF system that will send notification of such filing to the parties indicated on the Notice of Electronic Filing, and that the foregoing is also being served on the parties listed below via regular e-mail and U.S. Mail:

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