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*Liaison Counsel for Lead Plaintiff,
Class Representative, and the Class*

**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

**CLASS COUNSEL'S MOTION
FOR REIMBURSEMENT OF
LITIGATION EXPENSES;
AND MEMORANDUM OF
POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

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Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class
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2020/PUB_Year_End_Trends_012120_Final.pdf](http://www.nera.com/content/dam/nera/publications/2020/PUB_Year_End_Trends_012120_Final.pdf)..... 2

1 Pursuant to Federal Rule of Civil Procedure (“Rule”) 23(h), Court-appointed Class
2 Counsel Kessler Topaz Meltzer & Check, LLP (“Kessler Topaz”),¹ on behalf of
3 Plaintiffs’ Counsel,² hereby respectfully moves this Court for: (i) reimbursement of
4 litigation expenses in the amount of \$635,000—which amount represents only a portion
5 of the \$1,124,606.29 in aggregate expenses that were reasonably and necessarily incurred
6 by Plaintiffs’ Counsel in prosecuting and resolving the Action through May 22, 2020;³
7 and (ii) an award of \$15,000 to Court-appointed Class Representative Clark Miller for
8 costs incurred directly as a result of his representation of the Class in the Action, as
9 authorized by the Private Securities Litigation Reform Act of 1995 (“PSLRA”).

10 **I. PRELIMINARY STATEMENT**

11 After more than four years of litigation, Class Counsel successfully negotiated a
12 settlement of this securities class action with Defendant Darryl S. Baker. The proposed
13 Settlement, if approved by the Court, will resolve the Action against Defendant Baker for
14 \$2 million in cash. As discussed in the accompanying submissions, the Baker Settlement
15 provides meaningful compensation to the Class while avoiding the substantial risks,
16 costs, and delays of trial and post-trial appeals. Notably, the recovery from Defendant
17 Baker represents *more than* 50% of the insurance coverage available to him in connection
18 with the Action (i.e., \$3.96 million of a wasting \$5 million policy), and is directly in line
19 with the percentage of potentially recoverable damages secured in settlements of recent
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21
22 ¹ All capitalized terms not defined herein have the meanings ascribed to them in the
23 Stipulation and Agreement of Settlement Between Lead Plaintiff and Defendant Darryl
24 S. Baker dated May 22, 2020 (Doc. 341-1) (“Stipulation”) or in the Declaration of
25 Johnston de F. Whitman, Jr. in Support of (I) Class Representative’s Motion for Final
26 Approval of Settlement with Defendant Darryl S. Baker and Plan of Allocation; and (II)
27 Class Counsel’s Motion for Reimbursement of Litigation Expenses (“Whitman
28 Declaration”) filed herewith. “¶ _” herein refer to paragraphs in the Whitman Declaration.
Unless otherwise noted, all internal citations and quotations have been omitted, and
emphasis has been added.

² “Plaintiffs’ Counsel” refers to: (i) Kessler Topaz; and (ii) Court-appointed Liaison
Counsel Bonnett, Fairbourn, Friedman & Balint, P.C.

³ This submission reflects expenses incurred by Plaintiffs’ Counsel through May 22,
2020, the date Class Representative moved for preliminary approval of the Settlement.

1 securities class actions, as reported by NERA Economic Consulting.⁴ This result is
2 particularly significant in light of Insys' June 2019 bankruptcy filing, which eliminated
3 Insys as a potential source of recovery, altered the landscape of the litigation, and
4 compounded the substantial litigation risks already present in the Action. Although Insys'
5 bankruptcy significantly imperiled the chances of obtaining a recovery, Class Counsel
6 dedicated substantial time and resources to protecting Class Members' interests, and has
7 successfully obtained the Baker Settlement for the benefit of the Class.

8 As detailed in the Whitman Declaration, Class Counsel vigorously pursued this
9 Action from its outset, and was preparing to go to trial with Defendant Baker when the
10 Settlement was reached. Among their efforts, Class Counsel conducted a thorough
11 investigation, resulting in two detailed complaints (and two rounds of motion to dismiss
12 briefing); pursued multiple sources of discovery, including extensive document discovery
13 that resulted in receiving more than 14 million pages of documents that Class Counsel
14 reviewed and analyzed in connection with the Action; and participated in ten fact witness
15 depositions—including the depositions of all three individual defendants, two corporate
16 representatives of Insys under Rule 30(b)(6), and the Class Representative. ¶¶ 16-51.
17 Class Counsel also worked extensively with experts in the areas of market efficiency,
18 damages, loss causation, issues of revenue growth generated by oncologists during the
19 relevant period, and Insys' oncology marketing efforts. ¶ 52. These efforts generated six
20 expert reports during the Action. ¶¶ 53-55. Moreover, Class Counsel took or defended
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22 ⁴ As set forth in the Whitman Declaration, Class Representative's damages expert
23 estimates that the Class's aggregate damages range from approximately \$34.7 million to
24 approximately \$189.5 million, depending upon Class Representative's ability to establish
25 damages in connection with some or all of the alleged partial corrective disclosures. ¶ 10.
26 Accordingly, the Baker Settlement—*on its own and without considering the additional*
27 *recoveries from the other defendants*—represents between approximately 6% and 1% of
28 the Class's estimated damages. See Janeen McIntosh & Svetlana Starykh, *Recent Trends*
in Securities Class Action Litigation: 2019 Full-Year Review, NERA Economic
Consulting, 20 (Feb. 12, 2020), [http://www.nera.com/content/dam/nera/publications/](http://www.nera.com/content/dam/nera/publications/2020/PUB_Year_End_Trends_012120_Final.pdf)
2020/PUB_Year_End_Trends_012120_Final.pdf (finding between 2015 and 2018, the
median ratio of settlements to investor losses increased from 1.6% in 2015 to 2.6% in
2018 and declined to 2.1% in 2019).

1 five expert depositions. ¶ 54. Class Counsel also engaged experienced bankruptcy
2 counsel to protect the Class’s interests in Insys’ bankruptcy proceedings.

3 In addition to obtaining class certification and supervising the notice program
4 advising the Class of the pendency of the Action and Class Representative’s motion to
5 dismiss Insys from the Action with prejudice, Class Counsel defeated in its entirety
6 defendants’ Summary Judgment Motion, which challenged the falsity, materiality, and
7 loss causation elements of the Class’s claims. ¶¶ 56-61; 65-74. In the midst of briefing
8 the Summary Judgment Motion, Class Representative and Defendant Baker restarted
9 their earlier unsuccessful settlement discussions in a final attempt to resolve the Action
10 before trial. ¶ 79.

11 Class Counsel assumed all of the risks in litigating the Action by taking this case
12 on a fully contingent basis, and devoted the substantial resources required to prosecute
13 the Action in the best interests of the Class and to achieve the Settlement with Defendant
14 Baker. Class Counsel deployed a dedicated group of professionals to develop, support,
15 and aggressively pursue the Action, including not only skilled litigators in the area of
16 securities litigation, but also highly experienced investigators, paralegals, administrative
17 staff, and others. In total, Class Counsel’s attorneys and support staff collectively worked
18 more than 20,000 hours over the course of more than four years on this complex litigation
19 and advanced over one million dollars of its own money to fund the litigation, with no
20 guarantee of ever being paid.

21 Despite the attorney time spent litigating this Action up to the point of entering
22 into the Baker Settlement (resulting in a lodestar of *more than* \$10.5 million), Class
23 Counsel, in an effort to preserve proceeds of the Baker Settlement for Class Members, is
24 not requesting an award of attorneys’ fees in connection with the Settlement. Rather,
25 Class Counsel is requesting reimbursement of \$635,000—substantially less than the
26 \$1,124,606.29 in expenses Plaintiffs’ Counsel incurred in connection with prosecuting
27 the Action through May 22, 2020.

28

1 Class Representative Clark Miller, who has monitored and supervised this Action
2 since his appointment as Lead Plaintiff in June 2016, endorses Class Counsel’s request
3 for expenses.⁵ The reaction of the Class to date also supports Class Counsel’s expense
4 request. Pursuant to the Court’s Preliminary Approval Order (Doc. 347), over 29,800
5 Postcard Settlement Notices and 4,100 Settlement Notices have been disseminated to
6 potential Class Members and Nominees, and the Summary Settlement Notice was
7 published in *Investor’s Business Daily* and transmitted over *PR Newswire*.⁶ The Postcard
8 Settlement Notice, along with the long-form Settlement Notice mailed to nominees and
9 posted on the website, advises recipients that Class Counsel would be applying to the
10 Court for reimbursement of Litigation Expenses incurred by Plaintiffs’ Counsel in
11 connection with the institution, prosecution, and resolution of the claims against
12 Defendant Baker, in an amount not to exceed \$650,000, and further advises that this
13 amount may include a request for reimbursement of Class Representative’s costs in an
14 amount not to exceed \$15,000. Schachter Decl., Exs. A & B. The notices further inform
15 Class Members that they can object to these expense requests until September 2, 2020.
16 *Id.* While the deadline to object has not yet passed, to date, Class Counsel has not received
17 any objections to Class Counsel’s intent to seek reimbursement of Litigation Expenses,
18 as set forth in the notices. ¶¶ 11, 117.⁷

19 For the reasons discussed herein, Class Counsel respectfully submits that the
20 Litigation Expenses for which it seeks reimbursement were reasonable and necessary for
21

22 ⁵ See Declaration of Clark Miller in Support of (I) Class Representative’s Motion
23 for Final of Approval of Settlement with Defendant Darryl S. Baker and Plan of
24 Allocation; and (II) Class Counsel’s Motion for Reimbursement of Litigation Expenses
25 (“Miller Decl.”), attached as Exhibit 1 to the Whitman Declaration, ¶ 7.

26 ⁶ See Declaration of Eric Schachter Regarding: (A) Mailing of Settlement Notices
27 for Baker Settlement; (B) Updates to Website and Toll-Free Telephone Helpline;
28 (C) Posting of Settlement Notice and Claim Form Website; and (D) Publication of
Summary Settlement Notice (“Schachter Decl”) submitted on behalf of the Court-
authorized Claims Administrator A.B. Data, Ltd. (“A.B. Data”), attached as Exhibit 2 to
the Whitman Declaration, ¶¶ 10, 12.

⁷ Class Counsel will address any objections received in its reply submission to be
filed on or before September 16, 2020.

1 the successful prosecution of the Action, and that the request for reimbursement to Class
2 Representative for the time he dedicated to the Action on behalf of the Class is likewise
3 reasonable and appropriate. Accordingly, Class Counsel requests that its Motion for
4 Reimbursement of Litigation Expenses be granted.

5 **II. THE LITIGATION EXPENSES INCURRED ARE REASONABLE AND**
6 **WERE NECESSARY TO LITIGATE THE ACTION AND ACHIEVE THE**
7 **BAKER SETTLEMENT**

8 In connection with the Baker Settlement, Class Counsel is requesting
9 reimbursement from the Settlement Fund of \$635,000—a portion of Plaintiffs’ Counsel’s
10 total expenses of \$1,124,606.29 incurred through May 22, 2020. These expenses were
11 reasonably incurred in initiating, prosecuting, and resolving the Action against Defendant
12 Baker, and are properly recovered by counsel. *See, e.g., HCL Partners Ltd. P’ship v. Leap*
13 *Wireless Int’l, Inc.*, 2010 WL 4156342, at *2 (S.D. Cal. Oct. 15, 2010) (“Expenses are
14 compensable in a common fund case where the particular costs are of the type that would
15 normally be charged to a fee paying client.”) (*citing Harris v. Marhoefer*, 24 F.3d 16, 19
16 (9th Cir. 1994)); *see also Destefano v. Zynga, Inc.*, 2016 WL 537946, at *22 (N.D. Cal.
17 Feb. 11, 2016) (“[C]ourts throughout the Ninth Circuit regularly award litigation costs
18 and expenses—including photocopying, printing, postage, court costs, research on online
19 databases, experts and consultants, and reasonable travel expenses—in securities class
20 actions, as attorneys routinely bill private clients for such expenses in non-contingent
21 litigation.”). Plaintiffs’ Counsel’s expenses are set forth by category in Exhibits 3 and 4
22 to the Whitman Declaration. *See also* ¶¶ 121-122.

23 From the beginning of the case, Class Counsel was aware that it might not recover
24 any of its expenses, and would potentially recover any such amounts only if it succeeded
25 in resolving the Action through a settlement or judgment for the benefit of the Class.
26 ¶ 119. Class Counsel also understood that, even assuming that the case was ultimately
27 successful, an award of expenses would not compensate it for the lost use of the funds
28 spent over the last four years to prosecute this Action. *Id.* Thus, Class Counsel was

1 motivated to, and did, take significant steps to minimize expenses whenever practicable
2 without jeopardizing the vigorous and efficient prosecution of the Action. *Id.*

3 The largest component of Plaintiffs' Counsel's total expenses incurred through
4 May 22, 2020 is the costs of Class Representative's experts in the total amount of
5 \$609,979.02, or approximately 54% of total expenses. ¶ 124. As detailed in the Whitman
6 Declaration, Class Counsel worked extensively with these experts at different stages of
7 the Action, including class certification, litigation of the merits, and resolution efforts.
8 ¶¶ 52-55, 111, 124. These experts were critical to prosecuting and resolving the Action
9 with Defendant Baker, as their expertise, experience, and opinions allowed Class Counsel
10 to fully frame the issues, gather relevant evidence, make a realistic assessment of provable
11 damages, defeat defendants' motion for summary judgment, structure resolution of the
12 claims, and develop a fair and reasonable plan for allocating the settlement proceeds to
13 the Class. *Id.* Also included in this expense category is the costs of bankruptcy counsel
14 retained by Class Counsel to assist in navigating Insys' bankruptcy filing, evaluating its
15 effects on the prosecution of the Action, and protecting the Class's interests.

16 The second largest component of Plaintiffs' Counsel's expenses (i.e.,
17 \$317,999.36, or approximately 28% of their total expenses) was for document production
18 and management. ¶ 125. This amount includes charges for an outside vendor retained by
19 Class Counsel pursuant to a competitive bidding process to host the document databases
20 utilized to effectively and efficiently review and analyze the more than 14 million pages
21 of documents produced in this Action. ¶¶ 41-43. The ability to code, search, and isolate
22 documents to be utilized as exhibits at depositions, summary judgment, and trial was
23 required to prosecute this Action in the best interests of the Class.

24 Another significant component of Plaintiffs' Counsel's expense, \$43,517.21, was
25 for travel-related costs (i.e., lodging, transportation, meals, etc.) incurred in connection
26 with attendance at numerous hearings, status conferences, depositions, and formal
27 mediation. ¶ 121. As set forth in Exhibit 3 to the Whitman Declaration, certain of these
28

1 expenses were subject to limits, or “caps,” to help ensure cost-effective litigation. In
2 addition, Plaintiffs’ Counsel incurred \$56,091.84 for the costs of court reporters,
3 videographers, and transcripts in connection with court proceedings, as well as the
4 depositions they took or defended across the country. ¶¶ 121-122.

5 In addition to the forgoing expenses, Plaintiffs’ Counsel also incurred:
6 (i) \$41,373.98 for the costs of computerized research (e.g., LexisNexis, Westlaw, and
7 PACER); (ii) \$24,300.00 for formal mediation before retired federal Judge Layn R.
8 Phillips (“Judge Phillips”); and (iii) \$18,892.77 for internal and external copying costs.

9 *Id.* The other expenses for which Class Counsel seeks reimbursement also are the types
10 of expenses necessarily incurred in litigation and routinely charged to clients billed by
11 the hour, including, among others, court fees, process servers, and delivery expenses. *Id.*

12 The Postcard and long-form Settlement Notices inform recipients that Class
13 Counsel would seek reimbursement of Litigation Expenses (which may include
14 reimbursement of the reasonable costs incurred by Class Representative as discussed
15 below) in an amount not to exceed \$650,000. To date, no objection to the expense request
16 set forth in the notices has been received. ¶ 117. As such, Class Counsel’s request for
17 partial reimbursement of Plaintiffs’ Counsel’s Litigation Expenses incurred through May
18 22, 2020, is unopposed and should be approved.

19 **III. CLASS REPRESENTATIVE CLARK MILLER SHOULD BE AWARDED**
20 **HIS REASONABLE COSTS AND EXPENSES UNDER THE PSLRA**

21 The PSLRA provides that an “award of reasonable costs and expenses (including
22 lost wages) directly relating to the representation of the class” may be made to “any
23 representative party serving on behalf of a class.” 15 U.S.C. § 78u-4(a)(4). Consistent
24 with that statute, Class Representative seeks an award based on the time he dedicated in
25 supervising and monitoring the Action. Specifically, Class Representative Clark Miller
26 seeks an award of \$15,000, which represents a discount of approximately 40% from the
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1 time that Mr. Miller expended on behalf of the Class, multiplied by the average hourly
2 rate of his paying clients. *See* Miller Decl., ¶ 9.

3 The amount sought by Class Representative is purely for the time and effort he
4 devoted to representing the Class in this Action. Mr. Miller took an active role in
5 supervising the Action, and has been committed to pursuing the claims on behalf of the
6 Class from the outset of the Action in 2016. During the course of the litigation, Mr. Miller
7 frequently communicated with counsel regarding strategy and developments in the
8 Action, reviewed and authorized key pleadings and briefs filed in the Action, assisted
9 Class Counsel in responding to discovery requests, and prepared for and testified at a
10 deposition. *See id.*, ¶ 4. In addition, Mr. Miller consulted with counsel during the course
11 of the Settling Parties' settlement negotiations, including formal mediation with Judge
12 Phillips. *Id.*, ¶ 5. *See also In re Heritage Bond Litig.*, 2005 WL 1594403, at *14 (C.D. Cal.
13 June 10, 2005) (activities such as “responding to discovery, preparing for, traveling to and
14 attending their depositions and maintaining contact with Plaintiffs' counsel to monitor the
15 litigation” supporting a finding that class representatives were “actively involved in every
16 aspect of . . . litigation”). These efforts required Mr. Miller to dedicate time and resources
17 to the Action—time and resources he would have otherwise devoted to his regular duties
18 as an investment advisor to paying clients.⁸ Miller Decl., ¶ 9.

19 Numerous courts, including in this Circuit, have approved comparable awards to
20 compensate representative plaintiffs for the time and effort they spent on behalf of a class.
21 *See, e.g., In re Silver Wheaton Corp. Sec. Litig.*, 2020 WL 4581642, at *4 (C.D. Cal. Aug.
22 6, 2020) (awarding plaintiffs \$12,500 each, for a total of \$87,500); *Pirnik v. Fiat Chrysler*
23 *Autos. N.V.*, No. 15-cv-07199-JMF (S.D.N.Y. Sept. 5, 2019), ECF No. 369, at 9
24 (awarding three plaintiffs \$15,000 each); *In re Facebook, Inc. IPO Sec. & Derivative*

25 _____
26 ⁸ Moreover, “[t]he fact that . . . [Class Representative’s] incentive awards are not
27 conditioned on . . . [his] approval of the settlement, but that . . . [he] nonetheless
28 approve[s] the compromise, indicates that . . . [he] consider[s] the settlement fair.” *In re*
Toys “R” Us - Del., Inc. - Fair & Accurate Credit Transactions Act (FACTA) Litig., 295
F.R.D. 438, 455 (C.D. Cal. 2014).

1 *Litig.*, 12-md-02389-RWS-GWG (S.D.N.Y. Nov. 27, 2018), ECF No. 604, at 4-5
2 (awarding lead plaintiff and class representatives awards ranging from \$5,000 to \$15,000,
3 for a total of approximately \$50,000); *In re CytRx Corp. Sec. Litig.*, No. 2:16-cvV-05519-
4 SJO-SK (C.D. Cal. Sept. 17, 2018), ECF No. 129, at 3 (awarding lead plaintiff \$15,000
5 for his reasonable costs and expenses directly related to his representation of class);
6 *Nathanson v. Polycom, Inc.*, No. 13-cv-03476-YGR (N.D. Cal. Sept. 7, 2016), ECF No.
7 126, at 7 (awarding lead plaintiff \$13,500); *Buccellato v. AT & T Operations, Inc.*, 2011
8 WL 4526673, at *4 (N.D. Cal. June 30, 2011) (awarding \$20,000 to lead plaintiff and
9 \$5,000 to class representatives); *In re CV Therapeutics, Inc. Sec. Litig.*, 2007 WL
10 1033478, at *2 (N.D. Cal. Apr. 4, 2007) (awarding \$26,000 to individual lead plaintiff
11 for “reimbursement of time and expenses” for 104 hours at \$250 per hour); *In re Immune*
12 *Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1173 (S.D. Cal. 2007) (approving \$40,000
13 reimbursement to lead plaintiff).

14 The Postcard and long-form Settlement Notices inform recipients that Class
15 Counsel’s request for reimbursement of Litigation Expenses may include a request to
16 Class Representative for his reasonable costs incurred in representing the Class in the
17 Action up to \$15,000. To date, there have been no objections to this request. ¶ 117. For
18 the foregoing reasons, the reimbursement of costs sought by Class Representative here is
19 reasonable and justified under the PSLRA.

20 **IV. CONCLUSION**

21 For the reasons stated herein and in the Whitman Declaration, Class Counsel
22 respectfully requests the Court: (i) approve reimbursement of Plaintiffs’ Counsel’s
23 Litigation Expenses in the amount of \$635,000; and (ii) approve the proposed award to
24 Class Representative in the amount of \$15,000.

25 DATED: August 19, 2020

Respectfully submitted,

26 **KESSLER TOPAZ**
27 **MELTZER & CHECK, LLP**

28 *s/ Johnston de F. Whitman, Jr.* _____

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2020, 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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