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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

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

Plaintiff,

v.

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

Defendants.

No. 16-cv-00302-NVW

CLASS ACTION

**REPLY MEMORANDUM OF
POINTS AND AUTHORITIES IN
FURTHER SUPPORT OF
(I) CLASS REPRESENTATIVE'S
MOTION FOR FINAL APPROVAL
OF SETTLEMENT WITH
DEFENDANT MICHAEL L.
BABICH AND PLAN OF
ALLOCATION; AND (II) CLASS
COUNSEL'S MOTION FOR
REIMBURSEMENT OF
LITIGATION EXPENSES IN
CONNECTION WITH THE
BABICH SETTLEMENT**

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1 Court-appointed Class Representative Clark Miller,¹ on behalf of himself and the
2 Court-certified Class, and Class Counsel respectfully submit this reply memorandum of
3 points and authorities in further support of: (i) Class Representative’s Motion for Final
4 Approval of Settlement with Defendant Michael L. Babich and Plan of Allocation (Doc.
5 424); and (ii) Class Counsel’s Motion for Reimbursement of Litigation Expenses in
6 Connection with the Babich Settlement (Doc. 425) (together, the “Motions”).

7 **I. PRELIMINARY STATEMENT**

8 The Babich Settlement is the third—and final—settlement reached in the Action.
9 If approved, the Babich Settlement, combined with the settlements reached with
10 defendants Darryl S. Baker and John N. Kapoor, will provide the Class with a collective
11 recovery of at least \$2.95 million, with the potential to increase to as much as \$12.25
12 million, and will bring this contentious litigation to an end.

13 As detailed in Class Representative’s and Class Counsel’s October 14, 2020
14 opening papers in support of the Motions (Docs. 424-426) (“Opening Papers”), the
15 Settlement is the product of more than four years of litigation efforts, and was reached
16 less than a month before trial was scheduled to commence. The Settlement with Mr.
17 Babich is a favorable result for the Class, as it avoids the risks Class Representative faced
18 in trying the Class’s claims against Mr. Babich. Most significantly, the Babich Settlement
19 eliminates the likelihood that, even if a judgment was obtained against Mr. Babich at trial,
20 Class Representative would be unable to collect on such judgment given Mr. Babich’s
21 constrained assets and existing financial obligations. Indeed, at the time that the Parties
22 agreed to the Babich Settlement, Mr. Babich’s guilty plea in *United States v. Babich, et*
23 *al.*, No. 16-cr-10343-ADB (D. Mass.), obligated him to pay more than \$74 million in

24 ¹ Unless otherwise defined, all capitalized terms herein have the same meanings as
25 set forth in the Stipulation and Agreement of Settlement Between Lead Plaintiff and
26 Defendant Michael L. Babich dated July 21, 2020 (Doc. 399-1) (“Stipulation”), or in the
27 Declaration of Johnston de F. Whitman, Jr. in Support of (I) Class Representative’s
28 Motion for Final Approval of Settlement with Defendant Michael L. Babich and Plan of
Allocation; and (II) Class Counsel’s Motion for Reimbursement of Litigation Expenses
in Connection with the Babich Settlement dated October 14, 2020 (Doc. 426). Unless
otherwise noted, all internal citations and quotations are omitted.

1 forfeiture and restitution (“Criminal Obligation”)—an amount that substantially exceeded
2 his net worth at the time of the Settlement.² Had Class Representative succeeded in
3 obtaining a judgment against Mr. Babich at trial, it was likely that the federal government
4 would seek to collect on Mr. Babich’s Criminal Obligation, almost certainly driving Mr.
5 Babich into bankruptcy. Docs. 401 at 7; 401-2, ¶ 8.³ In addition, at the time of the
6 Settlement, Mr. Babich was a defendant in at least twenty other pending actions with
7 additional financial exposure of approximately \$3 billion. Doc. 401 at 2. Finally, there
8 was no insurance coverage for Mr. Babich in the Action, and any recovery obtained from
9 Mr. Babich had to come entirely from his constrained and diminishing personal resources.
10 Doc. 399 at 10-12.

11 Class Representative and Class Counsel are pleased to advise the Court that,
12 following the notice campaign conducted pursuant to the Court’s July 31, 2020
13 Preliminary Approval Order (Doc. 402)—including mailing of notice of the Babich
14 Settlement to more than 35,500 potential Class Members and nominees⁴—***not a single***
15 ***member of the Class has objected to any aspect of the Settlement, the Plan of Allocation,***
16 ***or Class Counsel’s request for reimbursement of Litigation Expenses.*** Class
17 Representative also has expressly endorsed the Settlement and Class Counsel’s request
18 for reimbursement of Litigation Expenses. *See* Doc. 426-1, ¶¶ 6-7.

19 The Class’s positive reaction is a further indication that the Settlement with Mr.
20 Babich, the Plan of Allocation, and Class Counsel’s request for reimbursement of
21

22 ² *See* Doc. 401 at 2. As of June 2020, Mr. Babich had approximately \$23.1 million
23 in assets, consisting of approximately \$21.6 million in marketable and unmarketable
24 securities, a significant portion of which was substantially illiquid, and \$1.5 million in
25 cash assets. Doc. 401-2, ¶ 5.

26 ³ As of June 20, 2020, Mr. Babich also had existing obligations in connection with
27 stipulated judgments with the State of Arizona and a public health authority (with
28 covenants not to execute unless Mr. Babich voluntarily files for bankruptcy). Doc. 401 at
5-6.

⁴ *See* Supplemental Declaration of Eric Schachter Regarding: (A) Mailing of
Settlement Notices for Babich Settlement; (B) Updates to Website and Toll-Free
Telephone Helpline; and (C) Report on Claims Received to Date (“Supp. Schachter
Decl.”), attached hereto as Exhibit 1, ¶ 3.

1 Litigation Expenses from the Babich Settlement are fair and reasonable, and provides
2 strong support for the Court’s approval of both Motions.

3 **II. THE FAVORABLE REACTION OF THE CLASS PROVIDES**
4 **ADDITIONAL SUPPORT FOR APPROVING THE MOTIONS**

5 Class Representative and Class Counsel respectfully submit that their Opening
6 Papers demonstrate that approval of the Motions is warranted. Given that the Motions
7 were unopposed by Mr. Babich *and the Class*, Class Representative and Class Counsel
8 will not restate any of their opening arguments here. Instead, Class Representative files
9 this reply because the lack of a single objection provides further support for approving
10 the Motions. *See In re LifeLock, Inc. Mktg. & Sales Practices Litig.*, 2010 WL 11627648,
11 at *5 (D. Ariz. Aug. 31, 2010) (“In assessing whether to grant approval of a settlement,
12 courts consider the reactions of the members of the class . . .”).

13 **A. The Court-Approved Notice Program**

14 Pursuant to the Court’s Preliminary Approval Order, more than 35,500 Settlement
15 notices have been mailed to potential Class Members and/or their nominees. *See Supp.*
16 *Schachter Decl.*, ¶ 3. A summary notice was also published in *Investor’s Business Daily*
17 and transmitted over *PR Newswire*, and the long-form Settlement Notice, along with other
18 relevant information and documents, were posted on the Website for the Action,
19 www.InsysRXSecuritiesLitigation.com. *See Doc. 426-2*, ¶¶ 12-14

20 Collectively, the notices informed Class Members of the terms of the Settlement
21 and Plan of Allocation, and that Class Counsel would apply for reimbursement of
22 Litigation Expenses incurred by Plaintiffs’ Counsel in connection with the Action which
23 were not sought for reimbursement from the Baker and/or Kapoor Settlements in an
24 amount not to exceed \$75,000. *See Settlement Postcard Notice (Doc. 426-2, Ex. A);*
25 *Settlement Notice (Doc. 426-2, Ex. B)*, ¶¶ 5, 62. The notices also apprised Class Members
26 of their right to object to the Settlement, the Plan of Allocation, and/or the request for
27 Litigation Expenses, and that the deadline to do so was October 28, 2020. *See Settlement*
28

1 Postcard Notice (Doc. 426-2, Ex. A); Settlement Notice (Doc. 426-2, Ex. B), ¶¶ 65-71.
2 Class Representative’s and Class Counsel’s Opening Papers—filed fourteen days prior to
3 the objection deadline—are and have been available on the public docket and on the
4 Website. *See* Supp. Schachter Decl., ¶ 5.⁵ As noted above, following this extensive notice
5 program, *not a single Class Member* has objected to any aspect of the Babich Settlement.

6 **B. The Class’s Reaction Supports Approving the Babich Settlement,**
7 **Plan of Allocation, and Class Counsel’s Request for**
8 **Reimbursement of Litigation Expenses from the Babich Settlement**

9 The absence of any objections from Class Members strongly supports a finding
10 that the proposed Settlement with Mr. Babich is fair, reasonable, and adequate. Notably,
11 there have been no objections to any of the settlements obtained in the Action. *See e.g.*,
12 *Giroux v. Essex Prop. Tr., Inc.*, 2019 WL 2106587, at *5 (N.D. Cal. May 14, 2019) (“The
13 Court finds that the absence of objections . . . indicate[s] overwhelming support among
14 the Class Members and weigh in favor of approval.”); *Destefano v. Zynga, Inc.*, 2016 WL
15 537946, at *13 (N.D. Cal. Feb. 11, 2016) (“By any standard, the lack of objection of the
16 Class Members favors approval of the Settlement.”); *In re Apollo Grp. Inc. Sec. Litig.*,
17 2012 WL 1378677, at *3 (D. Ariz. Apr. 20, 2012) (“There have been no objections from
18 Class Members or potential class members, which itself is compelling evidence that the
19 Proposed Settlement is fair, just, reasonable, and adequate.”). The absence of objections
20 from institutional investors, who possess ample means and incentive to object to the
21 Settlement if they deemed it unsatisfactory, is further evidence of the Settlement’s
22 fairness. *See, e.g., In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2017 WL 2481782, at
23 *4 (N.D. Cal. June 8, 2017) (absence of any objections from institutions means that “the
inference that the class approves of the settlement is even stronger”).

24 Likewise, there have been no objections to the Plan of Allocation or Class
25 Counsel’s request for reimbursement of Litigation Expenses, which provides additional,

26 ⁵ In addition, pursuant to the Court’s November 9, 2020 Order (Doc. 433), the
27 Website was updated on November 10, 2020 to inform Class Members that the Settlement
28 Fairness Hearing will be conducted telephonically and to provide the necessary
information for listening to the hearing. Supp. Schachter Decl., ¶ 5.

1 strong support for approving them. *See, e.g., Patel v. Axesstel, Inc.*, 2015 WL 6458073,
2 at *7 (S.D. Cal. Oct. 23, 2015) (approving plan of allocation where it “was laid out in
3 detail in the notice, and no class members objected”); *Destefano*, 2016 WL 537946, at
4 *22 (noting lack of objections in approving expense request).

5 In sum, the uniformly favorable reaction of the Class strongly supports approval
6 of the Babich Settlement, the Plan of Allocation, and Class Counsel’s request for
7 reimbursement of Litigation Expenses from the Babich Settlement.

8 **III. CONCLUSION**

9 For the foregoing reasons, and those set forth in their Opening Papers, Class
10 Representative and Class Counsel respectfully request that the Court approve the
11 Settlement with Defendant Babich, the Plan of Allocation, and Class Counsel’s request
12 for reimbursement of Litigation Expenses.

13 DATED: November 11, 2020 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 11, 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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