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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**

**DECLARATION OF  
JOHNSTON DE F. WHITMAN,  
JR. IN SUPPORT OF (I) CLASS  
REPRESENTATIVE'S  
MOTION FOR FINAL APPROVAL  
OF SETTLEMENT WITH  
DEFENDANT DARRYL S. BAKER  
AND PLAN OF ALLOCATION;  
AND (II) CLASS COUNSEL'S  
MOTION FOR  
REIMBURSEMENT OF  
LITIGATION EXPENSES**

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1 Johnston de F. Whitman, Jr., under penalty of perjury, declares as follows:

2 1. I am an attorney licensed to practice law in the State of New York and in  
3 the Commonwealth of Pennsylvania. I am admitted to practice *pro hac vice* before this  
4 Court. I am a partner of the law firm of Kessler Topaz Meltzer & Check, LLP (“Class  
5 Counsel” or “Kessler Topaz”), Court-appointed Class Counsel in this securities class  
6 action (“Action”) and counsel for the Court-appointed Lead Plaintiff and Class  
7 Representative, Clark Miller (“Lead Plaintiff” or “Class Representative”).<sup>1</sup>

8 2. I have personal knowledge of the matters set forth herein based upon my  
9 active supervision of and participation in the prosecution and resolution of the Action  
10 against defendant Darryl S. Baker (“Defendant Baker” or “Mr. Baker”).

11 3. I respectfully submit this Declaration in support of Class Representative’s  
12 motion pursuant to Rule 23(e) of the Federal Rules of Civil Procedure (“Federal Rules”  
13 or “Rules”) for final approval of the proposed Settlement with Defendant Baker (also  
14 referred to herein as the “Baker Settlement”). If approved, the Baker Settlement will  
15 resolve all claims asserted in the Action against Defendant Baker<sup>2</sup> on behalf of the Court-  
16 certified Class, consisting of all persons and entities who purchased or otherwise acquired  
17 Insys Therapeutics, Inc. (“Insys” or the “Company”) common stock during the period  
18 from March 3, 2015, through January 25, 2016, and were damaged thereby.<sup>3</sup> The Court  
19  
20

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21 <sup>1</sup> Unless otherwise defined herein, capitalized terms have the meanings ascribed to  
22 them in the Stipulation and Agreement of Settlement Between Lead Plaintiff and  
23 Defendant Darryl S. Baker, dated May 22, 2020 (Doc. 341-1) (“Stipulation”).

24 <sup>2</sup> This Settlement resolves claims against Defendant Baker only, and does not  
25 resolve claims against defendants John N. Kapoor (“Kapoor”) and Michael L. Babich  
26 (“Babich”). Separate settlements are pending before this Court with respect to Messrs.  
27 Kapoor and Babich (referred to herein together as the “Kapoor and Babich Settlements”).  
28 Docs. 371-1, 373, 399-1, 401, 402.

<sup>3</sup> Excluded from the Class are (a) Defendants; (b) present and former directors or  
executive officers of Insys and members of their immediate families (as defined in 17  
C.F.R. § 229.404, Instructions (1)(a)(iii) and (1)(b)(ii)); (c) any of the foregoing  
individuals’ or entities’ legal representatives, heirs, successors, or assigns; and (d) any  
entity in which any Defendant has or had a controlling interest, or which is related to or  
affiliated with any Defendant. *See* Stipulation, ¶ 1.h.

1 preliminarily approved the Baker Settlement by Order dated June 5, 2020 (Doc. 347)  
2 (“Preliminary Approval Order”).

3 4. I also respectfully submit this Declaration in support of: (i) the proposed  
4 plan for allocating the net proceeds of the Baker Settlement to eligible Class Members  
5 (“Plan of Allocation” or “Plan”); and (ii) Class Counsel’s motion for reimbursement of  
6 Litigation Expenses (“Expense Application”), including Class Representative’s request,  
7 in accordance with the Private Securities Litigation Reform Act of 1995 (“PSLRA”), for  
8 reimbursement of his costs in connection with representing the Class in the Action, up to  
9 the time that the parties entered into the Stipulation.

10 5. The Settlement and the Expense Application have the full support of Class  
11 Representative. *See* Declaration of Clark Miller (“Miller Declaration” or “Miller Decl.”)  
12 attached hereto as Exhibit 1. For the reasons discussed below and in the accompanying  
13 memoranda,<sup>4</sup> I, on behalf of Class Counsel, respectfully submit that: (i) the terms of the  
14 Baker Settlement are fair, reasonable, and adequate in all respects and should be approved  
15 by the Court; (ii) the proposed Plan of Allocation is fair, reasonable, and adequate and  
16 should be approved by the Court; and (iii) the Expense Application, including the request  
17 for reimbursement of Class Representative’s costs, is reasonable, supported by the facts  
18 and the law, and should be granted.

19 **I. INTRODUCTION**

20 6. Following more than four years of hard-fought litigation, Class  
21 Representative and Class Counsel succeeded in obtaining a \$2,000,000 cash recovery  
22 (“Settlement Amount”) from Defendant Baker. Pursuant to the Stipulation and  
23 Preliminary Approval Order, the Settlement Amount was received on June 23, 2020, and  
24

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25 <sup>4</sup> In addition to this Declaration, Class Representative and Class Counsel are  
26 submitting: (i) Class Representative’s Motion for Final Approval of Settlement with  
27 Defendant Darryl S. Baker and Plan of Allocation; and Memorandum of Points and  
28 Authorities in Support Thereof (“Settlement Memorandum”); and (ii) Class Counsel’s  
Motion for Reimbursement of Litigation Expenses; and Memorandum of Points and  
Authorities in Support Thereof (“Expense Reimbursement Memorandum”).

1 is currently being held in the interest-bearing Escrow Account. In exchange for the  
2 Settlement Amount, the Settlement resolves all claims asserted in the Action (and related  
3 claims) by Class Representative and the Class against Defendant Baker and the other  
4 Settling Defendant's Releasees. The Baker Settlement is the first of three settlements  
5 reached in the Action, and represents the largest portion of the *guaranteed* collective cash  
6 recovery obtained for the Class.<sup>5</sup>

7         7. From the date the Action was filed until the date of their agreement in  
8 principle to settle on May 8, 2020, the Settling Parties actively litigated the Action. At the  
9 time the Baker Settlement was reached, defendants' summary judgment motion was  
10 pending (though decided just minutes after the Settling Parties notified the Court that they  
11 had executed a settlement term sheet (Doc. 332)), and trial preparation was well underway  
12 while the Settling Parties negotiated the Stipulation and preliminary approval  
13 submissions. Prior to reaching the Settlement, Class Counsel, under the supervision of  
14 Class Representative, had, among other things: (i) conducted an extensive legal and  
15 factual investigation into the Class's claims; (ii) drafted two detailed amended  
16 complaints, including the operative Second Amended Complaint for Violation of the  
17 Federal Securities Laws (Doc. 77) ("Second Amended Complaint" or "SAC");  
18 (iii) opposed two rounds of motions to dismiss; (iv) participated in hotly-contested fact  
19 and expert discovery, which included reviewing over 14 million pages of documents,  
20 hundreds of written discovery requests and responses, and taking or defending ten fact  
21 and five expert depositions; (v) briefed a motion to certify the Class and opposed a  
22 petition for permission to appeal the Court's order certifying the Class pursuant to Rule  
23 23(f); (vi) engaged experienced bankruptcy counsel to protect the Class's interests in  
24 Insys' bankruptcy proceedings; (vii) conducted an extensive Class-notice program  
25 advising prospective Class Members of the Action's pendency and Class Representative's

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26  
27 <sup>5</sup> The Baker Settlement combined with the Kapoor and Babich Settlements provides  
28 for a Class recovery of at least \$2.95 million, with the potential to increase to up to \$12.25  
million, and will resolve this Action in its entirety.

1 motion to voluntarily dismiss Insys from the Action with prejudice; (viii) opposed  
2 defendants' summary judgment motion; (ix) engaged in hard-fought, arm's-length  
3 settlement negotiations with Defendant Baker's Counsel; and (x) prepared for a trial set  
4 to commence on August 17, 2020. As a result of these extensive efforts and others  
5 discussed herein, Class Counsel had a thorough understanding of the strengths and  
6 weaknesses of the Class's claims against Defendant Baker, as well as the low potential to  
7 secure payment from Defendant Baker following a trial victory, at the time the Settling  
8 Parties agreed to the Settlement.

9       8. Moreover, in agreeing to the Settlement, Class Representative and Class  
10 Counsel carefully considered the significant risks associated with advancing the Class's  
11 claims against Defendant Baker though a ruling on summary judgment (which the Court  
12 issued the day the Baker Settlement was reached), as well as the uncertainties of trial and  
13 post-trial appeals, including Defendant Baker's limited ability to pay all or a portion of  
14 any trial judgment against him. Had the Settlement not been reached, Defendant Baker  
15 would have continued to vigorously contest Class Representative's claims against him,  
16 significantly eroding the limited insurance proceeds available to Defendant Baker.

17       9. At trial, Defendant Baker would have argued, as he did throughout the  
18 course of the Action, that he lacked scienter, was unaware of any fraud, and believed that  
19 Subsys sales growth in 2014 was at least partially due to Insys' efforts with respect to  
20 oncologists. Defendant Baker would also likely have argued that the fraudulent acts  
21 alleged in the Action were undertaken by the criminally convicted Messrs. Kapoor and  
22 Babich, and that Defendant Baker himself had no contemporaneous knowledge of the  
23 criminal conduct. Notably, unlike Messrs. Kapoor and Babich, Defendant Baker was  
24 neither named as a defendant in the criminal proceedings related to Insys' off-label  
25 promotion of Subsys, nor was he interviewed by the government during its pre-trial  
26 investigation. Moreover, even were Class Representative to prevail against Defendant  
27 Baker at trial, the jury may have applied the proportionate fault provisions of the PSLRA  
28



1 to significantly reduce Defendant Baker's responsibility to pay a judgment in the Class's  
2 favor. Additionally, there were severe limitations on Defendant Baker's ability to pay a  
3 judgment beyond the limited insurance proceeds available to him, and Class  
4 Representative faced the real risk that he would be unable to collect any payment at all  
5 from Defendant Baker—even if a judgment was obtained against Defendant Baker at  
6 trial.<sup>6</sup> Thus, recovery from Defendant Baker was highly uncertain in this case, and could  
7 not have been achieved without incurring substantial additional costs and the considerable  
8 delay of further litigation.

9 10. Class Counsel believes that the Settlement, particularly when viewed in the  
10 context of the risks and uncertainties of continued litigation and trial against Defendant  
11 Baker, is a favorable result for the Class. Here, Class Counsel was able to resolve the  
12 claims against Defendant Baker for a substantial portion of the available insurance  
13 proceeds—i.e., more than 50% of the \$3.96 million remaining from a \$5 million policy,  
14 which was the only insurance coverage available to Defendant Baker in connection with  
15 the Action. Indeed, the recovery from Defendant Baker represents between approximately  
16 6% and 1% of the Class's aggregate damages range (i.e., \$34.7 million to \$189.5 million),  
17 as estimated by Class Representative's damages expert based on Class Representative's  
18 ability to establish damages based relating to one or more of the alleged partial corrective  
19 disclosures. This percentage of recovery range—on its own and without taking into  
20 consideration the additional recoveries from Messrs. Kapoor and Babich—is directly in  
21 line with the median ratio of securities class action settlements to investor losses in recent  
22 years as reported by NERA Economic Consulting.<sup>7</sup>

23  
24 <sup>6</sup> For example, Defendant Baker's counsel informed the Court that Defendant Baker  
would likely be insolvent if he had to fund his own defense costs and face an adverse  
judgment. *See* Doc. 260 (Aug. 9, 2019 Tr.) at 26:6-13.

25 <sup>7</sup> *See* Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action*  
*Litigation: 2019 Full-Year Review*, NERA Economic Consulting, 20 (Feb. 12, 2020),  
26 [https://www.nera.com/content/dam/nera/publications/2020/PUB\\_Year\\_End\\_Trends\\_01\\_2120\\_Final.pdf](https://www.nera.com/content/dam/nera/publications/2020/PUB_Year_End_Trends_01_2120_Final.pdf)  
27 (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).  
28



1           11. Class Counsel has worked with the Court-authorized Claims Administrator,  
2 A.B. Data, Ltd. (“A.B. Data”), to disseminate notice of the Baker Settlement to Class  
3 Members as directed in the Preliminary Approval Order. In this regard, A.B. Data has  
4 mailed over 29,800 Postcard Settlement Notices and 4,100 Settlement Notices to  
5 prospective Class Members and nominees.<sup>8</sup> Additionally, the Summary Settlement  
6 Notice was published in *Investor’s Business Daily* and transmitted over *PR Newswire* on  
7 June 22, 2020. *Id.* ¶ 12. Finally, the Postcard Settlement Notice, long-form Settlement  
8 Notice, Claim Form, Stipulation, Preliminary Approval Order, and Second Amended  
9 Complaint are available on the Website: [www.InsysRXSecuritiesLitigation.com](http://www.InsysRXSecuritiesLitigation.com). *Id.* ¶ 14.  
10 As ordered by the Court and stated in the notices, objections are due to be received no  
11 later than September 2, 2020. To date, no objections have been filed with respect to any  
12 aspect of the Baker Settlement, the Plan of Allocation, or Class Counsel’s request for  
13 reimbursement of Litigation Expenses, including Class Representative’s costs. In  
14 accordance with the Preliminary Approval Order, Class Counsel will provide the Court  
15 with further information on the Class’s response to the Settlement prior to the Settlement  
16 Fairness Hearing, scheduled for September 23, 2020.<sup>9</sup>

## 17 **II. SUMMARY OF CLASS REPRESENTATIVE’S CLAIMS**

18           12. During the Class Period, Insys represented itself as a commercial-stage  
19 specialty pharmaceutical company that developed and commercialized supportive care  
20 products primarily designed to assist patients with pain management attributable to their  
21 disease, treatments, or therapies. Insys’ principal product and virtually exclusive source  
22  
23  
24

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25 <sup>8</sup> See Declaration of Eric Schachter Regarding: (A) Mailing of Settlement Notices  
26 for Baker Settlement; (B) Updates to Website and Toll-Free Telephone Hotline;  
27 (C) Posting of Settlement Notice and Claim Form on Website; and (D) Publication of  
28 Summary Settlement Notice (“Schachter Decl.”), attached as Exhibit 2 hereto, ¶ 10.

<sup>9</sup> Should any objections be received, Class Counsel will address them in reply  
submissions to be filed no later than September 16, 2020.

1 of revenue during this time was the prescription medication Subsys, a sublingual fentanyl  
2 spray designed to treat breakthrough cancer pain in opioid tolerant patients.<sup>10</sup>

3 13. This Action was brought by Insys investors against Insys and certain of the  
4 Company's executive officers, including Defendant Baker—Insys' Chief Financial  
5 Officer ("CFO") during the Class Period<sup>11</sup>—for alleged violations of the federal securities  
6 laws. Class Representative alleged that defendants made materially false or misleading  
7 statements during the relevant time period regarding the marketing and sales of Subsys,  
8 including the source of Subsys sales growth. Class Representative further alleged that  
9 when the relevant truth was revealed, the price of Insys common stock declined, causing  
10 damage to Insys shareholders.

11 14. More specifically, after the Court's August 1, 2017 ruling on defendants'  
12 motion to dismiss the SAC (discussed in detail below in Section III.C), the Action alleged  
13 securities fraud claims against Defendant Baker based upon a statement made in Insys'  
14 2014 Form 10-K, issued on March 3, 2015, and signed by Defendant Baker ("Form 10-  
15 K Statement"). In the Form 10-K Statement, Defendant Baker and others represented that  
16 Insys' efforts to educate oncologists on the attributes of Subsys were a "key factor[]" in  
17 generating 2014 Subsys sales growth. Class Representative alleged that defendants'  
18 efforts to educate oncologists concerning Subsys were *not* a key factor in 2014 sales  
19 growth. Rather, Class Representative alleged that the Form 10-K Statement was:  
20 (i) misleading, because defendants failed to disclose that the overwhelming majority of  
21 Insys' 2014 revenues, and, therefore, sales growth, arose from off-label Subsys  
22 prescriptions, including those generated by bribes and insurance fraud ("Criminal  
23 Enterprise"); and (ii) false, because Subsys prescriptions that oncologists wrote generated  
24 only negligible revenues for Insys in 2014, including during fourth quarter 2014. Class  
25

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26  
27 <sup>10</sup> See SAC, ¶¶ 1, 2.

28 <sup>11</sup> See SAC, ¶ 31.

1 Representative further alleged that Defendant Baker made the Form 10-K Statement  
2 knowing or recklessly disregarding that it was materially false or misleading.

3 15. Class Representative also alleged that information correcting the Form 10-  
4 K Statement—i.e., that oncologist prescriptions were not a key factor in generating fourth  
5 quarter and full year 2014 Subsys revenues and/or revenue growth, and that such revenues  
6 and growth instead resulted from the Criminal Enterprise—entered the market through  
7 alleged disclosures made on November 4, 2015, December 3, 2015, and January 25, 2016  
8 (“Corrective Disclosures”). Each Corrective Disclosure revealed previously concealed  
9 and/or misrepresented material information, and as Class Representative asserted, caused  
10 the Class to suffer damages.

11 **III. THE LITIGATION EFFORTS OF CLASS REPRESENTATIVE AND**  
12 **PLAINTIFFS’ COUNSEL**

13 **A. Commencement of the Action and Appointment of Lead Plaintiff and**  
14 **Lead Counsel**

15 16. On February 2, 2016, this securities class action was commenced in this  
16 Court with Richard DiDonato’s filing of the initial complaint against Insys and individual  
17 defendants Baker, Babich, and Kapoor, asserting violations of Sections 10(b) and 20(a)  
18 of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. §§ 78j(b) and 78t(a),  
19 and Rule 10b-5, promulgated thereunder by the U.S. Securities and Exchange  
20 Commission (“SEC”), 17 C.F.R. § 240.10b-5. Doc. 1.

21 17. On April 4, 2016, Clark Miller (as well as others) moved to be appointed as  
22 lead plaintiff. Docs. 27-34. On June 3, 2016, the Court appointed Clark Miller as Lead  
23 Plaintiff pursuant to the PSLRA, and approved Lead Plaintiff’s selection of Kessler Topaz  
24 as Lead Counsel for the proposed class and Bonnett, Fairbourn, Friedman & Balint, P.C.  
25 (“Bonnett Fairbourn”) as Liaison Counsel for the proposed class. Doc. 40.<sup>12</sup>

26 \_\_\_\_\_  
27 <sup>12</sup> Lead Plaintiff and Lead Counsel were subsequently appointed Class  
28 Representative and Class Counsel, respectively, pursuant to the Court’s September 20,  
2019 Order (Doc. 271) (*see* ¶ 60 below). For consistency and to avoid confusion, Lead

1           18.     The Court set a deadline of June 24, 2016 for filing an amended complaint  
2 in the Action. Doc. 41.

3           **B.     Class Representative’s Investigation, the Amended Complaint, and**  
4           **Defendants’ Motion to Dismiss the Amended Complaint**

5           19.     Prior to filing the Amended Complaint for Violation of the Federal  
6 Securities Laws (“Amended Complaint”), Class Counsel conducted an exhaustive  
7 investigation into the facts underlying this Action. As part of its investigation, Class  
8 Counsel reviewed voluminous publicly available information regarding the defendants,  
9 including: (i) Insys’ public filings with the SEC; (ii) securities analysts’ reports about  
10 Insys; (iii) transcripts of Insys’ conference calls with securities analysts and investors;  
11 (iv) Insys’ press releases and other public statements; (v) media reports concerning Insys;  
12 (vi) court documents filed in several matters, including *United States v. Alfonso*, No. 3:15-  
13 cr-00111-MPS (D. Conn.), *United States v. Perhacs*, 1:16-cr-00024-CG (S.D. Ala.),  
14 *United States v. Roper*, 1:16-mj-03628 (S.D.N.Y.), *United States v. Serrano*, 1:16-mj-  
15 03629 (S.D.N.Y.), *United States v. Couch*, 1:15-cr-00088 (S.D. Ala.), and *Insys*  
16 *Therapeutics, Inc. v. Ferraro*, 7:15-cv-03613 (S.D.N.Y.); and (vii) the Notice of Unlawful  
17 Trade Practices and Proposed Resolution issued to Insys on July 10, 2015 by the Oregon  
18 Department of Justice in the matter captioned *In re Insys Therapeutics, Inc.*

19           20.     Based upon Class Counsel’s thorough investigation, Class Representative  
20 filed the Amended Complaint on June 24, 2016. Doc. 49.

21           21.     On August 19, 2016, defendants moved to dismiss the Amended Complaint  
22 for failure to state a claim pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules and  
23 pursuant to the pleading requirements of the PSLRA. Doc. 61. Class Representative  
24 opposed defendants’ motion to dismiss on September 6, 2016 (Doc. 67), and defendants  
25 submitted their reply on September 19, 2016 (Doc. 72).

26  
27 \_\_\_\_\_  
28 Plaintiff and Lead Counsel will be referred to as Class Representative and Class Counsel,  
respectively, throughout the remainder of this Declaration.

1           **C.     The Second Amended Complaint, Defendants’ Motion to Dismiss the**  
2           **Second Amended Complaint, and the Court’s Ruling Thereon**

3           22.     Prior to a ruling on defendants’ motion to dismiss the Amended Complaint  
4 and based on information that became available after its filing—most notably, the  
5 indictments of defendant Babich and Alec Burlakoff<sup>13</sup> in the action *United States v.*  
6 *Babich, et al.*, No. 16-cr-10343-ADB (D. Mass.)—Class Representative, with the consent  
7 of all defendants, filed the operative complaint in the Action, the Second Amended  
8 Complaint (or, SAC), on December 22, 2016. The SAC asserts claims under Sections  
9 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5  
10 promulgated thereunder by the SEC, 17 C.F.R. § 240.10b-5. *See* SAC.

11           23.     Defendants moved to dismiss the SAC for failure to state a claim pursuant  
12 to Rules 9(b) and 12(b)(6) of the Federal Rules and pursuant to the pleading requirements  
13 of the PSLRA on January 18, 2017. Doc. 85. Defendants’ arguments for dismissing the  
14 SAC included that:

- 15           • the SAC did not sufficiently plead actionable misstatements because Insys  
16 disclosed to investors: (i) the risk that the alleged misconduct at issue could  
17 occur, including, specifically, the risks associated with employee  
18 misconduct in marketing and sales practices; (ii) that Insys was under  
19 investigation by certain government agencies, including the U.S.  
20 Attorney’s Office for the District of Massachusetts and the U.S. Department  
21 of Health and Human Services; and (iii) that Insys had been sued in civil  
22 litigation for substantially similar misconduct at issue in this case;
- 23           • certain of the challenged misstatements were neither false nor misleading,  
24 as Insys had purported programs in place to market and sell Subsys to  
25 oncologists during fiscal year 2014;

26 \_\_\_\_\_  
27 <sup>13</sup> Alec Burlakoff was named as a defendant in the Second Amended Complaint. The  
28 Court dismissed Class Representative’s claims against Alec Burlakoff in its August 1,  
2017 Order. Doc. 107.

- 1           • many of the statements challenged by Class Representative were “forward-  
2           looking statements,” protected by the PSLRA’s statutory “safe harbor”;
- 3           • the SAC failed to plead facts giving rise to a “strong inference” of scienter  
4           as to Defendant Baker because the SAC did not contain any allegations of  
5           his actual knowledge of the alleged fraud;
- 6           • the SAC failed to plead loss causation because the information conveyed in  
7           the alleged Corrective Disclosures was already known to the market (i.e.,  
8           not “new”) and not corrective of defendants’ prior alleged misstatements;  
9           and
- 10          • the SAC’s Section 20(a) claims for “control person liability” were  
11          unsustainable because the SAC failed to plead a primary violation of  
12          Section 10(b).

13           24. Upon receiving the motion to dismiss, Class Counsel reviewed and  
14 analyzed the supporting briefing and the legal authority cited therein. Class Counsel also  
15 conducted additional legal research into defendants’ arguments and Class  
16 Representative’s responses thereto. On February 2, 2017, Class Representative opposed  
17 defendants’ motion to dismiss the SAC (Doc. 87) arguing, among other things, that:

- 18           • the SAC pleaded actionable misstatements because defendants: (i) failed to  
19           disclose the true source of Subsys sales, which was derived primarily from  
20           the Criminal Enterprise; (ii) defendants’ statements were not protected by  
21           the PSLRA “safe harbor” or “bespeaks caution” doctrine because, *inter*  
22           *alia*, they were not accompanied by adequate cautionary language and  
23           were made with actual knowledge of their falsity; and (iii) defendants’  
24           factually intensive truth-on-the-market argument could not be resolved at  
25           the pleading stage;
- 26           • the SAC sufficiently alleged scienter, based on: (i) defendants’ actual  
27           knowledge or reckless disregard of the fraud; and (ii) the “core operations”  
28

1 inference, including, specifically, that it would have been “absurd” for  
2 defendants not to have been aware of the true source of and “key factors”  
3 in Insys’ revenues; and

- 4 • the SAC adequately alleged loss causation, based on ten corrective  
5 disclosures which allegedly revealed new information to the market and  
6 caused the price of Insys common stock to decline.

7 25. On February 9, 2017, defendants filed their reply in further support of their  
8 motion to dismiss. Doc. 95. In their reply, defendants advanced further arguments in  
9 support of their purported bases for dismissing the SAC.

10 26. Following full briefing on the motion and oral argument, the Court, on  
11 August 1, 2017, granted in part and denied in part defendants’ motion to dismiss the SAC.  
12 Doc. 107. Specifically, the Court sustained the SAC’s allegations as to Defendant Baker  
13 and defendants Kapoor and Babich with respect to two statements made during the Class  
14 Period. As relevant to Defendant Baker, the Court sustained Class Representative’s  
15 claims based upon the representation in Form 10-K Statement that “expanding the usage  
16 of Subsys for BTCP by building awareness among oncologists” was one of the “key  
17 factors in generating continued growth in Subsys usage.” SAC ¶ 272. As the Court  
18 observed in sustaining Class Representative’s claims based upon the Form 10-K  
19 Statement: “Subsys’s growth had little—if anything—to do with breakthrough cancer  
20 pain and instead depended chiefly on doctors prescribing it off-label . . . .” Doc. 107 at  
21 21.

22 27. With respect to Defendant Baker’s scienter, the Court concluded that “it is  
23 absurd to think Baker knew about Subsys’s anomalous market dominance but did not  
24 know how the company had pulled off the feat when he signed on to the company’s SEC  
25 filings.” *Id.* at 28. The Court further concluded that loss causation had been adequately  
26 alleged with respect to three corrective disclosures: (i) on November 4, 2015, in a CNBC  
27 article; (ii) on December 3, 2015, in a Southern Investigative Reporting Foundation  
28



1 (“SIRF”) article; and (iii) on January 25, 2016, also in a SIRF article. *Id.* at 33, 35, 39.  
2 Finally, the Court held that the SAC adequately alleged control person claims as to  
3 Defendant Baker under Section 20(a). *Id.* at 39.

4 28. On April 13, 2018, defendants filed their answer to SAC, which they later  
5 amended on May 4, 2018. Docs. 131, 135. Thereafter, discovery commenced.

6 **D. Class Representative’s Extensive Discovery Efforts**

7 29. Through its efforts, Class Counsel obtained over 14 million pages of  
8 documents from defendants and nonparties. As set forth below, Class Counsel reviewed  
9 and analyzed these documents, as well as defendants’ responses to the extensive written  
10 discovery that Class Representative served, in order to engage experts, prepare for  
11 depositions, prepare for and oppose defendants’ motion for summary judgment, and  
12 develop the record for trial. These discovery efforts provided Class Counsel with a  
13 thorough understanding of the strengths and weaknesses of Class Representative’s  
14 claims, including his claims against Defendant Baker specifically, and assisted Class  
15 Counsel in considering and evaluating the fairness of the Baker Settlement. A summary  
16 of Class Counsel’s discovery efforts follows.

17 **1. Federal Rule 26(f) Report, Protective Order, and Initial**  
18 **Disclosures**

19 30. On May 9, 2018 the parties exchanged comprehensive initial disclosures  
20 pursuant to Federal Rule 26(a)(1).

21 31. On May 23, 2018, the parties filed with the Court a Joint Rule 26(f)  
22 Discovery Plan (“Joint Discovery Plan”) summarizing the parties’ positions regarding,  
23 *inter alia*: (i) document discovery; (ii) the factual and legal issues in the case; (iii) the  
24 subjects and sources of discovery; (iv) discovery limitations; (v) a proposed schedule;  
25 (vi) anticipated motions; (vii) anticipated length of trial; and (viii) settlement. Doc. 143.

26 32. Notably, the parties were able to reach agreement on all key elements of the  
27 Joint Discovery Plan, including discovery limitations and the schedule to govern the case.  
28

1 With respect to the comprehensive case schedule in particular, the parties agreed to  
2 specific dates for, *inter alia*: (i) substantial completion of document discovery; (ii) class  
3 certification briefing; (iii) the close of fact discovery; (iv) expert disclosures; and  
4 (v) dispositive motions.

5 33. On May 30, 2018, the parties participated in an in-person Rule 16  
6 conference with the Court. Doc. 145. Following the conference, the Court issued an Order  
7 approving the parties' Joint Discovery Plan and endorsing the parties' proposed schedule.  
8 Doc. 147.

9 34. On July 5, 2018, after several rounds of negotiations, the exchange of  
10 multiple drafts and rounds of edits, and several telephonic meet and confer sessions, the  
11 parties entered into a Stipulated Protective Order to govern confidentiality in the case,  
12 which the Court signed on July 18, 2018. Docs. 153-1, 156.

13 **2. Class Representative's Discovery Propounded on Defendants**

14 **a. Document Discovery**

15 35. Class Representative served his First Set of Requests for the Production of  
16 Documents on May 16, 2018 ("First Requests"). Class Representative thereafter  
17 negotiated in good faith with defendants' prior counsel, Cravath Swaine & Moore LLP  
18 ("Cravath") regarding defendants' responses and objections to his First Requests and the  
19 scope of defendants' document production in response thereto.

20 36. In connection with the numerous ongoing governmental and regulatory  
21 actions against and investigations of Insys at the time that Class Representative served  
22 his First Requests, the Company had previously collected and produced a significant  
23 volume of documents ("Regulatory Production") potentially relevant to Class  
24 Representative's claims. During meet and confers regarding the parties' Joint Discovery  
25 Plan and the First Requests, the parties discussed how to make efficient use of the  
26 Regulatory Production in this Action.

1           37. Class Counsel and defendants (through then-counsel, Cravath) ultimately  
2 agreed that document discovery in this case would proceed in two phases. First,  
3 defendants would produce to Class Representative the entirety of the Regulatory  
4 Production. Second, the parties agreed that after Class Representative had an opportunity  
5 to review the Regulatory Production, they would meet and confer concerning any  
6 additional documents that Class Representative believed were necessary for defendants  
7 to produce to satisfy their document production obligations in this case.

8           38. In November 2018, Cravath produced approximately 3.1 million  
9 documents (approximately 14 million pages). On March 12, 2019, counsel for Insys  
10 produced an additional 340,000 documents from the Regulatory Production.

11           39. On March 21, 2019, Class Representative served his Second Set of  
12 Requests for Production of Documents (“Second Requests”). In response to Class  
13 Representative’s Second Requests, counsel for Insys produced more than 200,000  
14 additional documents. Defendant Baker himself likewise produced documents totaling  
15 more than 230 pages in response to Class Representative’s discovery requests.

16           40. Class Counsel’s document review, which proceeded according to the  
17 protocols discussed below, began shortly after receiving the first installment of the  
18 Regulatory Production in November 2018.

19           41. First, Class Counsel solicited bids from database vendors for a document-  
20 management system that could accommodate the size of the production and offer the  
21 latest coding, review, and search capabilities for electronic discovery management.  
22 Ultimately, Class Counsel negotiated a favorable pricing arrangement with KLDDiscovery  
23 (“KLD”), a third-party vendor, to host this significant volume of information on its  
24 sophisticated electronic database and litigation support platform. Class Counsel used this  
25 electronic database to organize and search the large volume of documents, which allowed  
26 attorneys performing document review to categorize documents by issues and level of  
27  
28

1 relevance, and to identify the critical documents supporting Class Representative’s  
2 claims.

3 42. Second, once the documents were loaded into the database, Class Counsel  
4 utilized the algorithm-based “technology assisted review” (frequently referred to as  
5 “TAR” or “active learning”) to rank documents by relevance and priority. This allowed  
6 Class Counsel to focus its review on the most relevant documents first, and to exclude  
7 potentially irrelevant material by prioritizing documents based on their relative  
8 importance.

9 43. Third, to facilitate the document review, Class Counsel developed a  
10 detailed review protocol. Initially, Class Counsel created a comprehensive coding  
11 manual, with explanatory notes covering: (i) the key facts at issue in the Action;  
12 (ii) relevance coding instructions; and (iii) “tags” covering approximately fifteen unique  
13 issues and sub-issues.

14 44. Next, Class Counsel assembled a team of experienced attorneys to review  
15 and analyze defendants’ documents. Many of these attorneys analyzed defendants’  
16 production full time. These lawyers reported directly to senior associates and partners,  
17 participated in weekly meetings to discuss their findings, and prepared memoranda on  
18 key factual issues.

19 45. Finally, Class Counsel understood that defendants’ documents would very  
20 likely form the basis for liability at summary judgment or trial. Therefore, simultaneously  
21 with the linear review of the production for important documents, Class Counsel engaged  
22 in a number of additional discovery projects that involved a more targeted review and  
23 synthesis of the production. These projects included, for example: (i) a “key players” list,  
24 which included the job title and description for certain high interest individuals and  
25 potential deposition targets; (ii) a timeline, which included key dates and a description of  
26 important events; and (iii) many topic-specific memos, analyzing topics including  
27 defendants’ programs with respect to oncologists, the revenue generated from certain  
28

1 “whales” (i.e., high prescribing doctors), defendants’ use of the so-called “Factor,” and  
2 market and internal reaction to the Corrective Disclosures.

3 **b. Written Discovery**

4 46. Class Representative also served extensive written discovery on  
5 defendants, including 96 interrogatories (many of which were contention interrogatories)  
6 and 534 requests for admission (“RFAs”). The parties held numerous meet and confers  
7 with respect to Class Representative’s written discovery requests, which resulted in  
8 defendants’ agreement to amend certain of their discovery responses.

9 47. Defendants’ responses to Class Representative’s contention interrogatories  
10 were ultimately instrumental in framing expert discovery, particularly with respect to  
11 Class Representative’s accounting and industry experts who relied on and evaluated  
12 evidence cited by defendants regarding the source of Insys’ revenues and defendants’  
13 purported efforts with oncologists. Defendants’ RFA responses were also critical to Class  
14 Representative’s arguments at summary judgment and (had the parties reached that stage)  
15 trial.

16 **c. Deposition Discovery**

17 48. As summarized below, Class Counsel also took or defended fifteen  
18 depositions. Many of these depositions required Class Counsel to travel to locations such  
19 as Arizona, Florida, California, and New York.

20 <b>Deponent</b>	<b>Role</b>	<b>Date</b>	<b>Location</b>
21 Miller, Clark	Class Representative	9/28/2018	Larkspur, CA
22 Coffman, CFA, Chad	Expert (Class Representative)	10/4/2018	New York, NY
23 Smith, Ph.D., David C.	Expert (defendants)	11/15/2018	New York, NY
24 Brumm, Adam	Rule 30(b)(6) (Insys)	6/6/2019	Phoenix, AZ
25 Kizior, Eric	Rule 30(b)(6) (Insys)	6/7/2019	Phoenix, AZ
26 Sharpsten, Kevin	Nonparty	6/12/2019	Los Angeles, CA

<b>Deponent</b>	<b>Role</b>	<b>Date</b>	<b>Location</b>
Pipko, Brian	Nonparty	6/14/2019	West Palm Beach, FL
Baker, Darryl S.	defendant	6/18/2019	Phoenix, AZ
Yu, Xun	Nonparty	6/20/2019	Miami, FL
Kapoor, John N.	defendant	6/20/2019	Phoenix, AZ
Babich, Michael L.	defendant	6/21/2019	Phoenix, AZ
Burlakoff, Alec	Nonparty	6/21/2019	West Palm Beach, FL
Russell, John	Expert (Class Representative)	9/17/2019	Radnor, PA
Devor, CPA, Harris L.	Expert (Class Representative)	9/18/2019	Radnor, PA
Smith, Ph.D., David C.	Expert (defendants)	10/22/2019	New York, NY

### 3. Discovery of Class Representative

49. Defendants also sought extensive discovery from Class Representative. Most significantly, on May 16, 2018, defendants served Class Representative with twenty-eight document requests, which covered subjects including: (i) Class Representative's investments in Insys securities; (ii) Class Representative's investment strategies and records; (iii) Class Representative's participation in the Action; and (iv) all lawsuits that Class Representative had participated in ("defendants' First Requests"). Class Representative served responses and objections to defendants' First Requests on June 15, 2018.

50. The parties thereafter met and conferred regarding the scope of defendants' First Requests. In response to defendants' documents requests, Class Representative, with the help of Class Counsel, performed an extensive search and review of documents in his possession, custody, or control. Such documents were located in both hard copy and electronic format, and were produced to defendants.

51. In addition to document discovery, Defendant Baker also served comprehensive contention interrogatories on Class Representative on May 7, 2019 which sought wide-ranging information regarding, among other things: (i) all facts supporting Class Representative's falsity allegations; (ii) all facts supporting Class Representative's

1 scienter allegations; and (iii) all facts supporting Class Representative's control person  
2 allegations. At the same time, Defendant Baker also served four unique RFAs on Class  
3 Representative, which covered topics including Defendant Baker's alleged control over  
4 Insys and the Company's programs with respect to oncologists. After performing a  
5 thorough investigation, Class Representative submitted comprehensive, verified  
6 responses to Defendant Baker's interrogatories and responses to Defendant Baker's RFAs  
7 on June 6, 2019.

8 **E. Class Counsel's Work with Respect to Experts**

9 52. Class Representative retained three testifying experts: (i) Chad Coffman,  
10 CFA, of Global Economics Group ("Coffman"), who was engaged to testify concerning  
11 market efficiency, loss causation, and damages; (ii) Harris L. Devor, CPA ("Devor"), who  
12 was engaged to testify concerning Insys' efforts to quantify the revenue growth, if any,  
13 generated by oncologists during the relevant period, including efforts to artificially  
14 increase Subsys prescriptions and revenues attributed to the oncology specialty group, as  
15 well as in comparison to the revenues that non-oncologists generated for the Company;  
16 and (iii) John Russell ("Russell"), who was engaged to testify about Insys' oncology  
17 marketing efforts, including whether any of the Company's programs to promote the drug  
18 to oncologists were "unique."

19 53. Coffman issued reports on August 31, 2018 (Expert Report on the issue of  
20 market efficiency), November 30, 2018 (Expert Rebuttal Report on the issue of market  
21 efficiency), July 26, 2019 (Expert Report on loss causation and damages), and November  
22 1, 2019 (Expert Rebuttal Report on loss causation and damages). Devor issued reports on  
23 July 26, 2019 (Statement) and November 1, 2019 (Supplemental Statement). Russell  
24 likewise issued reports on July 26, 2019 (Expert Report) and November 1, 2019  
25 (Supplemental Report).

26 54. In addition to serving Class Representative's experts' opening,  
27 supplemental, and rebuttal reports, Class Counsel defended depositions of Class  
28



1 Representative's experts, including the deposition of Coffman on October 4, 2018, the  
2 deposition of Russell on September 17, 2019, and the deposition of Devor on September  
3 18, 2019. Prior to each of the foregoing depositions, Class Counsel engaged in thorough  
4 preparation with each expert. Class Counsel also successfully defended against motions  
5 to strike the supplemental reports of Messrs. Devor and Russell (*see* Docs. 276-88, 293-  
6 94, and 340).

7 55. In response to Class Representative's experts, Insys and, subsequently,  
8 Kapoor retained David C. Smith, Ph.D. ("Smith") to respond to Coffman's opinions on  
9 the issues of market efficiency, loss causation, and damages. On July 26, 2019, Defendant  
10 Baker served a notice cross-designating Smith as a testifying expert and incorporating by  
11 reference the reports Smith generated for Insys and Kapoor. Smith issued reports on  
12 October 26, 2018 and September 20, 2019. Each of these reports required Class Counsel  
13 to confer extensively with Coffman in order to formulate an appropriate response. Class  
14 Counsel deposed Smith on November 15, 2018 in connection with class certification, and  
15 on October 22, 2019 in connection with loss causation and damages.

16 **F. Class Representative's Motion to Certify the Class**

17 56. During the early stages of merits discovery, then-proposed Class  
18 Representative filed a motion for class certification ("Class Certification Motion") on  
19 August 31, 2018 pursuant to the Case Management Order. Doc. 159 ("CMO"). The Class  
20 Certification Motion sought certification of the Action on behalf of a class of all persons  
21 and entities who purchased or otherwise acquired Insys common stock during the period  
22 from March 3, 2015 through January 25, 2016, and were damaged thereby. The Class  
23 Certification Motion was supported by a robust market efficiency and damages  
24 methodology analysis and report prepared by Coffman, who opined that Insys common  
25 stock traded in an efficient market during the Class Period and that damages in the case  
26 were subject to common proof that could be computed on a class-wide basis utilizing a  
27 common methodology.  
28

1           57. Defendants opposed Class Representative's Class Certification Motion on  
2 October 26, 2018 (Doc. 165), supported by the Expert Rebuttal Report of David C. Smith,  
3 Ph.D. (Doc. 165-2). Defendants did not challenge Class Representative's arguments that  
4 he would be an adequate class representative or that his claims were typical of the claims  
5 of other Class Members. Rather, in their opposition submission, defendants argued,  
6 among other things, that:

- 7           • the question of reliance is not common to the putative class because it  
8           cannot invoke the presumption of reliance recognized in *Basic v. Levinson*  
9           because Class Representative failed to establish that the market for Insys  
10          stock was efficient during the Class Period and he is not entitled to a  
11          presumption of reliance under *Affiliated Ute Citizens of the State of Utah v.*  
12          *United States* because the alleged misstatements at issue are affirmative  
13          misrepresentations, not omissions;
- 14          • even if Class Representative was able to invoke the *Basic v. Levinson*  
15          presumption, defendants have rebutted the presumption by producing direct  
16          empirical evidence that the alleged misstatements, both made on March 3,  
17          2015, did not cause a statistically significant increase in the price of Insys'  
18          stock; and
- 19          • Class Representative has not shown that the question of damages is  
20          common to the putative class because he has failed to articulate a classwide  
21          damages methodology that is consistent with his theory of liability, as  
22          required under *Comcast Corp. v. Behrend*.

23           58. On November 30, 2018, Class Representative filed his reply submission in  
24 further support of the Class Certification Motion (Doc. 168), which included the Expert  
25 Rebuttal Report of Chad Coffman, CFA (Doc. 169-2). These submissions contended,  
26 among other things, that: (i) all of the factors that courts apply to determine whether a  
27 security trades in an efficient market supported finding that the market for Insys common  
28

1 stock was efficient during the Class Period; (ii) Smith was not offering an opinion that  
2 the alleged misstatements did not impact the price of Insys common stock during the  
3 Class Period, such that defendants lacked any evidence to try to rebut the fraud-on-the-  
4 market presumption of reliance; and (iii) the out-of-pocket damages methodology that  
5 Class Representative proposed could measure damages on a Class-wide basis.

6 59. Defendants filed a proposed sur-reply in further opposition to the Class  
7 Certification Motion (Doc. 170-1) on December 14, 2018, which Class Representative  
8 opposed on December 28, 2018 (Doc. 172). In connection with deciding the Class  
9 Certification Motion, the Court permitted defendants to file their sur-reply. Docs. 271-72.

10 60. On September 20, 2019, the Court granted Class Representative's Class  
11 Certification Motion ("Class Certification Order")—certifying the Class, appointing Lead  
12 Plaintiff (and then-proposed Class Representative) Clark Miller as Class Representative,  
13 and appointing Kessler Topaz as Class Counsel and Bonnett Fairbourn as Liaison  
14 Counsel. Doc. 271. The Court's Class Certification Order, however, made clear that it did  
15 not apply to Insys based upon the automatic stay provisions of 11 U.S.C. § 362(a) of the  
16 United States Code. *Id.* See Section III.G below.

17 61. Thereafter, on October 4, 2019, defendant Kapoor filed with the United  
18 States Court of Appeals for the Ninth Circuit a petition for permission to appeal the  
19 Court's Class Certification Order pursuant to Federal Rule 23(f) ("Petition"). Doc. 273.  
20 Class Representative opposed Defendant Kapoor's Petition on October 15, 2019. On  
21 December 18, 2019, the Ninth Circuit denied defendant Kapoor's Petition.

22 **G. Insys Files for Bankruptcy and the August 9, 2019 Status Conference**

23 62. While discovery efforts were ongoing and the Class Certification Motion  
24 was pending, Insys, on June 10, 2019, notified the Court and the parties to the Action that  
25 it had filed for bankruptcy protection under Chapter 11 of Title 11 of the United States  
26 Code in the United States Bankruptcy Court for the District of Delaware. Doc. 230.

27  
28

1 Accordingly, pursuant to 11 U.S.C. § 362(a) of the United States Code (“Automatic  
2 Stay”), the Action was automatically stayed as to Insys.

3 63. During a status conference conducted with the Court on August 9, 2019,  
4 the parties discussed, among other things, the impact of Insys’ bankruptcy on the  
5 continuation of the Action. Docs. 257-58. During this conference, counsel for Defendant  
6 Baker explained to the Court that based upon its bankruptcy filing, Insys was not  
7 indemnifying Mr. Baker or advancing his defense costs. Doc. 260 (Aug. 9, 2019Tr.) at  
8 5:14-21.

9 64. During the August 9, 2019 status conference, Class Counsel discussed with  
10 the Court dismissing Insys from the Action, in part, to enable the Action to proceed  
11 without any concern or encumbrance related to the Automatic Stay. While efforts to have  
12 the parties stipulate to such a dismissal had not gained traction at that point, Class Counsel  
13 indicated that it would be prepared to file a motion to voluntarily dismiss Insys from the  
14 Action to accomplish the same objective.

15 **H. Notice to the Class of the Pendency of the Action as a Class Action**  
16 **and the Insys Dismissal Motion**

17 65. On December 13, 2019, Class Representative filed a consent motion to  
18 voluntarily dismiss Insys from the Action with prejudice to bringing future claims against  
19 the Company in this Court, but without prejudice to pursuing any claims on behalf of the  
20 class in bankruptcy court (“Insys Dismissal Motion”). Doc. 311. On the same day, Class  
21 Representative filed a consent motion to approve the form and manner of providing notice  
22 to the Class regarding the Court’s certification of the Action as a class action pursuant to  
23 Federal Rule 23, as well as the Insys Dismissal Motion (“Class Notice Motion”). Doc.  
24 312. The Court granted the Class Notice Motion on March 20, 2020 (“Class Notice  
25 Order”). Doc. 331. Among other things, the Court found that the proposed notice to the  
26 Class met the requirements of Federal Rule 23 and due process, and constituted the best  
27 notice practicable under the circumstances.  
28

1           66. Pursuant to the Court’s Class Notice Order, A.B. Data began disseminating  
2 the Class Notice by mail to potential Class Members and nominees on April 3, 2020. *See*  
3 Doc. 336-1, ¶¶ 2-7. The Class Notice provided Class Members with the opportunity to  
4 request exclusion from the Class, explained that right, and set forth the procedures for  
5 doing so. *Id.* at Ex. A. The Class Notice also advised Class Members that it would be  
6 within the Court’s discretion whether to permit a second opportunity to request exclusion  
7 if there was a settlement. *Id.* The Class Notice informed Class Members that if they chose  
8 to remain a member of the Class, they would “be bound by all past, present, and future  
9 orders and judgments in the Action, whether favorable or unfavorable.” *Id.* The Class  
10 Notice also provided Class Members with the right to object to the Insys Dismissal  
11 Motion. In addition, in accordance with the Court’s Class Notice Order, A.B. Data caused  
12 a summary notice to be published in *Investor’s Business Daily* and transmitted over *PR*  
13 *Newswire* on April 6, 2020. *Id.*, ¶ 8.

14           67. On May 14, 2020, Class Representative submitted a declaration on behalf  
15 of A.B. Data reporting that A.B. Data had mailed an aggregate of 25,027 notices to  
16 potential Class Members via First-Class mail. *Id.*, ¶ 7. The deadline for submitting  
17 requests for exclusion was April 30, 2020. No requests for exclusion from the Class were  
18 received. *Id.*, ¶ 11.

19           68. Also, on May 14, 2020, Class Counsel reported to the Court that there were  
20 no objections to the Insys Dismissal Motion. Doc. 337. On May 14, 2020, the Court  
21 granted the Insys Dismissal Motion. Doc. 338.

### 22           **I. Defendants’ Motion for Summary Judgment**

23           69. In accordance with the deadlines set in the CMO, in November 2019, the  
24 parties exchanged pre-motion letters describing their contemplated motions for summary  
25 judgment. At that time, Defendants expressed an intent to move for summary judgment  
26 on all elements of Class Representative’s Section 10(b) claims.  
27  
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1           70. On December 4, 2019, the Court held an in-person conference to discuss  
2 the contemplated motions for summary judgment. At that hearing, the Court set a briefing  
3 schedule for defendants’ motion for summary judgment.

4           71. On December 20, 2019, defendants filed a motion for summary judgment  
5 asserting that Class Representative could not establish a triable issue of fact as to certain  
6 elements of his claims, and that defendants were entitled to summary judgment under  
7 Rule 56 of the Federal Rules (“Summary Judgment Motion”). Doc. 317. More  
8 specifically, defendants argued that:

- 9           • the alleged misstatements were neither false nor misleading, but rather  
10           literally true, because defendants had various programs in place designed  
11           to expand sales of Subsys to cancer patients, including through marketing  
12           Subsys to oncologists and oncology nurse practitioners;
- 13           • the alleged misstatements were forward-looking statements of opinion  
14           and/or puffery that were not actionable under Section 10(b);
- 15           • defendants were not obligated to disclose the allegedly omitted information  
16           (i.e., the existence of the Criminal Enterprise); and
- 17           • none of the alleged Corrective Disclosures revealed new information to the  
18           market regarding information that was related to defendants’ statements  
19           regarding oncologists.

20           72. Class Representative opposed the Summary Judgment Motion on February  
21 3, 2020. Docs. 324-27. In opposing the Summary Judgment Motion, Class Representative  
22 argued, among other things, that:

- 23           • the alleged misstatements were materially misleading because they omitted  
24           information regarding the “key factors” in Insys’ revenues (i.e., the  
25           Criminal Enterprise);
- 26           • the alleged misstatements were false because no more than 6% of Insys’  
27           revenues was generated by oncologists;
- 28

- 1 • the alleged misstatements were objectively verifiable, and thus not forward-  
2 looking, puffery, or statements of opinion; and
- 3 • each of the alleged corrective disclosures revealed new information to the  
4 market that partially corrected defendants' prior misstatements.

5 73. Defendants filed a reply in support of their motion on February 18, 2020.  
6 Doc. 328.

7 74. On May 8, 2020, the Court denied the Summary Judgment Motion in its  
8 entirety, finding, among other things, that: (i) the "representations materially omit the  
9 bribery and non-oncology explanations for the recent and expected future growth"; (ii)  
10 the "representations are not 'puffery'"; (iii) the "representations are not just or only  
11 forward-looking[] [o]ne speaks of 'continued' growth, which is literally past as well as  
12 future growth"; and (iv) "[l]oss causation is sufficiently presented and is a jury question."  
13 Doc. 333.

14 **J. Preparations for Trial**

15 75. On May 8, 2020, the Court issued its Order Setting Final Pretrial  
16 Conference, which required the parties to the Action to submit their Proposed Final  
17 Pretrial Order ("PTO") by June 18, 2020. Doc. 334.

18 76. On May 22, 2020, the Court issued an order setting a jury trial of Class  
19 Representative's Claims against Defendant Baker and the other defendants to commence  
20 on August 17, 2020 and to continue through, at least August 28, 2020. Doc. 339.

21 77. Prior to the Court's June 5, 2020 order preliminarily approving the  
22 Settlement with Defendant Baker (Doc. 347), the parties completed the majority of the  
23 work required to submit the PTO to the Court on June 18, 2020. Among other things,  
24 Class Counsel and counsel for Defendant Baker exchanged: (i) witness lists; (ii) exhibit  
25 lists, objections thereto, and copies of the exhibits; (iii) deposition designations,  
26 objections thereto, and counter-designations; (iv) lists of contemplated motions in limine;  
27 and (v) drafts of items A-Q of the PTO. Counsel for the parties also conducted a lengthy  
28



1 meet and confer session on June 3, 2020 to discuss the draft sections of the PTO that they  
2 had prepared and exchanged.

3 **IV. THE BAKER SETTLEMENT**

4 **A. The Settlement Negotiations**

5 78. In August 2018, Class Representative and certain defendants, including  
6 counsel representing Defendant Baker, participated in a full-day mediation in New York,  
7 New York before retired federal Judge Layn R. Phillips. The August 10, 2018 mediation  
8 did not result in an agreement to resolve any portion of the Action.

9 79. Following nearly two additional years of continuous litigation, and while  
10 defendants' Summary Judgment Motion was pending, Class Representative and  
11 Defendant Baker restarted their earlier discussions concerning the possibility of resolving  
12 the Action. Following months of hard-fought, arm's-length negotiations, including over  
13 the availability of any insurance coverage, Class Representative and Defendant Baker  
14 agreed to resolve the Action against Defendant Baker for \$2 million in cash to be funded  
15 entirely from a single, \$5 million insurance policy, of which only \$3.96 million remained  
16 at the time of settlement. *See* Doc. 346. The Settling Parties memorialized their agreement  
17 in principle to resolve the Action in a term sheet (subject to additional terms and  
18 conditions to be set forth in a detailed settlement agreement), that the Settling Parties  
19 executed on May 8, 2020. On the same day, the Settling Parties filed a notice of settlement  
20 informing the Court that they had reached an agreement in principle to resolve the Action  
21 as to Defendant Baker only. Doc. 332.

22 **B. Preparation of Settlement Documentation**

23 80. Thereafter, Class Counsel began working on various documents in  
24 connection with the Settling Parties' agreement to settle the Action as well as Class  
25 Representative's anticipated motion for preliminary approval of the Settlement. During  
26 this time, Class Counsel also worked with Class Representative's damages expert,  
27  
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1 Coffman, and his colleagues to develop the proposed Plan of Allocation. *See* Section VII  
2 below.

3 81. Counsel for the Settling Parties negotiated the specific terms of the  
4 Stipulation and exchanged drafts of the Stipulation (as well as the exhibits thereto). After  
5 negotiating the specific terms of their agreement, the Settling Parties executed the  
6 Stipulation setting forth their final and binding agreement to settle the Action against  
7 Defendant Baker on May 22, 2020.

8 **C. Class Counsel Seeks Preliminary Approval of Settlement**

9 82. On May 22, 2020, Class Representative filed the Stipulation (and related  
10 exhibits) along with his motion for an order preliminarily approving settlement with  
11 Defendant Baker and providing for notice and supporting memorandum (“Preliminary  
12 Approval Motion”). Doc. 341. On May 26, 2020, the Court issued an Order requesting  
13 the following additional information regarding the proposed Settlement with Defendant  
14 Baker: (i) the quantum of class damages; (ii) the quantum of recovery to the class as a  
15 whole and as a proportion of claimed damages per shareholder; and (iii) the source of  
16 funding of the \$2,000,000 Settlement Amount and information regarding available  
17 insurance coverage. Doc. 342. In response to the May 26, 2020 Order, Class Counsel, on  
18 June 3, 2020, filed a supplemental submission addressing the information requested by  
19 the Court. Doc. 346.

20 83. On June 5, 2020, the Court entered the Preliminary Approval Order,  
21 scheduling the final hearing on the Baker Settlement and related matters for September  
22 23, 2020 at 1:30 p.m. Doc. 347. On the same day, the Court entered an Order severing  
23 the claims against Defendant Baker from the August 17, 2020 trial of the claims against  
24 Messrs. Kapoor and Babich. Doc. 348.

25 **V. RISKS FACED BY CLASS REPRESENTATIVE IN THE ACTION**

26 84. As set forth in this Section and in the accompanying Settlement  
27 Memorandum, the Baker Settlement is a favorable result for the Class when evaluated in  
28

1 light of the risks, costs, and delays of continued litigation. The Settlement results from a  
2 realistic assessment by both sides of the strengths and weaknesses of their respective  
3 claims and defenses, as well as the risks of proceeding to trial (and on the likely appeals  
4 that would follow), and is a fair, reasonable, and adequate resolution of the Action with  
5 Defendant Baker.

6 85. At the time the Settling Parties reached their agreement in principle to  
7 resolve this Action, Class Representative and Class Counsel had ample material to  
8 evaluate the strengths and weaknesses of the claims alleged in the Second Amended  
9 Complaint. Class Counsel's exhaustive factual and legal research and analysis, the  
10 considerable record developed through document discovery, expert discovery, and in  
11 extensive preparation for trial, as well as Defendant Baker's legal and factual arguments  
12 in connection with defendants' Summary Judgment Motion and the Settling Parties'  
13 settlement discussions, informed Class Representative and Class Counsel that, while their  
14 case against Defendant Baker had merit, there were also numerous factors that made the  
15 outcome of continued litigation and ultimately a trial in the Action uncertain. Class  
16 Representative and Class Counsel conscientiously evaluated these factors in determining  
17 the course of action that was in the best interests of the Class.

18 86. While Class Representative and Class Counsel firmly believe that the  
19 evidence they intended to offer at trial would fully support the Class's claims against  
20 Defendant Baker, there was no way to predict which inferences, interpretations, or  
21 testimony the Court or the jury would accept. Further, Defendant Baker has adamantly  
22 denied any culpability throughout the Action, and was prepared to mount aggressive  
23 defenses that could have potentially foreclosed a recovery for the Class against this  
24 defendant. If the jury at trial sided with Defendant Baker on even one of his defenses, the  
25 Class would recover nothing from this defendant.

26 87. Beyond liability, there were limitations on the ability of Defendant Baker  
27 to pay a substantial judgment, and Class Representative faced a significant risk that he  
28

1 would not be able to collect any payment at all from Defendant Baker—even if a  
2 judgment was obtained against him at trial. In addition, the bankruptcy of the corporate  
3 defendant, Insys, seriously limited the sources of recovery in this proceeding, and it  
4 created a number of other challenges to the successful prosecution of claims against the  
5 remaining defendants.

6 **A. Risks Concerning Establishing Defendant Baker’s Liability**

7 88. Had the Action continued against Defendant Baker, Class Representative  
8 faced significant challenges to proving that he made a materially false or misleading  
9 statement. As set forth above, throughout the Action, Defendant Baker maintained that  
10 the only allegedly false or misleading statement attributable to him was: (i) forward  
11 looking; (ii) puffery; and, in any event, (iii) literally true. Defendant Baker also steadfastly  
12 maintained that he had no knowledge of the alleged fraud, including, in particular, the  
13 Criminal Enterprise. Class Counsel anticipates Defendant Baker would have continued to  
14 press these defenses at trial.

15 89. Certain of Defendant Baker’s defenses could have easily resonated with a  
16 jury. For instance, Defendant Baker would have likely argued, consistent with his  
17 deposition testimony and his verified interrogatory responses, that he legitimately  
18 believed any increased sales growth was at least partially due to Insys’ efforts to market  
19 Subsys to oncologists. Indeed, while the parties disputed the efficacy of Insys’ efforts on  
20 this front, discovery revealed that certain programs were nonetheless in place during fiscal  
21 year 2014. Evidence existed, for example, showing that Insys: (i) hired Brian Pipko as  
22 Vice President of Oncology; (ii) maintained an oncology sales force; and (iii) attempted  
23 to market Subsys to oncologists through the use of nurse educators.

24 90. In addition, Defendant Baker would likely have argued that he had no direct  
25 knowledge of any facts related to the alleged Criminal Enterprise, and that the alleged  
26 Criminal Enterprise was carried out by defendants Kapoor and Babich, largely through  
27 sales and marketing employees for whom Defendant Baker had no supervisory  
28

1 responsibility. Notably, moreover, Defendant Baker would likely have pointed out that  
2 he was the only individual defendant in this matter not criminally prosecuted. To that end,  
3 it is true that both the Federal Bureau of Investigation and U.S. Department of Justice had  
4 access to his emails and documents, and yet chose to not even interview him.

5 91. Further, Defendant Baker would likely have continued to point to the lack  
6 of traditional hallmarks of the scienter analysis, such as insider sales, his own personal  
7 financial interests, and financial restatements.

8 **B. Risks Concerning Loss Causation and Damages**

9 92. Even if Class Representative succeeded in establishing Defendant Baker's  
10 liability at trial, there were considerable challenges to his ability to prove loss causation  
11 and damages. On these issues, Class Representative would ultimately have to prove  
12 (through expert testimony) that the revelation of the alleged fraud through the partial  
13 Corrective Disclosures made on November 4, 2015, December 3, 2015, and January 25,  
14 2016 proximately caused the substantial declines in the price of Insys common stock, and  
15 that other information released and absorbed by the market on those days played little or  
16 no role in the price declines.

17 93. Class Representative believed that he and his expert would bring forth  
18 sufficient evidence to support a finding of loss causation and damages at trial. At the time  
19 that the parties agreed to the Settlement, however, Defendant Baker was positioned to  
20 present and rely upon the expert testimony of Smith, leading the parties' proof on loss  
21 causation and damages to result in an uncertain "battle of the experts" before the jury.

22 94. Among other things, Defendant Baker was prepared to present evidence  
23 (through Smith) contending that none of the Corrective Disclosures actually "corrected"  
24 the Form 10-K Statement because no disclosure mentioned Insys' oncology efforts one  
25 way or the other. Similarly, Defendant Baker would have presented evidence in an effort  
26 to prove that the Corrective Disclosures did not "correct" the Form 10-K Statement  
27 because no Corrective Disclosure identified the source or amount of any Subsys sales,  
28

1 and gave no indication that Insys was not making efforts to have oncologists prescribe  
2 the drug.

3 95. Moreover, Smith would have presented expert testimony that none of the  
4 information revealed in the Corrective Disclosures was “new” information that could  
5 explain the price declines on each of those days. In this regard, defendants have  
6 consistently argued that information revealing defendants’ off-label marketing, bribes to  
7 prescribers, and insurance fraud was publicly available prior to the start of the Class  
8 Period, and certainly before the Corrective Disclosures.

9 96. Finally, Defendant Baker would have argued that Class Representative  
10 could not recover any damages from the final Corrective Disclosure on January 25, 2016  
11 because Insys’ stock price did not suffer a statistically significant decline that day.

12 97. If Class Representative were to lose one or more of the Corrective  
13 Disclosures at trial, the Class’s recoverable damages would have been greatly reduced. In  
14 this regard, if the Class lost the January 25, 2016 alleged corrective disclosure, but proved  
15 loss causation as to the first two alleged corrective disclosures, Class Representative’s  
16 damages expert estimates that aggregate damages would drop from approximately  
17 \$189.5 million to approximately \$123.3 million. Likewise, were Mr. Baker able to  
18 convince a jury that the December 3, 2015 alleged corrective disclosure revealed nothing  
19 new to the market, estimated damages tied solely to the remaining November 4, 2015  
20 alleged corrective disclosure would drop to approximately \$34.7 million.

21 **C. Risks of Non-Payment**

22 98. In addition to facing the risks of establishing liability, loss causation, and  
23 damages, Class Representative faced a real risk of collecting very little from Defendant  
24 Baker following a trial judgment in the Class’s favor.

25 99. *First*, as discussed above, Class Representative did not have the same  
26 quantum of direct evidence of Defendant Baker’s culpability in comparison to defendants  
27 Kapoor and Babich. As a result, even if the jury rendered a verdict in Class  
28

1 Representative's favor, there was a risk that the same jury would apply the proportionate  
2 fault provisions of the PSLRA to assign to Defendant Baker only a very small portion of  
3 the aggregate responsibility for the securities fraud that Class Representative alleged. *See*  
4 15 U.S.C. § 78u-4(f). In this regard, one of the defenses that Defendants intended to  
5 present at trial was that: "Plaintiffs' recovery against any defendant, if any, is limited to  
6 the percentage of responsibility of each such defendant in proportion to the total fault of  
7 all persons, whether or not named as parties to this action." Doc. 355 at 12.

8 100. Class Counsel has experienced first-hand the risk that the proportionate  
9 fault provisions of the PSLRA can present to obtaining a significant trial judgment against  
10 a corporate CFO. *See, In re Longtop Fin. Techs. Ltd. Sec. Litig.*, No. 11-cv-3658-VEC,  
11 (S.D.N.Y. Jan. 28, 2015), ECF No. 272-1, 16 (Following trial conducted by Class  
12 Counsel, jury found company CFO liable for securities fraud under Section 10(b) of the  
13 Exchange Act, but apportioned only 1% of total damages to this defendant.). A similar  
14 risk attached to the claims against Defendant Baker here.

15 101. *Second*, Defendant Baker has very limited financial means, even to pay his  
16 portion of a judgment reduced by the jury's application of the proportionate fault  
17 provisions of the PSLRA. As Mr. Baker's counsel previously advised the Court, Mr.  
18 Baker does not have sufficient resources to pay for his defense, much less fund a  
19 settlement or satisfy a judgment. *See* Doc. 260 (Aug. 9, 2019 Transcript), at 25:6-19 and  
20 26:6-13 (counsel advising the Court that if Mr. Baker could not obtain insurance, Class  
21 Representative would be "essentially chasing a dry hole").

22 102. Moreover, as the Court is aware, there was very little insurance coverage, a  
23 total of \$3.96 million, available to Mr. Baker at the time that the Settling Parties agreed  
24 to the Settlement. If Class Representative and Defendant Baker had proceeded to trial, a  
25 significant portion of the available insurance proceeds would have been consumed  
26 funding Mr. Baker's defense at trial and through his appeal of a judgment in Class  
27 Representative's favor.  
28



1           103. Based upon Mr. Baker’s limited personal means and constrained insurance  
2 coverage, there was a strong likelihood that Class Representative would have recovered  
3 less from Mr. Baker after a verdict in Class Representative’s favor than the \$2 million  
4 recovered for the benefit of the Class through the Settlement. Moreover, any amount that  
5 Class Representative could have recovered from Mr. Baker following a trial judgment in  
6 Class Representative’s favor would have been diminished by the significant additional  
7 expenses that Class Counsel would have incurred in presenting the case at trial. Among  
8 other things, the costs of trial would have included: (i) the travel, lodging, and testimony  
9 of at least two expert witnesses; (ii) travel and lodging for Class Representative’s counsel;  
10 and (iii) the assistance of a trial consultant.

11 **VI. COMPLIANCE WITH THE COURT’S PRELIMINARY APPROVAL**  
12 **ORDER AND REACTION OF THE CLASS TO DATE**

13           104. By its Preliminary Approval Order, the Court authorized Class Counsel to  
14 retain A.B. Data as the Claims Administrator to supervise and administer the notice  
15 procedure in connection with the Baker Settlement, as well as the processing of Claims.  
16 Doc. 347, ¶ 4.<sup>14</sup> In accordance with the Preliminary Approval Order, A.B. Data, working  
17 under Class Counsel’s supervision: (i) mailed by First-Class mail a copy of the Postcard  
18 Settlement Notice to potential Class Members who were previously mailed a copy of the  
19 Class Notice and any other potential Class Member who otherwise could be identified  
20 through further reasonable effort, as well as copies of the Postcard Settlement Notice, in  
21 bulk, to brokers and other nominees (“Nominees”) who previously requested copies of  
22 the Class Notice in bulk; (ii) mailed a copy of the Settlement Notice and Claim Form  
23 (together, the “Notice Packet”) to the Nominees contained in A.B. Data’s Nominee  
24 database; (iii) published the Summary Settlement Notice in *Investor’s Business Daily* and  
25 transmitted the same over the *PR Newswire*; and (iv) updated the Website developed for

26 \_\_\_\_\_  
27 <sup>14</sup> A.B. Data was previously approved by the Court to be the Administrator for Class  
28 Notice, Doc. 331, and was preliminarily approved to disseminate notice of the Baker  
Settlement.

1 the Action in connection with Class Notice, [www.InsysRXSecuritiesLitigation.com](http://www.InsysRXSecuritiesLitigation.com), to  
2 provide information about the Baker Settlement, including downloadable copies of the  
3 Settlement Notice and Claim Form. Schachter Decl., ¶¶ 3-14.

4 105. The Postcard Settlement Notice contains important information concerning  
5 the Baker Settlement and, along with the Summary Settlement Notice, directs recipients  
6 to the Website for additional information regarding the Settlement (and the Action),  
7 including the long-form Settlement Notice, which includes, among other things, details  
8 about the Baker Settlement, the information required to submit a Claim, and a copy of the  
9 Plan of Allocation as Appendix A. Collectively, the notices provide the Class definition,  
10 a description of the Settlement with Defendant Baker, information regarding the claims  
11 asserted in the Action, and information to enable Class Members to determine whether  
12 to: (i) participate in the Settlement by completing and submitting a Claim Form; or  
13 (ii) object to any aspect of the Settlement, the Plan of Allocation, and/or the Expense  
14 Application. The Postcard Settlement Notice and Settlement Notice also inform  
15 prospective Class Members of Class Counsel's intent to apply for reimbursement of  
16 Litigation Expenses in connection with the institution, prosecution, and resolution of the  
17 Action in an amount not to exceed \$650,000, which amount may include a request for  
18 reimbursement of the reasonable costs and expenses incurred by Class Representative in  
19 an amount not to exceed \$15,000. *See* Schachter Decl., Exs. A & B.

20 106. In accordance with the Preliminary Approval Order, A.B. Data began  
21 mailing Postcard Settlement Notices to potential Class Members and Nominees, as well  
22 as Notice Packets to Nominees, on June 15, 2020. Schachter Decl., ¶¶ 6-7. To date, A.B.  
23 Data has disseminated more than 29,800 Postcard Settlement Notices and 4,100 Notice  
24 Packets to potential Class Members and Nominees. *Id.*, ¶ 10. In addition, A.B. Data  
25  
26  
27  
28

1 caused the Summary Settlement Notice to be published in *Investor's Business Daily* and  
2 transmitted over *PR Newswire* on June 22, 2020. *Id.*, ¶ 12.<sup>15</sup>

3 107. Contemporaneously with the mailing of the Postcard Settlement Notices,  
4 A.B. Data updated the Website to provide Class Members and other interested parties  
5 with information concerning the Baker Settlement and the important dates and deadlines  
6 in connection therewith, as well as downloadable copies of the Settlement Notice, Claim  
7 Form, Stipulation, Preliminary Approval Order, and Second Amended Complaint.  
8 Schachter Decl., ¶ 14. Additionally, A.B. Data updated the interactive voice-response  
9 system callers hear when contacting the toll-free telephone helpline for this matter in  
10 order to respond to inquiries regarding the Settlement. *Id.* ¶ 13. Class Members with  
11 questions regarding the Settlement can also contact A.B. Data by sending an e-mail to  
12 info@InsysRXSecuritiesLitigation.com.

13 108. As noted above, and as set forth in the notices, the deadline for Class  
14 Members to submit an objection to the Settlement, the Plan of Allocation, and/or Class  
15 Counsel's Expense Application is September 2, 2020. To date, no objections of any kind  
16 have been filed.<sup>16</sup> Should any objections be received, Class Counsel will address them in  
17 its reply to be filed on or before September 16, 2020. In addition, as the deadline for  
18 submitting claims for the Baker Settlement is September 12, 2020, Class Counsel also  
19 will provide preliminary information regarding the Claims received in its reply.  
20

21 \_\_\_\_\_  
22 <sup>15</sup> In accordance with the Stipulation, Defendant Baker issued notice of the  
Settlement on August 16, 2020, pursuant to the Class Action Fairness Act, 28 U.S.C.  
§ 1715(b). Doc. 404.

23 <sup>16</sup> As discussed above, in connection with the Court's Class Notice Order (Doc. 331),  
24 Class Notice was previously disseminated to potential members of the Class to notify  
them of, among other things: (i) the Action pending against the defendants; (ii) the Court's  
25 certification of the Action to proceed as a class action on behalf of the Court-certified  
Class; and (iii) their right to request to be excluded from the Class, the effect of remaining  
26 in the Class or requesting exclusion, and the requirements for requesting exclusion. No  
requests for exclusion were received in connection with the Class Notice. Pursuant to the  
27 Preliminary Approval Order, the Court exercised its discretion not to provide Class  
Members with a second opportunity to exclude themselves from the Class in connection  
28 with the Baker Settlement proceedings. Doc. 347, ¶ 11.

**VII. THE PLAN FOR ALLOCATING THE NET SETTLEMENT FUND TO THE CLASS IS FAIR AND REASONABLE**

109. In accordance with the Preliminary Approval Order, and as explained in the Settlement Notice, Class Members who wish to participate in the distribution of the Net Settlement Fund (i.e., the Settlement Fund less: (i) any Taxes; (ii) any Notice and Administration Costs; (iii) any Litigation Expenses awarded by the Court; and (iv) any other costs or fees approved by the Court) must submit a valid Claim Form and all required supporting documentation to the Court-authorized Claims Administrator, A.B. Data, postmarked (if mailed), or online through the Website, no later than September 12, 2020. As provided in the Settlement Notice, the Net Settlement Fund will be distributed to Authorized Claimants<sup>17</sup> in accordance with the plan for allocating the Net Settlement Fund among Authorized Claimants approved by the Court.

110. The Plan of Allocation proposed by Class Representative is attached as Appendix A to the Settlement Notice. *See* Schachter Decl., Ex. B. The Plan is designed to equitably distribute the Net Settlement Fund among Class Members; however, the calculations made pursuant to the Plan are not intended to be estimates of, nor indicative of, the amounts that Class Members might have been able to recover after a trial with Defendant Baker.

111. Class Counsel developed the Plan in consultation with Class Representative's damages expert, Coffman, and his team at Global Economic Group. The Plan creates a framework for the equitable distribution of the Net Settlement Fund among Class Members who purportedly suffered economic losses as a result of the alleged violations of the federal securities laws set forth in the Second Amended Complaint, as opposed to economic losses caused by market or industry forces. To that end, Class

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<sup>17</sup> As defined in paragraph 1.c of the Stipulation, an "Authorized Claimant" means a Class Member who submits a Claim to the Claims Administrator that is approved by the Court for payment from the Net Settlement Fund. Once the claims-administration process is complete, Class Counsel will file a motion for entry of the Class Distribution Order, which will seek the Court's approval of the claim determinations and authorization to conduct a distribution of the Net Settlement Fund to Authorized Claimants.

1 Representative's damages expert calculated the estimated amount of alleged artificial  
2 inflation in the per-share price of Insys common stock over the course of the Class Period  
3 that was allegedly proximately caused by defendants' alleged misleading statements and  
4 omissions. Table 1 of the Plan sets forth the estimated alleged artificial inflation in the  
5 per-share price of Insys common stock for each day during the Class Period that will be  
6 utilized in calculating each Claimant's Recognized Loss Amount, and ultimately the  
7 Claimant's overall Recognized Claim.

8 112. A Claimant's Recognized Loss Amount will depend upon several factors,  
9 including the date(s) when the Claimant purchased or acquired his, her, or its shares of  
10 Insys common stock during the Class Period, and whether such shares were sold and if  
11 so, when and at what price.<sup>18</sup> In order to have a Recognized Claim under the Plan, a  
12 Claimant must have suffered damages proximately caused by the disclosure of the  
13 relevant truth concealed by defendants' alleged fraud. Specifically, shares of Insys  
14 common stock purchased or otherwise acquired during the Class Period certified by the  
15 Court (i.e., the period from March 3, 2015, through January 25, 2016) must have been  
16 held through at least one of the alleged corrective disclosure that removed alleged  
17 artificial inflation related to that information.<sup>19</sup>

18 113. A.B. Data, as the Claims Administrator, will determine each Authorized  
19 Claimant's *pro rata* share of the Net Settlement Fund by dividing the Authorized  
20 Claimant's Recognized Claim (i.e., the sum of the Claimant's Recognized Loss Amounts  
21 as calculated under the Plan) by the total Recognized Claims of all Authorized Claimants,  
22 multiplied by the total amount in the Net Settlement Fund. Class Representatives' losses  
23 will be calculated in the same manner.

24 \_\_\_\_\_  
25 <sup>18</sup> The calculation of Recognized Loss Amounts also takes into account the PSLRA's  
26 statutory limitation on recoverable damages. *See* Section 21D(e)(1) of the Exchange Act.  
27 The 90-Day Look-Back values by sale/disposition date are set forth in Table 2 of the Plan.

28 <sup>19</sup> For purposes of the Plan, Class Representative's damages expert identified  
November 4, 2015, December 3, 2015, and January 25, 2016 as the dates on which alleged  
corrective information removed artificial inflation from the per-share price of Insys  
common stock.

1           114. Once A.B. Data has processed all submitted Claim Forms and provided  
2 Claimants with an opportunity to cure any deficiencies in their Claims or challenge the  
3 rejection of their Claims, Class Counsel will file a motion for approval of A.B. Data’s  
4 determinations with respect to all submitted Claims and authorization to distribute the  
5 Net Settlement Fund to Authorized Claimants.

6           115. As set forth in the Plan, if nine months after the initial distribution, there is  
7 a balance remaining in the Net Settlement Fund (whether by reason of uncashed checks,  
8 or otherwise), and if it is cost-effective to do so, Class Counsel will conduct a re-  
9 distribution of the funds remaining after payment of any unpaid fees and expenses  
10 incurred in administering the Settlement, including the costs for such re-distribution, to  
11 Authorized Claimants who have cashed their initial distribution checks and would receive  
12 at least \$10.00 from such re-distribution. Redistributions will be repeated until it is  
13 determined that re-distribution of the funds remaining in the Net Settlement Fund would  
14 no longer be cost effective. Thereafter, any remaining balance will be contributed to non-  
15 sectarian, not-for-profit organization(s), to be recommended by Class Counsel and  
16 approved by the Court.

17           116. As discussed in the Settlement Memorandum, the structure of the Plan is  
18 similar to the structure of plans of allocation that have been used to apportion settlement  
19 proceeds in numerous other securities class actions. To date, no objections to the Plan  
20 have been filed. In sum, Class Counsel believes that the Plan provides a fair and  
21 reasonable method to equitably distribute the Net Settlement Fund among Authorized  
22 Claimants, and respectfully submits that the Plan should be approved by the Court.

23 **VIII. CLASS COUNSEL’S APPLICATION FOR LITIGATION EXPENSES**

24           117. In addition to seeking final approval of the Baker Settlement and the Plan  
25 of Allocation, Class Counsel, on behalf of Plaintiffs’ Counsel, is also making an  
26 application to the Court for the *partial* reimbursement of expenses incurred by Plaintiffs’  
27 Counsel during the course of this Action up to the point that Class Representative filed  
28

1 his May 22, 2020 motion seeking preliminary approval of the Settlement with Mr. Baker.  
2 Specifically, Class Counsel respectfully requests reimbursement of Litigation Expenses  
3 in the amount of \$650,000. This amount *includes* a request for reimbursement in the  
4 amount of \$15,000 for Class Representative in connection with his representation of the  
5 Class in accordance with the PSLRA, 15 U.S.C. § 78u-4(a)(4). *See* Miller Decl., ¶ 9. Class  
6 Counsel's Expense Application is consistent with the expense amount set forth in the  
7 Settlement notices and, to date, no objections to this expense request have been filed.

8 **A. Plaintiffs' Counsel's Litigation Expenses**

9 118. Despite having expended over 20,000 hours of attorney and support staff  
10 time to litigate this case up to the point of entering into the Baker Settlement (resulting in  
11 a lodestar of *over* \$10.5 million), Class Counsel, in an effort to preserve a material  
12 percentage of the proceeds of the Baker Settlement for the Class, is NOT requesting an  
13 award of attorneys' fees. Rather, Class Counsel is requesting reimbursement of a portion  
14 of Plaintiffs' Counsel's total expenses in the amount of \$1,124,606.29, incurred in  
15 connection with the prosecution of the Action on behalf of the Class up to the point of  
16 seeking preliminary approval of the Baker Settlement. It is well-settled that attorneys who  
17 have created a common fund for the benefit of a class are entitled to be reimbursed for  
18 their out-of-pocket expenses incurred in creating the fund so long as the submitted  
19 expenses are reasonable, necessary and directly related to the prosecution of the action.  
20 *See* Expense Reimbursement Memorandum at Section II.

21 119. From the inception of this Action, Class Counsel was aware that it might  
22 not recover any of the expenses it would incur in prosecuting the claims against  
23 defendants and, at a minimum, would not recover any expenses until the Action was  
24 successfully resolved. Class Counsel also understood that, even assuming the Action was  
25 ultimately successful, an award of expenses would not compensate counsel for the lost  
26 use or opportunity costs of funds advanced to prosecute the claims against defendants.  
27 Class Counsel was motivated to, and did, take significant steps to minimize expenses  
28



1 wherever practicable without jeopardizing the vigorous and efficient prosecution of the  
2 Action.

3 120. Plaintiffs' Counsel's expenses include charges for, among other things:  
4 (i) experts and consultants in connection with various stages of the litigation;  
5 (ii) establishing and maintaining a database to house the massive volume of documents  
6 produced in discovery; (iii) online factual and legal research; (iv) deposition-related  
7 expenses; (v) mediation; (vi) travel; and (vii) document reproduction. Courts have  
8 consistently found that these kinds of expenses are payable from a fund recovered by  
9 counsel for the benefit of a class.

10 121. Specifically, the expenses incurred in this Action by Class Counsel total  
11 \$1,119,684.30 and break down as follows:

CATEGORY		AMOUNT
Court Filing and Other Fees		\$1,012.55
Service of Process		\$3,405.40
Postage & Express Mail		\$4,627.86
Class Action Notices / PR Newswire		\$400.00
On-Line Legal / Factual Research		\$40,957.94
External Reproduction Costs		\$4,094.77
Internal Reproduction Costs		\$11,699.40
Out of Town Travel (Transportation, Hotels & Meals)		\$43,517.21
Document Hosting / Management		\$317,999.36
Court Reporters, Transcripts & Deposition Services		\$55,640.79
Witness Counsel		\$2,050.00
Experts / Consultants		\$609,979.02
Global Economics Group, LLC	\$307,345.45	
Friedman LLP	\$193,928.00	
Intelligent Management Solutions, LLC	\$53,705.57	
Lowenstein Sandler LLP	\$55,000.00	
Mediation		\$24,300.00
<b>TOTAL EXPENSES:</b>		<b>\$1,119,684.30</b>

25  
26 122. The expenses incurred in this Action by Liaison Counsel Bonnett Fairbourn  
27 firm total \$4,921.99 and break down as follows:  
28

CATEGORY	AMOUNT
Court filing and other fees	\$535.50
Service of Process	\$420.80
On-Line Legal / Factual Research	\$416.04
Internal Reproduction Costs	\$3,098.60
Court Hearing Transcript	\$451.05
<b>TOTAL EXPENSES:</b>	<b>\$4,921.99</b>

123. The expenses set forth above would normally be charged to a fee-paying client in the private legal marketplace. Moreover, these expenses were reasonable and necessary for the effective prosecution and resolution of this matter. As set forth in Exhibits 3 and 4 hereto, these expenses are reflected in the books and records of the respective firms. These books and records are prepared from receipts, expense vouchers, check records and other documents and are an accurate record of the expenses incurred.

124. The largest component of Plaintiffs' Counsel's expenses (i.e., \$609,979.02, or approximately 54% of their total expenses) was incurred for experts and consultants. As detailed above, the retention of these experts and consultants was necessary and reasonable in order to prove Class Representative's claims. *See supra* ¶¶ 52-55.

125. The second largest component of Plaintiffs' Counsel's expenses (i.e., \$317,999.36, or approximately 28% of their total expenses) was for document production and management. In connection with its discovery efforts, Class Counsel retained an outside vendor to host the document database utilized to effectively and efficiently review and analyze the documents produced in this Action. Another significant expense, \$41,373.98, was incurred for legal research. This amount represents charges for computerized research services such as Lexis, Westlaw, and PACER. It is standard practice for attorneys to use online services to assist them in researching legal and factual issues, and indeed, courts recognize that these tools create efficiencies in litigation and ultimately save money for clients and the class. In addition, Class Counsel incurred \$24,300.00 for charges related to mediation with retired federal Judge Layn R. Phillips.

1           126. The other expenses incurred by Plaintiffs’ Counsel, as reflected in the above  
2 charts, are the types of expenses that are necessarily incurred in litigation and routinely  
3 charged to clients billed by the hour. These expenses include, among others, court fees;  
4 court reporters, videographers, and transcripts; process servers; travel costs; document  
5 reproduction costs; and postage and delivery expenses.

6           127. As noted above, in connection with the Baker Settlement, Class Counsel  
7 will be seeking reimbursement of \$635,000 (or, roughly half) of the \$1,124,606.29 in  
8 total expenses incurred by Plaintiffs’ Counsel in this Action through May 22, 2020.

9           **B. Reimbursement to Class Representative is Fair and Reasonable**

10           128. The PSLRA specifically provides that an “award of reasonable costs and  
11 expenses (including lost wages) directly relating to the representation of the class” may  
12 be made to “any representative party serving on behalf of a class.” 15 U.S.C. § 78u4(a)(4).  
13 Accordingly, Class Representative seeks reimbursement of his reasonable costs incurred  
14 directly for his work representing the Class in the amount of \$15,000. The amount of time  
15 and effort devoted to this Action by Class Representative is discussed in the Miller  
16 Declaration, attached as Exhibit 1 hereto.

17           129. As discussed in the Expense Reimbursement Memorandum and the  
18 accompanying declaration, Mr. Miller has been committed to pursuing the Class’s claims  
19 since he elected to file a motion to serve as the Lead Plaintiff in the Action. Mr. Miller  
20 has provided valuable assistance to Plaintiffs’ Counsel during the prosecution and  
21 resolution of the Action. Moreover, the efforts expended by Class Representative during  
22 the course of this Action, as set forth in his declaration, including communicating with  
23 Class Counsel, reviewing pleadings and motion papers, gathering and reviewing  
24 documents in response to discovery requests, and preparing for and testifying at a  
25 deposition, are precisely the types of activities courts have found to support  
26 reimbursement to class representatives, and fully support this request for reimbursement.

1 **IX. CONCLUSION**

2 130. For all the reasons set forth above, Class Counsel respectfully submits that  
3 the Baker Settlement and the Plan of Allocation should be approved as fair, reasonable,  
4 and adequate. Class Counsel further submits that its application for Litigation Expenses  
5 in the amount of \$650,000, which amount *includes* Class Representative's costs in the  
6 amount of \$15,000, should also be approved as fair and reasonable.

7 131. I declare, under penalty of perjury, that the foregoing is true and correct to  
8 the best of my knowledge.

9  
10 DATED this 19th day of August 2020.

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*s/ Johnston de F. Whitman, Jr.*  
\_\_\_\_\_  
Johnston de F. Whitman, Jr.

**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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