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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

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

Plaintiff,

v.

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

Defendants.

No. 16-cv-00302-NVW

**CLASS ACTION**

**REPLY MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
FURTHER SUPPORT OF  
(I) CLASS REPRESENTATIVE'S  
MOTION FOR FINAL APPROVAL  
OF SETTLEMENT WITH  
DEFENDANT JOHN N. KAPOOR  
AND PLAN OF ALLOCATION;  
AND (II) CLASS COUNSEL'S  
MOTION FOR AN AWARD OF  
ATTORNEYS' FEES**

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1 Court-appointed Class Representative Clark Miller,<sup>1</sup> on behalf of himself and the  
2 Court-certified Class, and Class Counsel, respectfully submit this reply memorandum of  
3 points and authorities in further support of: (i) Class Representative’s Motion for Final  
4 Approval of Settlement with Defendant John N. Kapoor and Plan of Allocation (Doc.  
5 409); and (ii) Class Counsel’s Motion for an Award of Attorneys’ Fees (Doc. 410)  
6 (together, the “Motions”).

7 **I. PRELIMINARY STATEMENT**

8 The proposed Settlement with Defendant John N. Kapoor (“Dr. Kapoor”) is the  
9 second of three settlements reached in the Action and represents the largest potential  
10 recovery for the Class. In exchange for the dismissal of all claims brought in the Action  
11 against Dr. Kapoor, the Class will secure a recovery from Dr. Kapoor’s personal assets  
12 of at least \$700,000 in cash, with the potential to increase to \$10,000,000.<sup>2</sup>

13 As detailed in Class Representative’s and Class Counsel’s September 10, 2020  
14 opening papers in support of the Motions (Docs. 409-411) (“Opening Papers”), the  
15 Settlement is the product of more than four years of litigation efforts, and was reached  
16 less than two months before trial. The Settlement is a favorable result for the Class, as it  
17 avoids the risks Class Representative faced in trying the Class’s claims against Dr.  
18 Kapoor and eliminates the likelihood that, even if a judgment was obtained against Dr.  
19 Kapoor at trial, Class Representative would be unable to collect on such judgment given  
20 the nearly \$62 million in restitution, forfeiture, and fines Dr. Kapoor is obligated to pay  
21 as a result of his criminal conviction in *United States of America v. Babich, et al.*, No.

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22  
23 <sup>1</sup> Unless otherwise defined, all capitalized terms herein have the same meanings as  
24 set forth in the Stipulation and Agreement of Settlement Between Lead Plaintiff and  
25 Defendant John N. Kapoor dated July 1, 2020 (Doc. 371-1) (“Stipulation”), or in the  
26 Declaration of Johnston de F. Whitman, Jr. in Support of (I) Class Representative’s  
27 Motion for Final Approval of Settlement with Defendant John N. Kapoor and Plan of  
28 Allocation; and (II) Class Counsel’s Motion for an Award of Attorneys’ Fees dated  
September 10, 2020 (Doc. 411). Unless otherwise noted, all internal citations and  
quotations are omitted.

<sup>2</sup> The Kapoor Settlement combined with the settlements reached with defendants  
Darryl S. Baker and Michael L. Babich provide for a Class recovery of at least \$2.95  
million, with the potential to increase to \$12.25 million.

1 1:16-cr-10343-ADB (D. Mass.) (i.e., the “Criminal Obligation”) as well as Dr. Kapoor’s  
2 lack of any insurance coverage in the Action. Accordingly, in light of these constraints  
3 and to avoid interference with Dr. Kapoor’s ability to satisfy his Criminal Obligation<sup>3</sup>,  
4 Class Representative and Class Counsel negotiated for and carefully structured payment  
5 of the Settlement Consideration as follows: (i) an initial \$250,000 cash payment;  
6 (ii) monthly cash payments of \$25,000 over a period of ten months for a total of \$250,000;  
7 (iii) a guaranteed payment based upon the results of Dr. Kapoor’s Criminal Conviction  
8 appeal—i.e., \$2,000,000 if he prevails or \$200,000 if he loses; and (iv) additional  
9 potential consideration of up to \$7,500,000 in the event Dr. Kapoor succeeds in having  
10 his Criminal Obligation reduced, eliminated, or paid by another party.<sup>4</sup>

11 Class Representative and Class Counsel are pleased to advise the Court that,  
12 following the notice campaign conducted pursuant to the Court’s July 2, 2020 Preliminary  
13 Approval Order (Doc. 373)—including mailing of notice of the Kapoor Settlement to  
14 over 35,500 potential Class Members and nominees<sup>5</sup>—***not a single member of the Class***  
15 ***has objected to any aspect of the Settlement, the Plan of Allocation, or Class Counsel’s***  
16 ***request for an award of attorneys’ fees.*** Class Representative also has expressly endorsed  
17 the Settlement and the requested attorneys’ fees. *See* Doc. 411-1, ¶¶ 6-7. The Class’s  
18 positive reaction is a further indication that the Settlement, the Plan of Allocation, and  
19 Class Counsel’s request for an award of attorneys’ fees are fair and reasonable, and  
20 provides strong support for the Court’s approval of both Motions.

21  
22  
23 <sup>3</sup> Before Class Representative agreed to the Settlement, Defendant Kapoor’s  
24 Counsel advised the DOJ of the Settlement Consideration, and confirmed that the  
25 consideration at issue here will not interfere with Dr. Kapoor’s obligation to satisfy his  
26 Criminal Obligation. Without such confirmation, Dr. Kapoor would have been subject to  
27 the risk of immediate seizure of his assets by the DOJ. Doc. 411, ¶ 99.

28 <sup>4</sup> Additional details regarding these payments, including timing, is set forth in ¶ 7 of  
the Stipulation.

<sup>5</sup> *See* Supplemental Declaration of Eric Schachter Regarding: (A) Mailing of  
Settlement Notices for Kapoor Settlement; (B) Updates to Website and Toll-Free  
Telephone Helpline; and (C) Report on Claims Received to Date (“Supp. Schachter  
Decl.”), filed herewith as Exhibit 1, ¶ 3.

1 **II. THE FAVORABLE REACTION OF THE CLASS PROVIDES**  
2 **ADDITIONAL SUPPORT FOR APPROVAL OF THE MOTIONS**

3 Class Representative and Class Counsel respectfully submit that their Opening  
4 Papers demonstrate that approval of the Motions is warranted. Given that the Motions  
5 were unopposed by Dr. Kapoor *and the Class*, Class Representative and Class Counsel  
6 will not restate any of their opening arguments here. Instead, Class Representative files  
7 this reply because the lack of a single objection provides further support for approval of  
8 the Motions.<sup>6</sup>

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

10 Pursuant to the Court's Preliminary Approval Order, more than 35,500 Settlement  
11 notices were mailed to potential Class Members and/or their nominees. *See* Supp.  
12 Schachter Decl., ¶ 3. A summary notice was also published in *Investor's Business Daily*  
13 and transmitted over *PR Newswire*, and the long-form Settlement Notice, along with other  
14 relevant information and documents, were posted on the Website for the Action,  
15 [www.InsysRXSecuritiesLitigation.com](http://www.InsysRXSecuritiesLitigation.com). *See* Doc. 411-2, ¶¶ 12-14

16 Collectively, the notices informed Class Members of the terms of the Settlement  
17 and Plan of Allocation, and that Class Counsel would apply for an award of attorneys'  
18 fees in an amount not to exceed 30% of the Settlement Fund obtained from the Kapoor  
19 Settlement. The notices also made clear that Class Counsel's application for attorneys'  
20 fees was *inclusive* of any remaining litigation expenses incurred by Plaintiffs' Counsel in  
21 connection with the institution, prosecution, and resolution of the claims against Dr.  
22 Kapoor that were not sought to be reimbursed in connection with the Settlement with  
23 defendant Baker. *See* Settlement Postcard Notice (Doc. 411-2, Ex. A); Settlement Notice  
24 (Doc. 411-2, Ex. B), ¶¶ 5, 6.<sup>7</sup> The notices also apprised Class Members of their right to

25 <sup>6</sup> *See In re LifeLock, Inc. Mktg. & Sales Practices Litig.*, 2010 WL 11627648, at \*5  
26 (D. Ariz. Aug. 31, 2010) ("In assessing whether to grant approval of a settlement, courts  
consider the reactions of the members of the class . . .").

27 <sup>7</sup> Specifically, as set forth in the Opening Papers, Class Counsel is applying for  
28 attorneys' fees in the amount of 30% of the Settlement Fund, inclusive of the portion of  
Plaintiffs' Counsel's Litigation Expenses, which were documented but not previously

1 object to the Settlement, the Plan of Allocation, and/or the attorneys’ fee request, and that  
 2 the deadline to do so was September 24, 2020. *See* Settlement Postcard Notice (Doc. 411-  
 3 2, Ex. A); Settlement Notice (Doc. 411-2, Ex. B), ¶¶ 64-70. Class Representative’s and  
 4 Class Counsel’s Opening Papers—filed fourteen days prior to the objection deadline—  
 5 are and have been available on the public docket and on the Website. *See* Supp. Schachter  
 6 Decl., ¶ 5.<sup>8</sup> As noted above, following this extensive notice program, *not a single Class*  
 7 *Member* has objected to any aspect of the Settlement.

8 **B. The Class’s Reaction Supports Approval of the Kapoor Settlement,**  
 9 **Plan of Allocation, and Class Counsel’s Request for an Award of**  
 10 **Attorneys’ Fees**

11 The absence of any objections from Class Members strongly supports a finding  
 12 that the proposed Settlement with Dr. Kapoor is fair, reasonable, and adequate. *See e.g.*,  
 13 *Giroux v. Essex Prop. Tr., Inc.*, 2019 WL 2106587, at \*5 (N.D. Cal. May 14, 2019) (“The  
 14 Court finds that the absence of objections . . . indicate[s] overwhelming support among  
 15 the Class Members and weigh in favor of approval.”); *Destefano v. Zynga, Inc.*, 2016 WL  
 16 537946, at \*13 (N.D. Cal. Feb. 11, 2016) (“By any standard, the lack of objection of the  
 17 Class Members favors approval of the Settlement.”); *In re Apollo Grp. Inc. Sec. Litig.*,  
 18 2012 WL 1378677, at \*3 (D. Ariz. Apr. 20, 2012) (“There have been no objections from  
 19 Class Members or potential class members, which itself is compelling evidence that the  
 20 Proposed Settlement is fair, just, reasonable, and adequate.”). The absence of objections  
 21 from institutional investors, who possess ample means and incentive to object to the

22 sought to be reimbursed in connection with the Baker Settlement, and any additional  
 23 expenses incurred since the May 22, 2020 cut-off used for the Baker Settlement through  
 24 July 1, 2020, when Class Representative moved for preliminary approval of the Kapoor  
 25 Settlement (i.e., the “Kapoor Expenses”). Given that the Kapoor Expenses total  
 26 \$548,923.82 Class Counsel’s request for attorneys’ fees will not result in an award of any  
 27 fees unless the Settlement Consideration ultimately exceeds \$1,829,746.07. Class  
 28 Counsel will not receive any “fees” if the Settlement Consideration is below this amount,  
 as any amount received pursuant to the fee request, if approved, will only serve to cover  
 the Kapoor Expenses. Doc. 411, ¶ 115.

<sup>8</sup> In addition, in accordance with the Court’s October 5, 2020 Order (Doc. 421), the  
 Website was updated on October 6, 2020 to inform Class Members that the Settlement  
 Fairness Hearing will be conducted telephonically and to provide the necessary  
 information for listening to the hearing. Supp. Schachter Decl., ¶ 5.

1 Settlement if they deemed it unsatisfactory, is further evidence of the Settlement’s  
2 fairness. *See, e.g., In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2017 WL 2481782, at  
3 \*4 (N.D. Cal. June 8, 2017) (absence of any objections from institutions means that “the  
4 inference that the class approves of the settlement is even stronger”).

5 Likewise, there have been no objections to the Plan of Allocation or Class  
6 Counsel’s request for attorneys’ fees, which provides additional, strong support for their  
7 approval. *See, e.g., Patel v. Axesstel, Inc.*, 2015 WL 6458073, at \*7 (S.D. Cal. Oct. 23,  
8 2015) (approving plan of allocation where it “was laid out in detail in the notice, and no  
9 class members objected”); *id.* at \*8 (granting 30% fee “[i]n light of the result achieved . .  
10 ., the complexity of securities litigation, the lodestar crosscheck, and the lack of any  
11 objection from the class members); *In re Heritage Bond Litig.*, 2005 WL 1594403, at \*21  
12 (C.D. Cal. June 10, 2005) (“The absence of objections or disapproval by class members  
13 to Class Counsel’s fee request further supports finding the fee request reasonable.”). And,  
14 as with approval of the Settlement, the lack of any objections by institutional investors  
15 lends further support for the fee request. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d  
16 294, 305 (3d Cir. 2005) (finding the fact that “a significant number of investors in the  
17 class were ‘sophisticated’ institutional investors that had considerable financial incentive  
18 to object had they believed the requested fees were excessive” and did not do so,  
19 supported approval of the requested fee).

20 In sum, the uniformly favorable reaction of the Class strongly supports approval  
21 of the Settlement, the Plan of Allocation, and Class Counsel’s request for an award of  
22 attorneys’ fees.

### 23 **III. CONCLUSION**

24 For the foregoing reasons, and those set forth in their Opening Papers, Class  
25 Representative and Class Counsel respectfully request that the Court approve the  
26 Settlement with Defendant Kapoor, the Plan of Allocation, and Class Counsel’s request  
27 for an award of attorneys’ fees.  
28



1 DATED: October 8, 2020

Respectfully submitted,

2 **KESSLER TOPAZ**  
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4 *s/ Johnston de F. Whitman, Jr.*

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 8, 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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