

**KESSLER TOPAZ
MELTZER & CHECK, LLP**

Andrew L. Zivitz
azivitz@ktmc.com
Johnston de F. Whitman, Jr.
jwhitman@ktmc.com
Jonathan F. Neumann
jneumann@ktmc.com
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056

-and-

Jennifer L. Joost
jjoost@ktmc.com
One Sansome Street, Suite 1850
San Francisco, CA 94104
Telephone: (415) 400-3000
Facsimile: (415) 400-3001

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

**BONNETT, FAIRBOURN,
FRIEDMAN & BALINT, P.C.**

Francis J. Balint, Jr.
fbalint@bffb.com
Andrew S. Friedman
afriedman@bffb.com
2325 E. Camelback Road, Suite 300
Phoenix, AZ 85016
Telephone: (602) 274-1100
Facsimile: (602) 274-1199

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

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

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

Plaintiff,

v.

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

Defendants.

No. 16-cv-00302-NVW

CLASS ACTION

**CLASS COUNSEL'S MOTION
FOR AN AWARD OF
ATTORNEYS' FEES; AND
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

		Page
1		
2		
3	I. PRELIMINARY STATEMENT	1
4	II. CLASS COUNSEL’S FEE APPLICATION IS REASONABLE AND	
5	SHOULD BE APPROVED	4
6	A. A Fee of 30% of the Settlement Fund is Reasonable Under	
7	Either the Percentage-of-Recovery or Lodestar Method	4
8	1. The Requested Fee Percentage Is Consistent with Ninth	
9	Circuit Law and is Appropriate in This Case.....	4
10	2. The Requested Attorneys’ Fees are Reasonable Under the	
11	Lodestar Method	6
12	B. The Factors Considered by Courts in the Ninth Circuit Support	
13	Approval of the Requested Fee	8
14	1. The Results Achieved Support the Fee Request	9
15	2. The Substantial Risks and Complexity of the Litigation	
16	Support the Fee Request	11
17	3. Skill Required and Quality of Work Support the	
18	Fee Request	12
19	4. The Contingent Nature of the Fee Supports the	
20	Fee Request	13
21	5. Awards Made in Similar Cases Support the Fee	
22	Request	15
23	6. The Reaction of the Class to Date Supports the Fee	
24	Request	15
25	7. The Other Applicable Factors Considered by Courts	
26	in this District Further Support the Requested Fee	16
27	a. The Undesirability of the Case	16
28	b. The Preclusion of Other Employment	16

1 8. The Fee Application is Inclusive of the Kapoor Expenses 16
2 III. CONCLUSION 17
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Cases

In re Am. Apparel, Inc. S’holder Litig.,
2014 WL 10212865 (C.D. Cal. July 28, 2014)..... 6

In re Amgen Inc. Sec. Litig.,
2016 WL 10571773 (C.D. Cal. Oct. 25, 2016).....6, 7-8

Anixter v. Home-Stake Prod. Co.,
77 F.3d 1215 (10th Cir. 1996) 14

In re Apollo Grp. Inc. Sec. Litig.,
2012 WL 1378677 (D. Ariz. Apr. 20, 2012) 6

Atlas v. Accredited Home Lenders Holding Co.,
2009 WL 3698393 (S.D. Cal. Nov. 4, 2009) 8

In re BankAtlantic Bancorp, Inc. Sec. Litig.,
2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) 14

Barbosa v. Cargill Meat Sols. Corp.,
297 F.R.D. 431 (E.D. Cal. 2013) 13

Billitteri v. Sec. Am., Inc.,
2011 WL 3585983 (N.D. Tex. Aug. 4, 2011)..... 16

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980)..... 4

Brandenburg v. Cousin Vinny’s Pizza,LLC,
2019 WL 6310376 (S.D. Ohio Nov. 25, 2019)..... 10

Braud v. Transp. Serv. Co. of Ill.,
2010 WL 3283398 (E.D. La. Aug. 17, 2010) 16

In re Cendant Corp. Litig.,
264 F.3d 201 (3d Cir. 2001) 12

In re CytRx Corp. Sec. Litig.,
2018 WL 8950655 (C.D. Cal. Sept. 17, 2018) 5

Destefano v. Zynga, Inc.,
2016 WL 537946 (N.D. Cal. Feb. 11, 2016) 13-14

1 *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*,
 2007 WL 2416513 (N.D. Cal. Aug. 16, 2007) 13

2

3 *In re Energy Future Holdings Corp.*,
 No. 14-10979 (Bankr. D. Del. Apr. 20, 2018), ECF No. 12983-5 7

4 *Fischel v. Equitable Life Assurance Soc’y of the United States*,
 307 F.3d 997 (9th Cir. 2002) 11

5

6 *In re Flag Telecom Holdings, Ltd. Sec. Litig.*,
 2010 WL 4537550 (S.D.N.Y. Nov. 8, 2010)..... 14

7

8 *Glass v. UBS Fin. Servs., Inc.*,
 331 F. App’x 452 (9th Cir. 2009) 4

9

10 *HCL Partners Ltd. P’ship v. Leap Wireless Int’l, Inc.*,
 2010 WL 4156342 (S.D. Cal. Oct. 15, 2010) 17

11 *Hefler v. Wells Fargo & Co.*,
 2018 WL 6619983 (N.D. Cal. Dec. 18, 2018)..... 11

12

13 *Hensley v. Eckerhart*,
 461 U.S. 424 (1983)..... 9

14

15 *In re Heritage Bond Litig.*,
 2005 WL 1594389 (C.D. Cal. June 10, 2005) 12

16

17 *In re Heritage Bond Litig.*,
 2005 WL 1594403 (C.D. Cal. June 10, 2005) 4-5

18

19 *Hopkins v. Stryker Sales Corp.*,
 2013 WL 496358 (N.D. Cal. Feb. 6, 2013) 7

20 *In re Initial Pub. Offering Sec. Litig.*,
 671 F. Supp. 2d 467 (S.D.N.Y. 2009) 7-8

21

22 *Jiangchen v. Rentech, Inc.*,
 2019 WL 5173771 (C.D. Cal. Oct. 10, 2019)..... 5, 11

23

24 *In re K12 Inc. Sec. Litig.*,
 2019 WL 3766420 (N.D. Cal. July 10, 2019)..... 5

25

26 *Mauss v. Nuvasive, Inc.*,
 2018 WL 6421623 (S.D. Cal. Dec. 6, 2018) 5

27 *In re Mego Fin. Corp. Sec. Litig.*,
 213 F.3d 454 (9th Cir. 2000) 5, 10

28

1 *Mo. v. Jenkins*,
 491 U.S. 274 (1989).....6-7

2

3 *Morris v. Lifescan, Inc.*,
 54 F. App'x 663 (9th Cir. 2003) 5

4

5 *Nguyen v. Radiant Pharm. Corp.*,
 2014 WL 1802293 (C.D. Cal. May 6, 2014) 12

6 *In re Nuvelo, Inc. Sec. Litig.*,
 2011 WL 2650592 (N.D. Cal. July 6, 2011).....13-14

7

8 *In re Omnivision Techs., Inc.*,
 559 F. Supp. 2d 1036 (N.D. Cal. 2008).....11-12, 13

9

10 *In re Pac. Enters. Sec. Litig.*,
 47 F.3d 373 (9th Cir. 1995) 5

11

12 *Patel v. Axesstel, Inc.*,
 2015 WL 6458073 (S.D. Cal. Oct. 23, 2015) 5

13 *Paul, Johnson, Alston & Hunt v. Grauldy*,
 886 F.2d 268 (9th Cir. 1989)4-5

14

15 *In re Portal Software, Inc. Sec. Litig.*,
 2007 WL 4171201 (N.D. Cal. Nov. 26, 2007) 11

16

17 *Robbins v. Koger Props. Inc.*,
 116 F.3d 1441 (11th Cir. 1997) 14

18

19 *Schaffer v. Litton Loan Servicing, LP*,
 2012 WL 10274679 (C.D. Cal. Nov. 13, 2012) 10

20 *Siracusano v. Matrixx Initiatives, Inc.*,
 No. 2:04-cv-00886 (D. Ariz. Nov. 13, 2012), ECF No. 172 5

21

22 *Smilovits v. First Solar, Inc.*,
 No. 2:12-cv-00555 (D. Ariz. Apr. 24, 2020), ECF Nos. 718-1, 719 7

23

24 *Stetson v. Grissom*,
 821 F.3d 1157 (9th Cir. 2016) 4

25

26 *Turocy v. El Pollo Loco Holdings, Inc.*,
 No. 8:15-cv-01343 (C.D. Cal. Aug. 27, 2019), ECF No. 219 5

27 *In re Tyco Int'l, Ltd. Multidistrict Litig.*,
 535 F. Supp. 2d 249 (D.N.H. 2007)..... 6

28

1 *Vincent v. Hughes Air W., Inc.*,
2 557 F.2d 759 (9th Cir. 1977) 4
3
4 *Vizcaino v. Microsoft Corp.*,
5 290 F.3d 1043 (9th Cir. 2002)*passim*
6
7 *In re Wash. Pub. Power Supply Sys. Sec. Litig.*,
8 19 F.3d 1291 (9th Cir. 1994)4, 5, 6-7, 13
9
10 *Willix v. Healthfirst, Inc.*,
11 2011 WL 754862 (E.D.N.Y. Feb. 18, 2011)14-15
12
13 **Other Authorities**
14
15 Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class*
16 *Action Litigation: 2019 Full-Year Review*, NERA Economic Consulting
17 (Feb. 12, 2020), [https://www.nera.com/content/dam/nera/publications/](https://www.nera.com/content/dam/nera/publications/2020/PUB_YEAR_END_Trends_012120_Final.pdf)
18 [2020/PUB_YEAR_END_Trends_012120_Final.pdf](https://www.nera.com/content/dam/nera/publications/2020/PUB_YEAR_END_Trends_012120_Final.pdf)10-11
19
20
21
22
23
24
25
26
27
28

1 Pursuant to Federal Rule of Civil Procedure 23(h), Court-appointed Class Counsel
2 Kessler Topaz Meltzer & Check, LLP (“Kessler Topaz”),¹ on behalf of Plaintiffs’
3 Counsel,² hereby respectfully moves for an award of attorneys’ fees in the amount of 30%
4 of the Settlement Fund (“Fee Application”). The Fee Application is *inclusive* of the
5 portion of Plaintiffs’ Counsel’s litigation expenses, which were documented as of May
6 22, 2020, but as to which reimbursement was not requested in connection with the Baker
7 Settlement, and additional litigation expenses incurred between May 23, 2020 and July 1,
8 2020 (referred to herein as the “Kapoor Expenses”).

9 I. PRELIMINARY STATEMENT

10 Through its efforts, Class Counsel has achieved a settlement of the Action with
11 defendant John N. Kapoor (“Dr. Kapoor”) providing for a recovery of at least \$700,000
12 in cash, with the potential to increase to \$10,000,000 in cash, for the benefit of the Class
13 (“Settlement” or “Kapoor Settlement”). The Settlement is a favorable result in light of the
14 significant risks Class Representative faced in trying the Class’s claims against Dr.
15 Kapoor, including proving that the sole statement attributed to Dr. Kapoor was materially
16 false or misleading and made with scienter, and establishing the Class’s entitlement to
17 damages. In addition, the Settlement also eliminates the likelihood that, even if a
18 judgment was obtained against Dr. Kapoor at trial, Class Representative would be unable
19 to collect on such judgment given the nearly \$62 million in restitution, forfeiture, and
20 fines Dr. Kapoor is obligated to pay as a result of his criminal conviction in *United States*
21 *of America v. Babich, et al.*, No. 1:16-cr-10343-ADB (D. Mass.) (i.e., the “Criminal
22

23 ¹ All capitalized terms not defined herein have the meanings ascribed to them in the
24 Stipulation and Agreement of Settlement Between Lead Plaintiff and Defendant John N.
25 Kapoor, dated July 1, 2020 (Doc. 371-1) (“Stipulation”) or in the Declaration of Johnston
26 de F. Whitman, Jr. in Support of (I) Class Representative’s Motion for Final Approval of
27 Settlement with Defendant John N. Kapoor and Plan of Allocation; and (II) Class
28 Counsel’s Motion for an Award of Attorneys’ Fees (“Whitman Declaration”) submitted
herewith. Citations to “¶ _” herein refer to paragraphs in the Whitman Declaration. Unless
otherwise noted, all internal citations and quotations are omitted.

² “Plaintiffs’ Counsel” refers collectively to: (i) Class Counsel, Kessler Topaz; (ii)
Court-appointed Liaison Counsel, Bonnett, Fairbourn, Friedman & Balint, P.C. (“Bonnett
Fairbourn”); and (iii) additional counsel, The Schall Law Firm and Goldberg Law PC.

1 Obligation”)—an amount that far exceeds his liquid assets and represents the vast
2 majority of his net worth (¶ 98)—as well as Dr. Kapoor’s lack of *any* insurance coverage
3 in the Action.³

4 Over the past four-plus years, Class Counsel has dedicated more than 22,224 hours
5 of attorney and other professional staff time litigating the Action, and has not received
6 any compensation. ¶ 125. Among other efforts, Class Counsel, with the assistance of the
7 other Plaintiffs’ Counsel firms: (i) conducted an extensive investigation into the Class’s
8 claims; (ii) drafted two detailed amended complaints (and briefed two rounds of motions
9 to dismiss); (iii) participated in hotly-contested fact and expert discovery, including the
10 review of more than 14 million pages of documents, hundreds of written discovery
11 requests and responses, and a total of sixteen fact and expert depositions; (iv) briefed a
12 motion to certify the Class, and opposed Dr. Kapoor’s Rule 23(f) petition for permission
13 to appeal to the Ninth Circuit the Court’s order certifying the Class; (v) consulted with
14 various experts; (vi) engaged experienced bankruptcy counsel to protect the Class’s
15 interests in Insys’ bankruptcy proceedings; (vii) conducted an extensive Class-notice
16 program advising of the Action’s pendency and Class Representative’s motion to
17 voluntarily dismiss Insys from the Action with prejudice; (viii) briefed defendants’
18 Summary Judgment Motion; (ix) undertook extensive trial preparations; and (x) engaged
19 in hard-fought, arm’s-length settlement negotiations, including formal mediation. ¶¶ 21-
20 79.⁴

21 Class Counsel assumed all the risks in litigating the Action by taking this case on
22 a fully contingent basis, and devoted substantial resources to prosecuting the Action
23 against well-resourced opposing counsel. As compensation for the amount of quality legal

24 ³ As detailed in Class Representative’s briefing submitted in support of preliminary
25 approval, Dr. Kapoor’s insurance carriers have consistently and repeatedly denied
26 coverage for him in this matter. Doc. 371 at 10-12.

27 ⁴ The Whitman Declaration is an integral part of this submission and, for the sake
28 of brevity herein, the Court is respectfully referred to it for a detailed description of, *inter*
alia: the claims asserted (¶¶ 14-17); the procedural history of the Action (¶¶ 18-77); the
Settlement negotiations (¶¶ 78-82); the risks of continued litigation (¶¶ 83-101); and the
services Plaintiffs’ Counsel provided for the benefit of the Class (¶¶ 9, 21-79).

1 work Plaintiffs’ Counsel dedicated to the Action, and their commitment to bringing the
2 Action to a conclusion providing a meaningful cash recovery for the benefit of Class
3 Members, Class Counsel, on behalf of Plaintiffs’ Counsel, requests a fee of 30% of the
4 Settlement Fund. As discussed herein, Class Counsel’s Fee Application is:
5 (i) consistent with fee percentages awarded in other securities and complex class actions
6 in this Circuit; (ii) consistent with the agreement Class Representative entered into with
7 Class Counsel at the outset of the Action; and (iii) *inclusive* of the Kapoor Expenses—
8 i.e., Class Counsel is not separately seeking reimbursement of the \$548,923.82 in
9 outstanding unreimbursed expenses (and for which reimbursement has not yet been
10 sought) incurred in litigating the Action through July 1, 2020. In addition, a 30% fee
11 award is well below Plaintiffs’ Counsel’s lodestar, resulting in a fractional or “negative”
12 multiplier of approximately 0.018 on Plaintiffs’ Counsel’s lodestar (assuming only the
13 \$700,000 payment is made) and approximately 0.26 on Plaintiffs’ Counsel’s lodestar (if
14 the Class receives the maximum \$10,000,000 Settlement amount). Thus, despite the
15 substantial risks Plaintiffs’ Counsel faced (which would otherwise justify a positive
16 multiplier on their lodestar), the requested attorneys’ fees are significantly less than the
17 value of the time Plaintiffs’ Counsel devoted to litigating the case on behalf of the Class.

18 Class Representative supports Class Counsel’s Fee Application. *See* Declaration
19 of Clark Miller (attached as Ex. 1 to the Whitman Decl.) (“Miller Decl.”), ¶ 7. In addition,
20 while the deadline set by the Court for Class Members to object to the requested attorneys’
21 fees has not yet passed, to date, no objections have been received. ¶¶ 13, 116.⁵

22 In light of the recovery obtained from Dr. Kapoor, the time and effort devoted by
23 Plaintiffs’ Counsel over the course of more than four years, the wholly contingent nature
24 of the representation, the considerable risks that counsel assumed, and the fact that the
25

26
27 ⁵ The deadline for objections is September 24, 2020. Should any objections be
28 received, Class Counsel will address them in his reply submissions on or before October
8, 2020.

1 requested fee is considerably less than Plaintiffs' Counsel's lodestar, Class Counsel
2 respectfully submits that the Fee Application is reasonable and should be approved.

3 **II. CLASS COUNSEL'S FEE APPLICATION IS REASONABLE AND**
4 **SHOULD BE APPROVED**

5 Courts in this Circuit recognize that "a private plaintiff, or his attorney, whose
6 efforts create, discover, increase or preserve a fund to which others also have a claim is
7 entitled to recover from the fund the costs of his litigation, including attorneys' fees."
8 *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); accord *Stetson v.*
9 *Grissom*, 821 F.3d 1157, 1165 (9th Cir. 2016). Further, the Supreme Court "has
10 recognized consistently that a litigant or a lawyer who recovers a common fund for the
11 benefit of persons other than himself or his client is entitled to a reasonable attorney's fee
12 from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The
13 policy rationale for awarding attorneys' fees from a common fund is that "those who
14 benefit from the creation of the fund should share the wealth with the lawyers whose skill
15 and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291,
16 1300 (9th Cir. 1994) ("WPPSS").

17 As discussed further below, the requested attorneys' fee in this case is reasonable
18 and consistent with Ninth Circuit law.

19 **A. A Fee of 30% of the Settlement Fund is Reasonable Under Either**
20 **the Percentage-of-Recovery or Lodestar Method⁶**

21 **1. The Requested Fee Percentage Is Consistent with Ninth Circuit**
22 **Law and is Appropriate in This Case**

23 Although the Ninth Circuit has established 25% of the fund as the 'benchmark' fee
24 award in common fund cases, *see, e.g., In re Heritage Bond Litig.*, 2005 WL 1594403, at

25 _____
26 ⁶ Where a settlement produces a common fund, courts in this Circuit have discretion
27 to employ either the percentage-of-recovery method or the lodestar method in awarding
28 attorneys' fees. *See WPPSS*, 19 F.3d at 1296; *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043,
1047 (9th Cir. 2002). The percentage-of-recovery method is the prevailing method used
in this Circuit. *See, e.g., Glass v. UBS Fin. Servs., Inc.*, 331 F. App'x 452, 456-57 (9th
Cir. 2009).

1 *18 (C.D. Cal. June 10, 2005), “[t]hat percentage amount can then be adjusted upward or
2 downward to account for any unusual circumstances involved in th[e] case.” *Paul,*
3 *Johnson, Alston & Hunt v. Graulity*, 886 F.2d 268, 272 (9th Cir. 1989). Indeed, courts
4 award fees in excess of 25% in appropriate circumstances. *See Jiangchen v. Rentech, Inc.*,
5 2019 WL 5173771, at *9 (C.D. Cal. Oct. 10, 2019) (“The actual percentage varies
6 depending on the facts of each case, but in most common fund cases, the award exceeds
7 th[e] [25%] benchmark.”); *Patel v. Axesstel, Inc.*, 2015 WL 6458073, at *8 (S.D. Cal.
8 Oct. 23, 2015) (granting 30% fee “in light of the result achieved [], the complexity of
9 securities litigation, the lodestar crosscheck, and the lack of any objection from the class
10 members). Moreover, the guiding principle in awarding fees remains that a fee award
11 should be “reasonable under the circumstances.” *WPPSS*, 19 F.3d at 1295.

12 Class Counsel’s 30% fee request is consistent with percentage fees that have been
13 awarded in securities class actions and other complex litigation in this Court and in this
14 Circuit. *See, e.g., Siracusano v. Matrixx Initiatives, Inc.*, No. 2:04-cv-00886 (D. Ariz.
15 Nov. 13, 2012), ECF No. 172, at 1 (Wake, J.) (awarding 30% fee); *Turocy v. El Pollo*
16 *Loco Holdings, Inc.*, No. 8:15-cv-01343 (C.D. Cal. Aug. 27, 2019), ECF No. 219, at 1
17 (awarding 30% fee); *In re K12 Inc. Sec. Litig.*, 2019 WL 3766420, at *1 (N.D. Cal. July
18 10, 2019) (awarding 33% fee); *Mauss v. Nuvasive, Inc.*, 2018 WL 6421623, at *13 (S.D.
19 Cal. Dec. 6, 2018) (awarding 30% fee); *In re CytRx Corp. Sec. Litig.*, 2018 WL 8950655,
20 at *1 (C.D. Cal. Sept. 17, 2018) (awarding 30% fee); *Patel*, 2015 WL 6458073, at *8
21 (awarding 30% fee); *Morris v. Lifescan, Inc.*, 54 F. App’x 663, 664 (9th Cir. 2003)
22 (affirming 33% fee); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000)
23 (affirming 33.3% fee); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995)
24 (affirming 33% fee). Indeed, Plaintiffs’ Counsel litigated this Action to the brink of trial,
25 securing a favorable result for the Class where the risk of no recovery was high. And,
26 unlike the typical attorneys’ fee request in similar cases, the 30% fee request here is also
27
28

1 designed to compensate Plaintiffs' Counsel for unreimbursed litigation expenses, further
2 confirming that the Fee Application is reasonable.⁷

3 **2. The Requested Attorneys' Fees are Reasonable Under the**
4 **Lodestar Method**

5 Courts in the Ninth Circuit, although not required to do so, often cross-check a
6 proposed fee award based upon a percentage of a common fund against counsel's
7 lodestar. *See In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *9 (C.D. Cal. Oct. 25,
8 2016) ("Although an analysis of the lodestar is not required for an award of attorneys'
9 fees in the Ninth Circuit, a cross-check of the fee request with a lodestar amount can
10 demonstrate the fee request's reasonableness."). When the lodestar is used as a cross-
11 check, the "focus is not on the 'necessity and reasonableness of every hour' of the
12 lodestar, but on the broader question of whether the fee award appropriately reflects the
13 degree of time and effort expended by the attorneys." *In re Tyco Int'l, Ltd. Multidistrict*
14 *Litig.*, 535 F. Supp. 2d 249, 270 (D.N.H. 2007).⁸

15 As detailed in the Whitman Declaration, Plaintiffs' Counsel exerted a tremendous
16 amount of effort in advancing this Action over the past four-plus years in the face of an
17 aggressive and determined defense. Through July 1, 2020, Plaintiffs' Counsel have spent
18 over 22,306 hours of attorney and other professional support staff time prosecuting the
19 Action for the benefit of the Class. ¶ 132. Plaintiffs' Counsel's lodestar, derived by
20 multiplying the hours spent on the Action by each attorney and professional support staff
21 employee by their respective hourly rate, is \$11,539,774.75. *See id.*⁹

22 _____
23 ⁷ The Fee Application will not result in actual "fees" (exceeding unreimbursed
expenses incurred as of July 1, 2020) unless the Settlement Consideration ultimately
exceeds \$1,829,746.07. ¶ 115.

24 ⁸ "In contrast to the use of the lodestar method as a primary tool for setting a fee
25 award, the lodestar cross-check can be performed with a less exhaustive cataloging and
review of counsel's hours." *See, e.g., In re Am. Apparel, Inc. S'holder Litig.*, 2014 WL
26 10212865, at *23 (C.D. Cal. July 28, 2014); *In re Apollo Grp. Inc. Sec. Litig.*, 2012 WL
1378677, at *7 n.2 (D. Ariz. Apr. 20, 2012) ("an itemized statement of legal services is
not necessary for an appropriate lodestar cross-check").

27 ⁹ It is well established and appropriate to calculate counsel's lodestar based on
28 current rates, rather than historical rates, as a method of compensating for the delay in
payment and the loss of interest on the funds. *See Mo. v. Jenkins*, 491 U.S. 274, 284

1 Accordingly, the 30% fee request represents a *negative* multiplier of
2 approximately 0.018 on Plaintiffs’ Counsel’s lodestar (assuming only the \$700,000
3 payment is made) and a *negative* multiplier of approximately 0.26 on Plaintiffs’
4 Counsel’s lodestar (if the Class receives the maximum \$10,000,000 Settlement
5 Consideration). In other words, regardless of the ultimate amount of the Settlement
6 Consideration, the requested fee will represent a significant discount to the lodestar value
7 of the time that Plaintiffs’ Counsel dedicated to the Action. This “negative” multiplier *is*
8 *well* below the range of multipliers—often between one and four—commonly awarded
9 in comparable litigation. *See Vizcaino*, 290 F.3d at 1051 n.6 (finding that lodestar
10 multipliers ranging from one to four are common); *Hopkins v. Stryker Sales Corp.*, 2013
11 WL 496358, at *4 (N.D. Cal. Feb. 6, 2013) (same). Indeed, in cases of this nature, fees
12 representing multiples well above counsel’s lodestar are regularly awarded to reflect the
13 contingency fee risk and other relevant factors. *See Vizcaino*, 290 F.3d at 1051 (noting
14 “courts have routinely enhanced the lodestar to reflect the risk of non-payment in common
15 fund cases” and affirming a fee representing a 3.65 lodestar multiplier). Further, courts
16 repeatedly recognize that a percentage fee request that is less than counsel’s lodestar
17 provides strong confirmation of the reasonableness of the award. *See, e.g., Amgen*, 2016
18 WL 10571773, at *9 (“a percentage fee that falls below counsel’s lodestar strongly
19 supports the reasonableness of the award”); *In re Initial Pub. Offering Sec. Litig.*, 671 F.
20 Supp. 2d 467, 515 (S.D.N.Y. 2009) (finding “no real danger of overcompensation” given

21
22 _____
23 (1989); *WPPSS*, 19 F.3d at 1305. The Lodestar Declarations, attached as Exs. 3 through
24 5 to the Whitman Declaration, include a description of the legal background and
25 experience of the lawyers at Plaintiffs’ Counsel firms that worked on the Action, which
26 supports the hourly rates submitted. Moreover, Plaintiffs’ Counsel’s hourly rates are fair
27 and reasonable for this legal market. *See, e.g., Smilovits v. First Solar, Inc.*, No. 2:12-cv-
28 00555 (D. Ariz. Apr. 24, 2020), ECF Nos. 718-1, 719 (fee requests reporting hourly rates
from \$650 to \$1,325 per hour for partners and from \$250 to \$630 per hour for other
attorneys). By way of comparison, Cravath Swaine & Moore LLP, one of firms that
represented Dr. Kapoor during the course of the Action, reported hourly rates ranging
from \$340 to \$1,250 per hour for associates and other non-partner attorneys and as high
as \$1,400 per hour for partners in a 2018 bankruptcy court submission. *See In re Energy
Future Holdings Corp.*, No. 14-10979 (Bankr. D. Del. Apr. 20, 2018), ECF No. 12983-
5. These rates are in line with, or exceed, Plaintiffs’ Counsel’s rates.

1 that the requested fee represented a discount to counsel's lodestar). Here, even utilizing a
2 lodestar figure based on a flat \$200 hourly rate for all Plaintiffs' Counsel's attorneys, a
3 30% fee award would still result in a *negative* multiplier of approximately 0.053 on
4 Plaintiffs' Counsel's lodestar assuming the minimum consideration of \$700,000, and
5 approximately 0.76 on Plaintiffs' Counsel's lodestar assuming the maximum
6 consideration of \$10 million.

7 In sum, Class Counsel's requested fee is reasonable, justified, and well within the
8 range of what courts in this Circuit regularly award in class actions, whether calculated
9 as a percentage-of-recovery or as a cross-check on Plaintiffs' Counsel's lodestar.

10 **B. The Factors Considered by Courts in the Ninth Circuit Support**
11 **Approval of the Requested Fee**

12 Courts in this Circuit also consider the following factors when determining
13 whether a requested fee is fair and reasonable: (i) results achieved; (ii) risks of litigation;
14 (iii) skill required and quality of work; (iv) contingent nature of the fee and financial
15 burden carried by the plaintiffs; (v) awards made in similar cases; (vi) reaction of the
16 class; and (vii) the amount of a lodestar cross-check. *See Vizcaino*, 290 F.3d at 1048-50;
17 *see also Atlas v. Accredited Home Lenders Holding Co.*, 2009 WL 3698393, at *3 (S.D.
18 Cal. Nov. 4, 2009) ("The relative degree of importance to be attached to any particular
19 factor will depend upon . . . the nature of the claim(s) advanced, the type(s) of relief
20 sought, and the unique facts and circumstances presented by each individual case.")
21 (alteration in original).¹⁰ Each of the *Vizcaino* factors confirms that the requested 30% fee
22 is fair and reasonable in this case.

23 _____
24 ¹⁰ LRCiv 54.2(c)(3) also provides the following factors, many of which overlap with
those enumerated in *Vizcaino*, for purposes of determining a reasonable fee award:

25 (A) The time and labor required of counsel; (B) The novelty and difficulty of
26 the questions presented; (C) The skill requisite to perform the legal service
27 properly; (D) The preclusion of other employment by counsel because of the
28 acceptance of the action; (E) The customary fee charged in matters of the type
involved; (F) Whether the fee contracted between the attorney and the client
is fixed or contingent; (G) Any time limitations imposed by the client or the
circumstances; (H) The amount of money, or the value of the rights, involved,
and the results obtained; (I) The experience, reputation and ability of counsel;

1. The Results Achieved Support the Fee Request

1
2 Courts have consistently recognized that the result achieved is “the most critical
3 factor” to consider in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436
4 (1983); *Vizcaino*, 290 F.3d at 1050. Here, Class Counsel was able to overcome various
5 hurdles to obtain a recovery from Dr. Kapoor through years of hard-fought litigation and
6 creative settlement terms that provide a favorable result for the Class.

7 Aside from the defenses Dr. Kapoor would assert at trial, there were additional
8 challenges to obtaining a recovery from Dr. Kapoor *even if* a judgment was obtained
9 against him. In light of his Criminal Conviction and resulting monetary obligation of
10 nearly \$62 million (i.e., the Criminal Obligation), and the unavailability of any insurance
11 coverage, Class Counsel negotiated settlement terms that provide the maximum monetary
12 contribution Dr. Kapoor can make from his personal resources at this time, with the
13 potential for additional consideration in the future.¹¹ In this regard, Class Counsel
14 mandated that the Stipulation require Dr. Kapoor’s counsel to advise the DOJ of the
15 Settlement and confirm that the Settlement Consideration would not interfere with Dr.
16 Kapoor’s obligation to satisfy his Criminal Obligation. *See* Stipulation, ¶ 8. Class Counsel
17 insisted upon this provision based upon the substantial likelihood that the DOJ would
18 seize and ultimately liquidate the entirety of Dr. Kapoor’s assets if Class Representative
19 demanded and received more consideration as part of the Settlement, or was successful
20 in obtaining a judgment against Dr. Kapoor at trial.

21
22 _____
23 (J) The “undesirability” of the case; (K) The nature and length of the
24 professional relationship between the attorney and the client; (L) Awards in
25 similar actions; and (M) Any other matters deemed appropriate under the
26 circumstances.

25 Two of these factors—the “time limitations imposed by the client or the circumstances”
26 and the “nature and length of . . . [counsel’s] professional relationship with the client”—
27 are not relevant here.

28 ¹¹ In connection with the Settling Parties’ settlement discussions, Dr. Kapoor’s
counsel shared details of Dr. Kapoor’s financial condition with Class Counsel. Dr.
Kapoor’s counsel, as part of the Settlement, has affirmatively represented that he believes
that the consideration provided for in the Settlement is the maximum consideration that
Dr. Kapoor is able to pay. *See* Stipulation, ¶ 8.

1 To that end, the Settlement provides: (i) an initial payment of \$250,000;
2 (ii) monthly payments of \$25,000 over a period of ten months; (iii) a guaranteed payment
3 resulting from Dr. Kapoor's success (\$2,000,000) or failure (\$200,000) on the currently
4 pending appeal of his Criminal Conviction; and (iv) additional potential consideration of
5 up to \$7,500,000 in the event Dr. Kapoor succeeds in having his Criminal Obligation
6 reduced, eliminated, or paid by another party. Thus, accepting material proceeds now,
7 particularly with the potential for upside in the future, rather than pursuing a likely
8 judgment-proof defendant after trial, is in the best interests of the Class. *See Brandenburg*
9 *v. Cousin Vinny's Pizza, LLC*, 2019 WL 6310376, at *4 (S.D. Ohio Nov. 25, 2019)
10 ("When a case implicates a defendants' ability to pay a judgment greater than the
11 proposed settlement, the Court, like Class Counsel, must measure success in light of the
12 practical realities of a defendants' financial condition.").

13 In addition, this recovery, on its own and not factoring in the recoveries from
14 defendants Baker and Babich, also represents a meaningful portion of the Class's
15 estimated aggregate damages ranging from approximately \$34.7 million to
16 \$189.5 million. ¶ 12. More specifically, the recovery from Dr. Kapoor is between
17 approximately 0.37% and 2.02% of the Class's damages assuming only a \$700,000
18 payment is made, and between approximately 5.28% and 28.82% of the Class's damages
19 if the Class receives the maximum \$10,000,000 under the Settlement. *See generally*
20 *Mego*, 213 F.3d at 459 ("It is well-settled law that a cash settlement amounting to only a
21 fraction of the potential recovery does not per se render the settlement inadequate or
22 unfair."); *Schaffer v. Litton Loan Servicing, LP*, 2012 WL 10274679, at *11 (C.D. Cal.
23 Nov. 13, 2012) ("Estimates of what constitutes a fair settlement figure are tempered by
24 factors such as the risk of losing at trial, the expense of litigating the case, and the
25 expected delay in recovery (often measured in years).").¹²

26
27 ¹² *See also* Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class*
28 *Action Litigation: 2019 Full-Year Review*, NERA Economic Consulting, 20 (Feb. 12,
2020), https://www.nera.com/content/dam/nera/publications/2020/PUB_YEAR_END

1 It also bears noting the numerous interim successes achieved by Class Counsel
 2 throughout the course of this Action, which paved the way for the Settlement. As detailed
 3 in the Whitman Declaration, Class Counsel defeated in part defendants’ motion to dismiss
 4 the operative SAC, and obtained certification of the Class over defendants’ vigorous
 5 opposition (and defended that certification by fending off Dr. Kapoor’s Rule 23(f) petition
 6 to the Ninth Circuit). ¶¶ 24-29, 57-62. In addition, based on their fact and expert discovery
 7 efforts, Class Counsel was able to marshal a compelling evidentiary record at summary
 8 judgment, which provided the foundation for opposing (and defeating) defendants’
 9 comprehensive Rule 56 motion. ¶¶ 31-52, 69-74. Put simply, Class Counsel devoted an
 10 enormous amount of effort to prosecuting this case.

11 2. The Substantial Risks and Complexity of the Litigation Support 12 the Fee Request

13 Another factor that courts consider in determining an appropriate fee award is the
 14 risk of further litigation. *Vizcaino*, 290 F.3d at 1048; *Rentech*, 2019 WL 5173771, at *9
 15 (“The risk that further litigation might result in Plaintiffs not recovering at all, particularly
 16 in a case involving complicated legal issues, is a significant factor in the award of
 17 fees.”).¹³ Moreover, “securities actions are highly complex and . . . securities class
 18 litigation is notably difficult and notoriously uncertain.” *Hefler v. Wells Fargo & Co.*,
 19 2018 WL 6619983, at *13 (N.D. Cal. Dec. 18, 2018); *see also In re Portal Software, Inc.*
 20 *Sec. Litig.*, 2007 WL 4171201, at *3 (N.D. Cal. Nov. 26, 2007) (noting “significant risks”
 21 the PSLRA poses “to plaintiffs’ ability to survive . . . summary judgment and prevail[] at
 22 trial[.]”). For these reasons, in securities class actions, fee awards often exceed the Ninth’s
 23
 24

25 Trends 012 120 Final.pdf (finding between 2015 and 2018, the median ratio of
 26 settlements to investor losses increased from 1.6% in 2015 to 2.6% in 2018, and declined
 27 from 2.6% to 2.1% in 2019).

28 ¹³ In evaluating the reasonableness of a fee award, the Court should also consider all
 risks the litigation presented from the outset. *See Fischel v. Equitable Life Assurance
 Soc’y of the United States*, 307 F.3d 997, 1009 (9th Cir. 2002) (“there is no dispute that a
 court should consider risk at the ‘outset’ of litigation”).

1 Circuit’s 25% benchmark. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047
2 (N.D. Cal. 2008).

3 As further detailed in Class Representative’s accompanying submissions, there
4 were many challenges to succeeding in the Action that could have resulted in no recovery
5 from Dr. Kapoor. For example, Class Representative faced significant risks in proving
6 that the sole statement attributable to Dr. Kapoor in the Action was materially false or
7 misleading when made. In this regard, Dr. Kapoor would have argued, as he did at the
8 summary judgment stage, that the statement at issue was both forward looking (and thus
9 protected by the PSLRA’s “safe harbor” provision) and an inactionable statement of
10 opinion. ¶ 87. Class Representative also faced additional challenges in proving Dr.
11 Kapoor’s state of mind at the time he made the alleged misrepresentation given the lack
12 of a clear-cut financial motive to engage in the fraud (i.e., absence of Insys common stock
13 sales). ¶ 89. In addition, Class Representative faced risks to establishing loss causation
14 and proving that the Class suffered damages. ¶¶ 90-95. Ultimately, the parties’ arguments
15 on loss causation and damages would have hinged upon extensive expert testimony at
16 trial. As the Court is doubtless aware, one can never comfortably predict how a jury or
17 court will weigh the testimony of competing experts. *See In re Cendant Corp. Litig.*, 264
18 F.3d 201, 239 (3d Cir. 2001) (“establishing damages at trial would lead to a ‘battle of
19 experts’ . . . with no guarantee whom the jury would believe”); *see also Nguyen v. Radiant*
20 *Pharm. Corp.*, 2014 WL 1802293, at *2 (C.D. Cal. May 6, 2014) (approving requested
21 attorneys’ fees and noting particular challenges of proving and calculating damages).

22 Finally, in addition to the foregoing litigation risks, Insys’ June 2019 bankruptcy
23 filing altered the landscape of the litigation and compounded the substantial litigation
24 risks already present in the Action, which included eliminating the corporate defendant
25 as a source of any recovery for the Class.

26 **3. Skill Required and Quality of Work Support the Fee Request**

27 “The experience of counsel is also a factor in determining the appropriate fee
28 award.” *In re Heritage Bond Litig.*, 2005 WL 1594389, at *12 (C.D. Cal. June 10, 2005).

1 Indeed, “[t]he prosecution and management of a complex national class action requires
2 unique legal skills and abilities.” *OmniVision*, 559 F. Supp. 2d at 1047.

3 Class Counsel has extensive experience prosecuting securities class actions and
4 other complex litigation throughout the country.¹⁴ This experience and skill was critical
5 to prosecuting this Action for more than four years to a successful resolution with Dr.
6 Kapoor. Not only did Class Counsel successfully litigate the case through dispositive
7 motions—including defeating defendants’ Summary Judgment Motion in its entirety—
8 but it brought the case to the brink of trial, reaching a settlement with Dr. Kapoor just
9 days before the July 9, 2020 final pre-trial conference.

10 The quality of opposing counsel is also important to consider when evaluating the
11 quality of services rendered by Class Counsel. *See, e.g., Barbosa v. Cargill Meat Sols.*
12 *Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013). During the course of the Action, Dr. Kapoor
13 was represented by several prominent defense firms that spared no effort in vigorously
14 defending their client. ¶ 134. Notwithstanding this formidable opposition, Class
15 Counsel’s ability to present a strong case, and to demonstrate their willingness and ability
16 to prosecute the Action against Dr. Kapoor through trial and inevitable appeals, helped
17 secure the Settlement.

18 **4. The Contingent Nature of the Fee Supports the Fee Request**

19 Class Counsel undertook this Action on a contingent fee basis, assuming a
20 substantial risk that the Action would yield no recovery and leave counsel
21 uncompensated. The Ninth Circuit has confirmed that a determination of a fair and
22 reasonable fee must include consideration of the contingent nature of the fee.¹⁵ It is an
23 established practice in the private legal market to reward attorneys for taking on the
24 serious risk of non-payment by permitting a fee award that reflects a premium to normal

25 _____
26 ¹⁴ See Doc. 407-3, Ex. H for a copy of the firm résumé for Kessler Topaz. The
additional Plaintiffs’ Counsel law firms are also experienced in complex litigation. *See*
Exs. 4-C & 5-C to the Whitman Declaration.

27 ¹⁵ See *WPPSS*, 19 F.3d at 1299; *In re Dynamic Random Access Memory (DRAM)*
28 *Antitrust Litig.*, 2007 WL 2416513, at *1 (N.D. Cal. Aug. 16, 2007); *see also OmniVision*,
559 F. Supp. 2d at 1047.

1 hourly billing rates. *See In re Nuvelo, Inc. Sec. Litig.*, 2011 WL 2650592, at *2 (N.D. Cal.
2 July 6, 2011); *Destefano v. Zynga, Inc.*, 2016 WL 537946, at *18 (N.D. Cal. Feb. 11,
3 2016) (noting that “when counsel takes on a contingency fee case and the litigation is
4 protracted, the risk of non-payment after years of litigation justifies a significant fee
5 award”). That is not the case here, given that the requested fee represents a **significant**
6 **discount** to counsel’s lodestar. *See, e.g., In re Flag Telecom Holdings, Ltd. Sec. Litig.*,
7 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010).

8 Even with the most vigorous and competent of efforts, success in contingent-fee
9 litigation, such as this, is never assured.¹⁶ Thus, any fee award has always been at risk,
10 and completely contingent on the result achieved. Here, the risk of nonpayment was
11 heightened due to Insys’ bankruptcy filing during the course of the Action. As also
12 discussed above, there were substantial risks to proving Dr. Kapoor’s liability and the
13 Class’s damages. Unlike defense counsel—who typically receive payment on a timely
14 and regular basis throughout a case, whether they win or lose—Class Counsel carried the
15 significant risk of not only funding the expense of this Action, but also the risk that it
16 would receive no compensation whatsoever unless Class Representative prevailed at trial.

17 Class Counsel has received no compensation during the more than four years that
18 this Action has been pending. Through July 1, 2020, Plaintiffs’ Counsel have invested
19 over 22,306 hours for a total lodestar of \$11,539,774.75 (in addition to advancing over
20 \$1 million in costs to prosecute the case). *See* ¶¶ 115, 117. Additional work in connection
21 with the Kapoor Settlement and claims administration will still be required. *See Willix v.*
22 *Healthfirst, Inc.*, 2011 WL 754862, at *7 (E.D.N.Y. Feb. 18, 2011) (“The fact that Class
23 Counsel’s fee award will not only compensate them for time and effort already expended,

24
25 ¹⁶ There have been many hard-fought lawsuits where excellent professional efforts
26 produced no fee for counsel. *See, e.g., In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011
27 WL 1585605 (S.D. Fla. Apr. 25, 2011), *aff’d* on other grounds, 688 F.3d 713 (11th Cir.
28 2012) (granting defendants judgment as a matter of law following jury verdict in
plaintiff’s favor); *Robbins v. Koger Props. Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury
verdict of \$81 million for plaintiffs against accounting firm reversed on appeal); *Anixter*
v. Home-Stake Prod. Co., 77 F.3d 1215 (10th Cir. 1996) (overturning securities class
action jury verdict for plaintiffs’ in case filed in 1973 and tried in 1988).

1 but for time that they will be required to spend administering the settlement going forward
2 also supports their fee request.”). Accordingly, the contingent nature of the representation,
3 and the burden carried by Class Counsel, support the requested fee.

4 **5. Awards Made in Similar Cases Support the Fee Request**

5 Class Counsel’s fee request is within the range of what courts in this Circuit
6 commonly award in complex securities class actions. To avoid repetition, Class Counsel
7 refers the Court to Section II.A.1, *supra*, which explains that the 30% fee request is
8 consistent with percentage fees that have been awarded in securities class actions and
9 other complex litigation in this Circuit; and Section II.A.2, *supra*, which explains that the
10 30% fee request represents a negative multiplier on Plaintiffs’ Counsel’s lodestar, well
11 below the typical lodestar multiplier in cases of this nature.

12 **6. The Reaction of the Class to Date Supports the Fee Request**

13 The reaction of the Class to date also supports the requested fee. To date, more
14 than 29,900 Settlement Postcard Notices and 4,200 Settlement Notices have been mailed
15 to potential Class Members who received the Class Notice and/or notice of the Baker
16 Settlement, and any new potential Class Members identified by Nominees. *See*
17 Declaration of Eric Schachter on behalf of A.B. Data (attached as Ex. 2 to the Whitman
18 Decl.), ¶¶ 3-10. The Settlement Notice was posted on the Website,
19 www.InsysRXSecuritiesLitigation.com, and informs potential Class Members of Class
20 Counsel’s intent to apply to the Court for an award of attorneys’ fees in an amount not to
21 exceed 30% of the Settlement Fund, *inclusive* of unreimbursed litigation expenses
22 incurred by Plaintiffs’ Counsel in connection with the institution, prosecution, and
23 resolution of the claims against Defendant Kapoor which were not sought in connection
24 with the Baker Settlement. *See id.*, Exs. A & B ¶¶ 5, 61. The Settlement notices further
25 advise Class Members of their right to object to Class Counsel’s Fee Application. While
26 the deadline for filing any objections is not until September 24, 2020, to date, no
27 objections have been filed. ¶¶ 13, 107, 116. Should any objections be received, Class
28 Counsel will address them in its reply submissions on or before October 8, 2020.

1 **7. The Other Applicable Factors Considered by Courts in this**
2 **District Further Support the Requested Fee**

3 **a. The Undesirability of the Case**

4 Although Class Counsel did not consider this case to be “undesirable,” there were
5 substantial risks in financing and prosecuting the Action (*see* ¶¶ 63-64, 83-101), which
6 intensified after the corporate defendant filed for bankruptcy during the course of the
7 litigation. As a result, Class Counsel knew that it would have to spend substantial time
8 and money and face significant risks without any assurance of being compensated for its
9 efforts. *See, e.g., Billitteri v. Sec. Am., Inc.*, 2011 WL 3585983, at *8 (N.D. Tex. Aug. 4,
10 2011) (increase in fees warranted where a case “raised particularly difficult issues,”
11 including the risk of “no recovery whatsoever”); *Braud v. Transp. Serv. Co. of Ill.*, 2010
12 WL 3283398, at *13 (E.D. La. Aug. 17, 2010) (given the “risk of non-recovery” and the
13 burdens of “undertaking expensive litigation against . . . well-financed corporate
14 defendants on a contingent fee,” the Court found that “undesirability in this case warrants
15 an increase in the fee award”). This factor supports the requested fee.

16 **b. The Preclusion of Other Employment**

17 Plaintiffs’ Counsel dedicated substantial time and effort to the Action (collectively,
18 more than 22,306 hours) despite the very significant risks of no recovery and while
19 deferring any payment of their fees and expenses until a settlement was reached.
20 Accordingly, this factor also supports the requested fee.

21 **8. The Fee Application is Inclusive of the Kapoor Expenses**

22 As noted above, Class Counsel is not separately requesting reimbursement of
23 remaining unreimbursed litigation expenses in connection with the Kapoor Settlement.
24 Rather, any attorneys’ fees awarded pursuant to the Fee Application would first be applied
25 to cover: (i) litigation expenses incurred by Plaintiffs’ Counsel in the Action that were
26 documented, but not were not included in the application for litigation expenses made in
27 connection with the Baker Settlement; (ii) expenses incurred by Class Counsel from May
28 23, 2020, through July 1, 2020 that were likewise not requested in connection with the

1 Baker Settlement; and (iii) expenses incurred exclusively in connection with the
2 settlement negotiations and formal mediation with Dr. Kapoor (i.e., the Kapoor
3 Expenses). Collectively, the foregoing expenses were reasonably incurred in prosecuting
4 and resolving the Action against Dr. Kapoor, and are properly recovered by counsel. *See,*
5 *e.g., HCL Partners Ltd. P’ship v. Leap Wireless Int’l, Inc.*, 2010 WL 4156342, at *2 (S.D.
6 Cal. Oct. 15, 2010) (“Expenses are compensable in a common fund case where the
7 particular costs are of the type that would normally be charged to a fee paying client.”)
8 (*citing Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)).

9 The majority of the Kapoor Expenses (\$489,606.29) were previously documented
10 in connection with the Baker Settlement. *See* Docs. 407, ¶¶ 121-22; 407-3; 407-4. The
11 expenses incurred by Class Counsel since May 23, 2020 include: (i) \$36,779.86 for
12 document hosting/management; (ii) \$8,260.00 for experts; (iii) \$1,320.99 for on-line legal
13 and factual research; (iv) \$314.00 for service of process; (v) \$229.40 for reproduction
14 costs; and (vi) \$93.33 for overnight mail. ¶ 137. Class Counsel has also incurred
15 \$12,320.00 in mediation costs exclusively in connection with its settlement efforts with
16 Dr. Kapoor. *Id*; see also Whitman Lodestar Decl., ¶ 7. In total, Plaintiffs’ Counsel have
17 incurred a total of \$548,923.82 in litigation expenses through July 1, 2020 which have
18 not been sought for reimbursement in connection with the Baker Settlement.

19 III. CONCLUSION

20 For the reasons stated herein and in the Whitman Declaration, Class Counsel
21 respectfully requests the Court approve the Fee Application.

22 DATED: September 10, 2020 Respectfully submitted,

23 **KESSLER TOPAZ**
24 **MELTZER & CHECK, LLP**

25 s/ Johnston de F. Whitman, Jr.
26 Johnston de F. Whitman, Jr. (admitted *Pro Hac Vice*)
27 jwhitman@ktmc.com
28 Andrew L. Zivitz (admitted *Pro Hac Vice*)
azivitz@ktmc.com
Jonathan F. Neumann (admitted *Pro Hac Vice*)
jneumann@ktmc.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056

-and-

Jennifer L. Joost (admitted *Pro Hac Vice*)
jjoost@ktmc.com
One Sansome Street, Suite 1850
San Francisco, CA 94104
Telephone: (415) 400-3000
Facsimile: (415) 400-3001

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

**BONNETT, FAIRBOURN,
FRIEDMAN & BALINT, P.C.**

Francis J. Balint, Jr.
fbalint@bffb.com
Andrew S. Friedman
afriedman@bffb.com
2325 E. Camelback Road, Suite 300
Phoenix, AZ 85016
Telephone: (602) 274-1100
Facsimile: (602) 274-1199

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

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 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:

Don Bivens
dbivens@swlaw.com
Anthony T. King
aking@swlaw.com
SNELL & WILMER LLP
One Arizona Center
400 E. Van Buren
Phoenix, AZ 85004
Telephone: 602-382-6513
Facsimile: 602-382-6070

David B. Rosenbaum
drosenbaum@omlaw.com
OSBORN MALEDON PA
2929 N. Central Ave.,
21st Floor
Phoenix, AZ 85012
Telephone: 602-640-9000
Facsimile: 602-640-9050

George J. Coleman
gjc@slwplc.com
Michael K. Foy
mkf@slwplc.com
**SALMON, LEWIS &
WELDON, P.L.C.**
2850 E. Camelback Road,
Suite 200
Phoenix, AZ 85016
Telephone: 602-801-9060
Facsimile: 602-801-9070

William Klain
wklain@lang-klain.com
Zachary Rosenberg
zrosenberg@lang-klain.com
LANG & KLAIN, PC
6730 N. Scottsdale Road
Suite 101
Scottsdale, AZ 85253
Telephone: 480-534-4900
Facsimile: 480-970-5034

Bahram Seyedin-Noor
bahram@altolit.com
Bryan Ketroser
bryan@altolit.com
Jared Kopel
jared@altolit.com
Ian Browning
ian@altolit.com
ALTO LITIGATION
4 Embarcadero Center,
Suite 1400
San Francisco, CA 94111
Telephone: 415-779-2586
Facsimile: 866-654-7207

Brian T. Kelly
bkelly@nixonpeabody.com
Matthew L. McLaughlin
mmclaughlin@nixonpeabody.com
George J. Skelly
gskelly@nixonpeabody.com
NIXON PEABODY LLP
Exchange Place
53 State St.
Boston, MA 02109
Telephone: 617-345-1000
Facsimile: 617-345-1300

Russell Piccoli
rp@winazlaw.com
RUSSELL PICCOLI PLC
701 N. 44th St.
Phoenix, AZ 85008
Telephone: 480-429-3000
Facsimile: 480-429-3100

s/ Johnston de F. Whitman, Jr.