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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

**CLASS COUNSEL'S MOTION
FOR REIMBURSEMENT OF
LITIGATION EXPENSES IN
CONNECTION WITH THE
BABICH SETTLEMENT;
AND MEMORANDUM OF
POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

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1 Pursuant to Federal Rule of Civil Procedure (“Rule”) 23(h), Court-appointed Class
2 Counsel, Kessler Topaz Meltzer & Check, LLP (“Kessler Topaz” or “Class Counsel”)
3 hereby respectfully moves this Court for reimbursement from the Settlement Fund¹
4 created under the settlement with Defendant Michael L. Babich (“Settlement” or “Babich
5 Settlement”) of \$75,000.00 in Litigation Expenses, consisting of: (i) \$18,465.73 in
6 Litigation Expenses incurred from July 2, 2020 through July 21, 2020—the date Class
7 Representative filed his motion for preliminary approval of the Babich Settlement; and
8 (ii) \$56,534.27 of the \$548,923.87 in Litigation Expenses previously documented, but for
9 which reimbursement was not requested, in connection with the Baker and Kapoor
10 Settlements.

11 **I. PRELIMINARY STATEMENT**

12 After more than four years of hard-fought litigation, and while actively preparing
13 for trial, Class Counsel agreed to resolve the Action with Defendant Babich for \$250,000
14 in cash. As discussed in the accompanying submissions, the Babich Settlement—the third
15 and final settlement, which will resolve the Action in its entirety—is a favorable result
16 for the Class, particularly in light of the severe limitations Class Representative faced in
17 collecting any recovery from this defendant. ¶¶ 89-93. The Settlement also avoids the
18 risks, costs, and delay of taking the Action to trial. ¶¶ 97-102.

19 If approved, the Babich Settlement, together with the separate settlements reached
20 with defendant Darryl S. Baker and defendant John N. Kapoor, will provide a collective
21 Class recovery of at least \$2.95 million, with the potential to increase to as much as
22 \$12.25 million. This recovery represents a meaningful percentage of the Class’s
23

24 ¹ All capitalized terms not defined herein have the meanings ascribed to them in the
25 Stipulation and Agreement of Settlement Between Lead Plaintiff and Defendant Michael
26 L. Babich dated July 21, 2020 (Doc. 399-1) (“Stipulation”) or in the Declaration of
27 Johnston de F. Whitman, Jr. in Support of (I) Class Representative’s Motion for Final
28 Approval of Settlement with Defendant Michael L. Babich and Plan of Allocation; and
(II) Class Counsel’s Motion for Reimbursement of Litigation Expenses (“Whitman
Declaration”) filed herewith. Citations to “¶ _” herein refer to paragraphs in the Whitman
Declaration. Unless otherwise noted, all internal citations and quotations have been
omitted, and emphasis has been added.

1 estimated aggregate damages—ranging from approximately \$34.7 million to
2 approximately \$189.5 million based on Class Representative’s ability to establish
3 damages based on certain of the alleged Corrective Disclosures. ¶ 11. Notably, this result
4 was obtained despite Insys’ June 2019 bankruptcy filing, which eliminated Insys as a
5 potential source of recovery in the Action, and materially heightened the risk of obtaining
6 a recovery for the Class.

7 The Whitman Declaration sets forth Class Counsel’s litigation efforts in detail.
8 Class Counsel, among other efforts: (i) conducted a thorough investigation, resulting in
9 two detailed complaints (and two rounds of motion to dismiss briefing); (ii) pursued
10 multiple sources of discovery, including extensive document discovery that resulted in
11 receiving more than 14 million pages of documents that Class Counsel reviewed and
12 analyzed in connection with the Action; (iii) worked extensively with experts in the areas
13 of market efficiency, damages, loss causation, Insys’ revenue growth sources during the
14 relevant period, and Insys’ oncology marketing efforts; (iv) took or defended ten fact
15 witness depositions and six expert depositions; (v) engaged experienced bankruptcy
16 counsel to protect the Class’s interests in Insys’ bankruptcy proceedings; and
17 (vi) defeated defendants’ Summary Judgment Motion in its entirety. ¶¶ 17-73. At the time
18 of settlement, the Settling Parties were actively preparing for trial, and had already filed
19 their proposed Final Pretrial Order, their respective in limine motions (and oppositions
20 thereto), and other key pretrial disclosures. ¶¶ 74-76. In addition, on July 9, 2020, the
21 Settling Parties attended the Final Pretrial Conference (Doc. 390), at which the Court and
22 counsel for the Settling Parties discussed matters relating to the August 2020 trial,
23 including the Court’s determination of the Settling Parties’ in limine motions. ¶ 77. In the
24 midst of these trial preparations, Class Representative and Mr. Babich, with the assistance
25 of Michelle Yoshida of Phillips ADR, engaged in settlement discussions. ¶ 80.

26 Class Counsel assumed all of the risks of litigating the Action by taking this case
27 on a fully contingent basis, and devoted the substantial resources required to prosecute,
28

1 and ultimately resolve, the Action in the best interests of the Class. In total, Plaintiffs'
2 Counsel's attorneys and support staff collectively worked more than 22,306 hours on this
3 complex litigation—resulting in a lodestar of more than \$11.5 million as of July 1,
4 2020—and have advanced more than \$1.2 million dollars to fund the litigation, with no
5 guarantee of ever being paid. ¶ 116; *see also* Doc. 411, ¶¶ 117, 125, 136.

6 In an effort to preserve proceeds of the Babich Settlement for the Class, Class
7 Counsel is not seeking an award of attorneys' fees in connection with the Settlement.
8 Rather, Class Counsel is requesting reimbursement of Litigation Expenses in the amount
9 of \$75,000.00, consisting of: (i) \$18,465.73 in Litigation Expenses incurred from July 2,
10 2020 through July 21, 2020, and not previously sought for reimbursement from either the
11 Baker or Kapoor Settlements; and (ii) \$56,534.27 of the \$548,923.87 (or, 10.3%) in
12 Litigation Expenses previously documented, but for which reimbursement was not
13 requested, in connection with the Baker and Kapoor Settlements.² Class Counsel's
14 expense request is supported by the Court-appointed Class Representative, Clark Miller.³
15 The reaction of the Class to date also supports the expense request. ¶ 115.⁴

16 For the reasons discussed herein, Class Counsel respectfully submits that the
17 Litigation Expenses for which it seeks reimbursement were reasonable and necessary for
18
19

20 ² Plaintiffs' Counsel have incurred a total of \$1,202,389.60 in expenses from the
21 inception of the Action through July 21, 2020. The majority of these expenses (i.e.,
22 \$1,124,606.29) were first documented in connection with the Baker Settlement, *see* Docs.
23 407, ¶¶ 121-22; 407-3; 407-4, and \$59,317.58 of these expenses were first documented
24 in connection with the Kapoor Settlement, *see* Docs. 411, ¶ 137; 411-3. Of this
\$1,183,923.87 in previously documented Litigation Expenses, Class Counsel has
requested reimbursement of \$635,000 (Doc. 406 at 1), resulting in \$548,923.87 in
previously documented Litigation Expenses for which Class Counsel has not yet
requested reimbursement.

25 ³ *See* Declaration of Clark Miller in Support of (I) Class Representative's Motion
26 for Final of Approval of Settlement with Defendant Michael L. Babich and Plan of
Allocation; and (II) Class Counsel's Motion for Reimbursement of Litigation Expenses,
attached as Exhibit 1 to the Whitman Decl., ¶ 7.

27 ⁴ The deadline for objecting to Class Counsel's expense request is October 28, 2020.
28 Class Counsel will address any objection received in its reply to be filed on or before
November 11, 2020.

1 the successful prosecution of the Action. Accordingly, Class Counsel requests that its
2 Motion for Reimbursement of Litigation Expenses be granted.

3 **II. THE LITIGATION EXPENSES INCURRED ARE REASONABLE AND**
4 **WERE NECESSARY TO LITIGATE THE ACTION AND ACHIEVE THE**
5 **BABICH SETTLEMENT**

6 In connection with the Babich Settlement, Class Counsel is requesting
7 reimbursement from the Settlement Fund of \$75,000.00 in expenses incurred by Class
8 Counsel in connection with the Action. These expenses were reasonably incurred in
9 initiating, prosecuting, and resolving the Action, and are properly recovered by counsel.
10 *See, e.g., HCL Partners Ltd. P'ship v. Leap Wireless Int'l, Inc.*, 2010 WL 4156342, at *2
11 (S.D. Cal. Oct. 15, 2010) (“Expenses are compensable in a common fund case where the
12 particular costs are of the type that would normally be charged to a fee paying client.”)
13 (*citing Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)); *see also Destefano v. Zynga,*
14 *Inc.*, 2016 WL 537946, at *22 (N.D. Cal. Feb. 11, 2016) (“[C]ourts throughout the Ninth
15 Circuit regularly award litigation costs and expenses—including photocopying, printing,
16 postage, court costs, research on online databases, experts and consultants, and
17 reasonable travel expenses—in securities class actions, as attorneys routinely bill private
18 clients for such expenses in non-contingent litigation.”).

19 Class Counsel’s prior submissions addressed in detail the \$1,124,606.29 in
20 Litigation Expenses first documented in connection with the Baker Settlement, *see* Docs.
21 407, ¶¶ 121-22; 407-3; 407-4, as well as the \$59,317.58 in Litigation Expenses first
22 documented in connection with the Kapoor Settlement, *see* Docs. 411, ¶ 137; 411-3. As
23 noted above, Class Counsel’s present request for reimbursement of Litigation Expenses
24 includes a request for reimbursement of \$56,534.27 (or, 10.3%) of the \$548,923.87
25 previously documented Litigation Expenses for which Class Counsel has not yet
26 requested reimbursement. The additional \$18,465.73 in Litigation Expenses requested
27 from the Babich Settlement are expenses incurred from July 2, 2020 through July 21,
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2020, and are set forth by category below. *See also* ¶ 119; Ex. 3 to the Whitman Declaration.

CATEGORY	AMOUNT
Postage & Express Mail	\$134.26
On-Line Legal / Factual Research	\$1,197.30
Internal Reproduction Costs	\$287.50
Out of Town Travel (Transportation, Hotels & Meals)	\$1,523.04
Document Hosting / Management	\$12,174.45
Court Reporters, Transcripts & Deposition Services	\$703.05
Mediation	\$2,446.13
TOTAL EXPENSES:	\$18,465.73

The Postcard and long-form Settlement Notices informed recipients that Class Counsel would seek reimbursement of Litigation Expenses in an amount not to exceed \$75,000.00 from the Babich Settlement. To date, no objection to the expense request set forth in the notices has been received. ¶ 115. As such, Class Counsel's request for reimbursement of Class Counsel's Litigation Expenses in connection with the Babich Settlement should be approved.

III. CONCLUSION

For the reasons stated herein and in the Whitman Declaration, Class Counsel respectfully requests the Court approve Class Counsel's request for reimbursement of Litigation Expenses in the amount of \$75,000.00. A proposed Order is attached.⁵

DATED: October 14, 2020

Respectfully submitted,

**KESSLER TOPAZ
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⁵ Per the Court's instruction during the September 23, 2020 hearing in connection with the Baker Settlement, the attached proposed Order has been combined with the proposed fee and expense orders previously submitted in connection with the Baker and Kapoor Settlements.

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 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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