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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 MICHAEL L.
BABICH 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”).¹

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 Michael L. Babich (“Defendant Babich” or “Mr. Babich”).

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 Babich (also
14 referred to herein as the “Babich Settlement”). If approved, the Babich Settlement will
15 resolve all claims asserted in the Action against Defendant Babich² on behalf of the Court-
16 certified Class, which consists of all persons and entities who purchased or otherwise
17 acquired Insys Therapeutics, Inc. (“Insys” or the “Company”) common stock during the
18 period from March 3, 2015, through January 25, 2016, and were damaged thereby.³ The
19
20

21 ¹ 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 Michael L. Babich, dated July 21, 2020 (Doc. 399-1) (“Stipulation”).

24 ² This Settlement resolves claims against Defendant Babich only, and does not
25 resolve claims against defendant Darryl S. Baker (“Baker”) or defendant John N. Kapoor
26 (“Kapoor”). Separate settlements are pending before this Court with respect to Messrs.
27 Baker and Kapoor (referred to herein as the “Baker Settlement” and the “Kapoor
28 Settlement,” respectively). Docs. 341-1, 347, 371-1, 373.

³ 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.i.

1 Court preliminarily approved the Babich Settlement by Order dated July 31, 2020 (Doc.
2 402) (“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 Babich Settlement to eligible Class Members
5 (“Plan of Allocation” or “Plan”); and (ii) Class Counsel’s motion for reimbursement of
6 Litigation Expenses not previously sought for reimbursement in connection with the
7 Baker or Kapoor Settlements, including expenses incurred from July 2, 2020 through the
8 Settling Parties’ execution of the Stipulation on July 21, 2020 (“Expense Application”).

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

17 **I. INTRODUCTION**

18 6. Following more than four years of hard-fought litigation and while
19 finalizing preparations for an August 2020 trial, Class Representative and Class Counsel
20 successfully negotiated a resolution of the Action with Mr. Babich in exchange for
21 \$250,000 in cash to be paid from Mr. Babich’s personal resources (“Settlement
22 Amount”). Pursuant to the Stipulation and Preliminary Approval Order, the Settlement
23

24 ⁴ In addition to this Declaration, Class Representative and Class Counsel are
25 submitting: (i) Class Representative’s Motion for Final Approval of Settlement with
26 Defendant Michael L. Babich and Plan of Allocation; and Memorandum of Points and
27 Authorities in Support Thereof (“Settlement Memorandum”); and (ii) Class Counsel’s
28 Motion for Reimbursement of Litigation Expenses in Connection with the Babich
Settlement; and Memorandum of Points and Authorities in Support Thereof (“Expense
Memorandum”).

1 Amount was received on September 3, 2020, and is currently being held in the interest-
2 bearing Escrow Account.

3 7. In exchange for the Settlement Amount, the Settlement resolves all claims
4 asserted in the Action (and related claims) by Class Representative and the Class against
5 Defendant Babich and the other Settling Defendant's Releasees. If approved, the
6 Settlement with Defendant Babich, combined with the settlements reached in the Action
7 with defendants Baker and Kapoor, will provide the Class with a collective recovery of
8 at least \$2.95 million, with the potential to increase to as much as \$12.25 million, and will
9 resolve this Action in its entirety.

10 8. As detailed herein, the Settling Parties actively litigated the Action until
11 Class Representative requested preliminary approval of the Settlement on July 21, 2020.
12 At the time the Babich Settlement was reached, the Settling Parties were in the final stages
13 of preparing for a trial scheduled to begin on August 17, 2020, and the key pretrial steps,
14 including a proposed final pretrial order, in limine motions, and the Final Pretrial
15 Conference had already been addressed. In addition, prior to resolving the Action, Class
16 Counsel, under the supervision of Class Representative, had, among other things:
17 (i) conducted an extensive legal and factual investigation into the Class's claims;
18 (ii) drafted two detailed amended complaints, including the operative Second Amended
19 Complaint for Violation of the Federal Securities Laws (Doc. 77) ("Second Amended
20 Complaint" or "SAC"); (iii) opposed two rounds of motions to dismiss; (iv) participated
21 in hotly-contested fact and expert discovery, which included reviewing more than 14
22 million pages of documents, hundreds of written discovery requests and responses, and
23 taking or defending ten fact and six expert depositions; (v) briefed a motion to certify the
24 Class and opposed a petition for permission to appeal the Court's order certifying the
25 Class pursuant to Rule 23(f); (vi) engaged experienced bankruptcy counsel to protect the
26 Class's interests in Insys' bankruptcy proceedings; (vii) conducted an extensive Class-
27 notice program advising prospective Class Members of the Action's pendency and Class
28

1 Representative’s motion to voluntarily dismiss Insys from the Action with prejudice;
2 (viii) opposed defendants’ summary judgment motion; (ix) engaged in hard-fought,
3 arm’s-length settlement negotiations overseen by an experienced third party neutral
4 mediator; (x) participated in the Final Pretrial Conference on July 9, 2020; and
5 (xi) prepared extensively for trial. As a result of these efforts and others discussed herein,
6 Class Counsel, at the time of settlement, had a thorough understanding of the strengths
7 and weaknesses of the Class’s claims against Defendant Babich, his constrained assets
8 and existing financial obligations to federal and state regulators, including: (i) the more
9 than \$74 million in unsatisfied forfeiture and restitution obligations arising from Mr.
10 Babich’s guilty plea in *United States v. Babich, et al.*, No. 16-cr-10343-ADB (D. Mass.)
11 (“Criminal Action”); (ii) the roughly \$3 billion in exposure from other pending matters
12 (“Concurrent Litigation”); and (iii) the low probability of securing an amount greater than
13 the Settlement Amount from Defendant Babich following a trial judgment in Class
14 Representative’s favor.

15 9. For these reasons, in agreeing to the Settlement, Class Representative and
16 Class Counsel carefully considered Defendant Babich’s limited ability to pay all or a
17 portion of any trial judgment against him as well as the significant risks associated with
18 advancing the Class’s claims against Defendant Babich at trial. Had the Settlement not
19 been reached, Defendant Babich would have continued to vigorously contest Class
20 Representative’s claims against him.

21 10. At trial, Defendant Babich would have argued, as he did throughout the
22 course of the Action, that the alleged false or misleading statements that he made
23 (discussed more fully in Section V.A below) were both forward-looking (and thus
24 protected by the PSLRA’s “safe harbor” provision) and inactionable statements of
25 opinion. Defendant Babich was also prepared to offer evidence suggesting that he
26 believed the statements at issue were true when made. Defendant Babich contends that
27 such evidence shows that Insys engaged in substantial efforts during fiscal year 2014, as
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1 well as during the first quarter of 2015, to develop a comprehensive program to build
2 awareness among oncologists about the key features and benefits of Subsys, and that
3 those efforts were successful and did, in fact, result in “expanding the usage of Subsys”
4 in fiscal year 2014 and as of March 3, 2015. Further, Defendant Babich was prepared to
5 raise several defenses to loss causation and damages that, if accepted by a jury, could
6 materially decrease or eliminate the Class’s claim to damages.⁵ These litigation risks were
7 in addition to the severe limitations on Defendant Babich’s ability to pay a judgment, and
8 Class Representative faced the real risk that he would be unable to collect any payment
9 at all from Defendant Babich—even after obtaining a judgment against him at trial.⁶ Thus,
10 recovery from Defendant Babich was highly uncertain in this case, and could not have
11 been achieved without incurring substantial additional costs and considerable delay.

12 11. Class Counsel believes that the Settlement, particularly when viewed in the
13 context of the risks and uncertainties of continued litigation and trial against Defendant
14 Babich, is a favorable result for the Class. If approved, the Babich Settlement, along with
15 the Baker and Kapoor Settlements, will bring this Action to a conclusion. The collective
16 recovery obtained for the Class—a minimum of \$2.95 million with the potential to
17 increase to \$12.25 million—represents between approximately 1.6% and 8.5% of the
18 Class’s aggregate damages (when assessed as a \$2.95 million recovery) and between
19 approximately 6.5% and 35.3% of the Class’s aggregate damages (when assessed as a
20 \$12.25 million recovery). At the low end, this recovery range is directly in line with the
21 median ratio of securities class action settlements to investor losses in recent years as
22

23 _____
24 ⁵ If all of these arguments were accepted, overall estimated aggregate damages
would drop from \$189.5 million to \$34.7 million. *See Baker Settlement* (Doc. 346 at 2).

25 ⁶ In connection with the Settling Parties’ settlement discussions, Defendant
26 Babich’s Counsel shared details of Mr. Babich’s financial condition with Class Counsel.
Pursuant to the Court’s July 24, 2020 Order (Doc. 400), the Settling Parties supplemented
27 their July 21, 2020 preliminary approval submissions with information regarding Mr.
Babich’s assets and the various constraints on his ability to pay more in settlement. Doc.
28 401.

1 reported by NERA Economic Consulting. On the high end, the recovery range exceeds
2 the median ratio by many multiples.⁷

3 12. Class Counsel has worked with the Court-authorized Claims Administrator,
4 A.B. Data, Ltd. (“A.B. Data”), to disseminate notice of the Babich Settlement to Class
5 Members as directed in the Preliminary Approval Order. In this regard, A.B. Data has
6 mailed over 31,300 Postcard Settlement Notices and 4,200 Settlement Notices to
7 prospective Class Members and nominees.⁸ Additionally, the Summary Settlement
8 Notice was published in *Investor’s Business Daily* and transmitted over *PR Newswire* on
9 August 17, 2020. *Id.* ¶ 12. Finally, the long-form Settlement Notice, Claim Form,
10 Stipulation, and Preliminary Approval Order were posted to the Website for the Action,
11 www.InsysRXSecuritiesLitigation.com. *Id.* ¶ 14. As ordered by the Court and stated in
12 the Settlement notices, objections are due to be received no later than October 28, 2020.
13 To date, no objections have been filed with respect to any aspect of the Babich Settlement,
14 the Plan of Allocation, or Class Counsel’s request for reimbursement of Litigation
15 Expenses. In accordance with the Preliminary Approval Order, Class Counsel will
16 provide the Court with further information on the Class’s response to the Babich
17 Settlement at least one week prior to the Settlement Fairness Hearing, scheduled for
18 November 18, 2020.⁹

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22 ⁷ See Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action*
23 *Litigation: 2019 Full-Year Review*, NERA Economic Consulting, 20 (Feb. 12, 2020),
24 [https://www.nera.com/content/dam/nera/publications/2020/PUB_Year_End_Trends_01](https://www.nera.com/content/dam/nera/publications/2020/PUB_Year_End_Trends_012120_Final.pdf)
25 [2120_Final.pdf](https://www.nera.com/content/dam/nera/publications/2020/PUB_Year_End_Trends_012120_Final.pdf) (between 2015 and 2018, the median ratio of settlements to investor
26 losses increased from 1.6% in 2015 to 2.6% in 2018, and declined to 2.1% in 2019).

25 ⁸ See Declaration of Eric Schachter Regarding: (A) Mailing of Settlement Notices
26 for Babich 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.

⁹ Should any objections be received, Class Counsel will address them in reply
submissions to be filed no later than November 11, 2020.

1 **II. SUMMARY OF CLASS REPRESENTATIVE’S CLAIMS**

2 13. During the Class Period, Insys represented itself as a commercial-stage
3 specialty pharmaceutical company that developed and commercialized supportive care
4 products primarily designed to assist patients with pain management attributable to their
5 disease, treatments, or therapies. Insys’ principal product and virtually exclusive source
6 of revenue during this time was the prescription medication Subsys, a sublingual fentanyl
7 spray designed to treat breakthrough cancer pain in opioid tolerant patients.¹⁰

8 14. This Action was brought by Insys investors against Insys and certain of the
9 Company’s executive officers, including Mr. Babich—Insys’ President and Chief
10 Executive Officer (“CEO”) throughout much of the Class Period¹¹—for alleged violations
11 of the federal securities laws. Class Representative alleged that defendants made
12 materially false or misleading statements during the relevant time period regarding the
13 marketing and sale of Subsys, including the source of Subsys sales growth. Class
14 Representative further alleged that when the relevant truth was revealed, the price of Insys
15 common stock declined, causing damages to Insys shareholders.

16 15. More specifically, after the Court’s August 1, 2017 ruling on defendants’
17 motion to dismiss the SAC (discussed in detail below in Section III.C), the Action alleged
18 securities fraud claims against Defendant Babich based upon: (i) a statement made during
19 a conference call with securities analysts on March 3, 2015 attributing Subsys’ sales
20 growth to the Company’s work with oncologists, including through purportedly “very
21 unique” programs within the oncology setting (“Conference Call Statement”); and (ii) a
22 statement made in Insys’ 2014 Form 10-K, issued on March 3, 2015, and signed by Mr.
23 Babich (“Form 10-K Statement”). *See* SAC, ¶¶ 268, 272. More specifically, Class
24

25 ¹⁰ *See* SAC, ¶¶ 1, 2.

26 ¹¹ *See* SAC, ¶ 30. Between March 2007 and March 2011, Mr. Babich also served as
27 Insys’ Chief Operating Officer and as a director of Insys’ wholly-owned subsidiary, Insys
28 Pharma, Inc. *Id.* Mr. Babich resigned from his role as CEO of Insys on November 5, 2015.
Id.

1 Representative alleged that in the Form 10-K Statement, Defendant Babich and others
2 represented that Insys’ efforts to educate oncologists on the attributes of Subsys were a
3 “key factor[.]” in generating 2014 Subsys sales growth. Class Representative further
4 alleged that defendants’ efforts to educate oncologists concerning Subsys were *not* a key
5 factor in 2014 sales growth. Rather, Class Representative alleged that the Form 10-K
6 Statement was: (i) misleading, because defendants failed to disclose that the
7 overwhelming majority of Insys’ 2014 revenues, and, therefore, sales growth, arose from
8 off-label Subsys prescriptions, including those generated by bribes and insurance fraud
9 (“Criminal Enterprise”); and (ii) false, because Subsys prescriptions that oncologists
10 wrote generated only negligible revenues for Insys in 2014, including during the fourth
11 quarter of 2014. Class Representative alleged that the Conference Call Statement was
12 materially false or misleading for the same reasons, and further alleged that Defendant
13 Babich made these statements knowingly or recklessly disregarding that they were
14 materially false or misleading.

15 16. Class Representative also alleged that information correcting the
16 misstatements—i.e., that oncologist prescriptions were not a key factor in generating
17 fourth quarter and full year 2014 Subsys revenues and/or revenue growth, and that such
18 revenues and growth instead resulted from the Criminal Enterprise—entered the market
19 through alleged disclosures made on November 4, 2015, December 3, 2015, and January
20 25, 2016 (“Corrective Disclosures”). Class Representative alleged that each Corrective
21 Disclosure revealed previously concealed and/or misrepresented material information,
22 causing the Class to suffer damages.

23 **III. THE LITIGATION EFFORTS OF CLASS REPRESENTATIVE AND** 24 **PLAINTIFFS’ COUNSEL**

25 **A. Commencement of the Action and Appointment of Lead Plaintiff and** 26 **Lead Counsel**

27 17. On February 2, 2016, this securities class action was commenced in this
28 Court with Richard DiDonato’s filing of the initial complaint against Insys and individual

1 defendants Babich, Baker, and Kapoor, asserting violations of Sections 10(b) and 20(a)
2 of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. §§ 78j(b) and 78t(a),
3 and Rule 10b-5, promulgated thereunder by the U.S. Securities and Exchange
4 Commission (“SEC”), 17 C.F.R. § 240.10b-5. Doc. 1.

5 18. On April 4, 2016, Clark Miller (as well as others) moved to be appointed as
6 lead plaintiff. Docs. 27-34. On June 3, 2016, the Court appointed Clark Miller as Lead
7 Plaintiff pursuant to the PSLRA, and approved Lead Plaintiff’s selection of Kessler Topaz
8 as Lead Counsel for the proposed class and Bonnett, Fairbourn, Friedman & Balint, P.C.
9 (“Bonnett Fairbourn”) as Liaison Counsel for the proposed class. Doc. 40.¹²

10 19. The Court set a deadline of June 24, 2016 for filing an amended complaint
11 in the Action. Doc. 41.

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

14 20. Prior to filing the Amended Complaint for Violation of the Federal
15 Securities Laws (“Amended Complaint”), Class Counsel conducted an exhaustive
16 investigation into the facts underlying this Action. As part of its investigation, Class
17 Counsel reviewed voluminous publicly available information regarding the defendants,
18 including: (i) Insys’ public filings with the SEC; (ii) securities analysts’ reports about
19 Insys; (iii) transcripts of Insys’ conference calls with securities analysts and investors;
20 (iv) Insys’ press releases and other public statements; (v) media reports concerning Insys;
21 (vi) court documents filed in several matters, including *United States v. Alfonso*, No. 3:15-
22 cr-00111-MPS (D. Conn.), *United States v. Perhacs*, No. 1:16-cr-00024-CG (S.D. Ala.),
23 *United States v. Roper*, No. 1:16-mj-03628 (S.D.N.Y.), *United States v. Serrano*, No.
24 1:16-mj-03629 (S.D.N.Y.), *United States v. Couch*, No. 1:15-cr-00088 (S.D. Ala.), and

25 ¹² Lead Plaintiff and Lead Counsel were subsequently appointed Class
26 Representative and Class Counsel, respectively, pursuant to the Court’s September 20,
27 2019 Order (Doc. 271) (*see* ¶ 60 below). For consistency and to avoid confusion, Lead
28 Plaintiff and Lead Counsel will be referred to as Class Representative and Class Counsel,
respectively, throughout the remainder of this Declaration.

1 *Insys Therapeutics, Inc. v. Ferraro*, No. 7:15-cv-03613 (S.D.N.Y.); and (vii) the Notice
2 of Unlawful Trade Practices and Proposed Resolution issued to Insys on July 10, 2015 by
3 the Oregon Department of Justice in the matter captioned *In re Insys Therapeutics, Inc.*

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

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

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

13 23. Prior to a ruling on defendants’ motion to dismiss the Amended Complaint,
14 and based on information that became available after its filing—most notably, the
15 indictments of Defendant Babich and Alec Burlakoff¹³ in the action *United States v.*
16 *Babich, et al.*, No. 16-cr-10343-ADB (D. Mass.)—Class Representative, with the consent
17 of all defendants, filed the operative complaint in the Action, the Second Amended
18 Complaint (or, SAC), on December 22, 2016. Doc. 77. The SAC asserts claims under
19 Sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule
20 10b-5 promulgated thereunder by the SEC, 17 C.F.R. § 240.10b-5. *See generally* SAC.

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

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26
27 ¹³ Alec Burlakoff was named as a defendant in the SAC. The Court dismissed Class
28 Representative’s claims against Alec Burlakoff in its August 1, 2017 Order. Doc. 107.

- 1 • the SAC did not sufficiently plead actionable misstatements because Insys
2 disclosed to investors: (i) the risk that the alleged misconduct at issue could
3 occur, including, specifically, the risks associated with employee
4 misconduct in marketing and sales practices; (ii) that Insys was under
5 investigation by certain government agencies, including the U.S.
6 Attorney’s Office for the District of Massachusetts and the U.S. Department
7 of Health and Human Services; and (iii) that Insys had been sued in civil
8 litigation for substantially similar misconduct at issue in this case;
- 9 • certain of the challenged misstatements were neither false nor misleading,
10 as Insys had purported programs in place to market and sell Subsys to
11 oncologists during fiscal year 2014;
- 12 • many of the statements challenged by Class Representative were “forward-
13 looking statements,” protected by the PSLRA’s statutory “safe harbor”;
- 14 • the SAC failed to plead loss causation because the information conveyed in
15 the alleged Corrective Disclosures was already known to the market (i.e.,
16 not “new”) and not corrective of defendants’ prior alleged misstatements;
17 and
- 18 • the SAC’s Section 20(a) claims for “control person liability” were
19 unsustainable because the SAC failed to plead a primary violation of
20 Section 10(b).

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

- 26 • the SAC pleaded actionable misstatements because defendants: (i) failed to
27 disclose the true source of Subsys sales, which was derived primarily from
28

1 the Criminal Enterprise; (ii) defendants’ statements were not protected by
2 the PSLRA “safe harbor” or “bespeaks caution” doctrine because, *inter*
3 *alia*, they were not accompanied by adequate cautionary language and
4 were made with actual knowledge of their falsity; and (iii) defendants’
5 factually intensive truth-on-the-market argument could not be resolved at
6 the pleading stage; and

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

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

13 27. Following full briefing on the motion and oral argument, the Court, on
14 August 1, 2017, granted in part and denied in part defendants’ motion to dismiss the SAC.
15 Doc. 107. Specifically, the Court sustained the SAC’s allegations as to Defendant Babich
16 with respect to two statements made during the Class Period. The Court sustained Class
17 Representative’s claims based upon the representation in the Form 10-K Statement that
18 “expanding the usage of Subsys for BTCP by building awareness among oncologists”
19 was one of the “key factors in generating continued growth in Subsys usage.” SAC,
20 ¶ 272. As the Court observed in sustaining Class Representative’s claims based upon the
21 Form 10-K Statement: “Subsys’s growth had little—if anything—to do with
22 breakthrough cancer pain and instead depended chiefly on doctors prescribing it off-label
23” Doc. 107 at 21. The Court also sustained Class Representative’s claims based upon
24 the Conference Call Statement, which alleged that Babich represented that Insys had
25 “very unique programs within the oncology setting that we continue to execute on,” which
26 generated Subsys sales growth in the fourth quarter of 2014. Doc. 107 at 21-22; SAC,
27 ¶ 268.

1 28. The Court further concluded that loss causation had been adequately
2 alleged with respect to three corrective disclosures: (i) on November 4, 2015, in a CNBC
3 article; (ii) on December 3, 2015, in a Southern Investigative Reporting Foundation
4 (“SIRF”) article; and (iii) on January 25, 2016, also in a SIRF article. *Id.* at 33, 35, 39.
5 Finally, the Court held that the SAC adequately alleged control person claims as to
6 Defendant Babich under Section 20(a). *Id.* at 39.

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

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

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

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

22 31. On May 9, 2018 the parties exchanged comprehensive initial disclosures
23 pursuant to Federal Rule 26(a)(1).

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

3 33. Notably, the parties were able to reach agreement on all key elements of the
4 Joint Discovery Plan, including discovery limitations and the schedule to govern the case.
5 With respect to the comprehensive case schedule in particular, the parties agreed to
6 specific dates for, *inter alia*: (i) substantial completion of document discovery; (ii) class
7 certification briefing; (iii) the close of fact discovery; (iv) expert disclosures; and
8 (v) dispositive motions.

9 34. On May 30, 2018, the parties participated in an in-person Rule 16
10 conference with the Court. Doc. 145. Following the conference, the Court issued an Order
11 approving the parties' Joint Discovery Plan and endorsing the parties' proposed schedule.
12 Doc. 147.

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

17 2. Class Representative's Discovery Propounded on Defendants

18 a. Document Discovery

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

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

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

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

14 40. On March 21, 2019, Class Representative served his Second Set of
15 Requests for Production of Documents ("Second Requests"). In response to Class
16 Representative's Second Requests, counsel for Insys produced more than 200,000
17 additional documents.

18 41. Class Counsel's document review, which proceeded according to the
19 protocols discussed below, began shortly after receiving the first installment of the
20 Regulatory Production in November 2018.

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

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

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

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

20 46. Finally, Class Counsel understood that defendants’ documents would very
21 likely form the basis for Class Representative’s liability proof at summary judgment and
22 trial. Therefore, simultaneously with the linear review of the production for important
23 documents, Class Counsel engaged in a number of additional discovery projects that
24 involved a more targeted review and synthesis of the production. These projects included,
25 for example: (i) a “key players” list, which identified the job title and description for
26 certain high interest individuals and potential deposition targets; (ii) a timeline, which
27 included key dates and a description of important events; and (iii) many topic-specific
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1 memos, analyzing topics including defendants’ programs with respect to oncologists, the
 2 revenue generated from certain “whales” (i.e., high prescribing doctors), defendants’ use
 3 of the so-called “Factor,” and market and internal reaction to the Corrective Disclosures.

4 **b. Written Discovery**

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

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

17 **c. Deposition Discovery**

18 49. As summarized below, Class Counsel also took or defended sixteen
 19 depositions during the course of the Action. Many of these depositions required Class
 20 Counsel to travel to locations such as Arizona, Florida, California, and New York.

21 Deponent	Role	Date	Location
22 Miller, Clark	Class Representative	9/28/2018	Larkspur, CA
23 Coffman, CFA, Chad	Expert (Class Representative)	10/4/2018	New York, NY
24 Smith, Ph.D., David C.	Expert (defendants)	11/15/2018	New York, NY
25 Brumm, Adam	Rule 30(b)(6) (Insys)	6/6/2019	Phoenix, AZ

Deponent	Role	Date	Location
Kizior, Eric	Rule 30(b)(6) (Insys)	6/7/2019	Phoenix, AZ
Sharpsten, Kevin	Nonparty	6/12/2019	Los Angeles, CA
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
Russell, John	Expert (Class Representative)	6/30/2020	Telephonic

3. Discovery of Class Representative

50. 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.

51. 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.

1 **E. Class Counsel’s Work with Experts**

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

12 53. Coffman issued reports on August 31, 2018 (Expert Report on the issue of
13 market efficiency), November 30, 2018 (Expert Rebuttal Report on the issue of market
14 efficiency), July 26, 2019 (Expert Report on loss causation and damages), and November
15 1, 2019 (Expert Rebuttal Report on loss causation and damages). Devor issued reports on
16 July 26, 2019 (Statement) and November 1, 2019 (Supplemental Statement). Russell
17 likewise issued reports on July 26, 2019 (Expert Report) and November 1, 2019
18 (Supplemental Expert Report).

19 54. In addition to serving Class Representative’s experts’ opening,
20 supplemental, and rebuttal reports, Class Counsel defended depositions of Class
21 Representative’s experts, including the deposition of Coffman on October 4, 2018,
22 depositions of Russell on September 17, 2019 and June 30, 2020, and the deposition of
23 Devor on September 18, 2019. Prior to each of the foregoing depositions, Class Counsel
24 engaged in thorough preparation with each expert. Class Counsel also successfully
25 defended against motions to strike the supplemental reports of Messrs. Devor and Russell
26 (*see* Docs. 276-88, 293-94, and 340).

1 55. In response to Class Representative’s experts, Insys and, subsequently,
2 defendant Kapoor retained David C. Smith, Ph.D. (“Dr. Smith”) to respond to Coffman’s
3 opinions on the issues of market efficiency, loss causation, and damages. Dr. Smith issued
4 reports on October 26, 2018 and September 20, 2019. Each of these reports required Class
5 Counsel to confer extensively with Coffman in order to formulate an appropriate
6 response. Class Counsel deposed Dr. Smith on November 15, 2018 in connection with
7 class certification, and on October 22, 2019 in connection with loss causation and
8 damages.

9 **F. Class Representative’s Motion to Certify the Class**

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

21 57. Defendants opposed Class Representative’s Class Certification Motion on
22 October 26, 2018 (Doc. 165), supported by the Expert Rebuttal Report of Dr. Smith (Doc.
23 165-2). Defendants did not challenge Class Representative’s arguments that he would be
24 an adequate class representative or that his claims were typical of the claims of other
25 Class Members. Rather, in their opposition submission, defendants argued, among other
26 things, that:

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

17 58. On November 30, 2018, Class Representative filed his reply submission in
18 further support of the Class Certification Motion (Doc. 168), which included the Expert
19 Rebuttal Report of Chad Coffman, CFA (Doc. 169-2). These submissions contended,
20 among other things, that: (i) all of the factors that courts apply to determine whether a
21 security trades in an efficient market supported finding that the market for Insys common
22 stock was efficient during the Class Period; (ii) Dr. Smith was not offering an opinion
23 that the alleged misstatements did not impact the price of Insys common stock during the
24 Class Period, such that defendants lacked any evidence to try to rebut the fraud-on-the-
25 market presumption of reliance; and (iii) the out-of-pocket damages methodology that
26 Class Representative proposed could measure damages on a Class-wide basis.

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

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

12 61. Thereafter, on October 4, 2019, defendant Kapoor filed with the United
13 States Court of Appeals for the Ninth Circuit a petition for permission to appeal the
14 Court’s Class Certification Order pursuant to Federal Rule 23(f) (“Petition”). Doc. 273.
15 Class Representative opposed defendant Kapoor’s Petition on October 15, 2019. On
16 December 18, 2019, the Ninth Circuit denied the Petition.

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

18 62. While discovery efforts were ongoing and the Class Certification Motion
19 was pending, Insys, on June 10, 2019, notified the Court and the parties to the Action that
20 it had filed for bankruptcy protection under Chapter 11 of Title 11 of the United States
21 Code in the United States Bankruptcy Court for the District of Delaware. Doc. 230.
22 Accordingly, pursuant to 11 U.S.C. § 362(a) of the United States Code (“Automatic
23 Stay”), the Action was automatically stayed as to Insys.

24 63. During a status conference conducted with the Court on August 9, 2019,
25 the parties discussed, among other things, the impact of Insys’ bankruptcy on the
26 continuation of the Action. Docs. 257-58. Among other things, Class Counsel discussed
27 with the Court dismissing Insys from the Action, in part, to enable the Action to proceed
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1 without any concern or encumbrance related to the Automatic Stay. While efforts to have
2 the parties stipulate to such a dismissal had not gained traction at that point, Class Counsel
3 indicated that it would be prepared to file a motion to voluntarily dismiss Insys from the
4 Action to accomplish the same objective.

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

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

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

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

9 67. Also, on May 14, 2020, Class Counsel reported to the Court that there were
10 no objections to the Insys Dismissal Motion. Doc. 337. On May 14, 2020, the Court
11 granted the Insys Dismissal Motion. Doc. 338.

12 **I. Defendants’ Motion for Summary Judgment**

13 68. In accordance with the deadlines set in the CMO, in November 2019, the
14 parties exchanged pre-motion letters describing their contemplated motions for summary
15 judgment. At that time, defendants expressed an intent to move for summary judgment
16 on all elements of Class Representative’s Section 10(b) claims.

17 69. On December 4, 2019, the Court held an in-person conference to discuss
18 the contemplated motions for summary judgment. At that hearing, the Court set a briefing
19 schedule for defendants’ motion for summary judgment.

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

- 25 • the alleged misstatements were neither false nor misleading, but rather
26 literally true, because defendants had various programs in place designed
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- 1 to expand sales of Subsys to cancer patients, including through marketing
2 Subsys to oncologists and oncology nurse practitioners;
- 3 • the alleged misstatements were forward-looking statements of opinion
4 and/or puffery that were not actionable under Section 10(b);
 - 5 • defendants were not obligated to disclose the allegedly omitted information
6 (i.e., the existence of the Criminal Enterprise); and
 - 7 • none of the alleged Corrective Disclosures revealed new information to the
8 market regarding information that was related to defendants' statements
9 regarding oncologists.

10 71. Class Representative opposed the Summary Judgment Motion on February
11 3, 2020. Docs. 324-27. In opposing the Summary Judgment Motion, Class Representative
12 argued, among other things, that:

- 13 • the alleged misstatements were materially misleading because they omitted
14 information regarding the “key factors” in Insys’ revenues (i.e., the
15 Criminal Enterprise);
- 16 • the alleged misstatements were false because no more than 6% of Insys’
17 revenues was generated by oncologists;
- 18 • the alleged misstatements were objectively verifiable, and thus not forward-
19 looking, puffery, or statements of opinion; and
- 20 • each of the alleged corrective disclosures revealed new information to the
21 market that partially corrected defendants’ prior misstatements.

22 72. Defendants filed a reply in support of their Summary Judgment Motion on
23 February 18, 2020. Doc. 328.

24 73. On May 8, 2020, the Court denied the Summary Judgment Motion in its
25 entirety, finding, among other things, that: (i) the “representations materially omit the
26 bribery and non-oncology explanations for the recent and expected future growth”;
27 (ii) the “representations are not ‘puffery’”; (iii) the “representations are not just or only
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1 forward-looking[] [o]ne speaks of ‘continued’ growth, which is literally past as well as
2 future growth”; and (iv) “[l]oss causation is sufficiently presented and is a jury question.”
3 Doc. 333.

4 **J. Preparations for Trial**

5 74. On May 8, 2020, the Court issued its Order Setting Final Pretrial
6 Conference, which required the parties to the Action to submit their Proposed Final
7 Pretrial Order (“PTO”) by June 18, 2020. Doc. 334.

8 75. On May 22, 2020, the Court issued an order setting a jury trial of Class
9 Representative’s Claims against Defendant Babich and the other defendants to commence
10 on August 17, 2020 and to continue through, at least August 28, 2020. Doc. 339.

11 76. Prior to the Court’s July 31, 2020 order preliminarily approving the
12 Settlement with Defendant Babich (Doc. 402), the Settling Parties actively prepared for
13 trial, including completing all of the work required to file the proposed final pretrial order
14 on June 18, 2020 (Doc. 355), as well as the accompanying proposed: statements of the
15 case (Doc. 350); voir dire (Doc. 351); forms of verdict (Doc. 352); and jury instructions
16 (Doc. 356). Also on June 18, 2020, the Settling Parties filed their respective motions in
17 limine (Docs. 354 & 362) and trial briefs (Docs. 357 & 358). The Settling Parties filed
18 their respective oppositions to the motions in limine on July 2, 2020. Docs. 375 & 376.

19 77. Thereafter, the Settling Parties prepared extensively for the Final Pretrial
20 Conference held on July 9, 2020 (Doc. 390), at which the Court and counsel for the
21 Settling Parties discussed extensively matters relating to the trial set to commence on
22 August 17, 2020.

23 78. From the date of the July 9, 2020 Final Pretrial Conference through the
24 Court’s July 31, 2020 Order preliminarily approving the Babich Settlement, counsel for
25 the Settling Parties continued to prepare for trial, which included making further
26 submissions to the Court. Docs. 392-94, 396-98.

1 **IV. THE BABICH SETTLEMENT**

2 **A. The Settlement Negotiations**

3 79. On August 10, 2018, shortly after discovery commenced in the Action,
4 Class Representative and certain defendants, including Defendant Babich, participated in
5 a full-day mediation in New York, New York before retired federal Judge Layn R.
6 Phillips of Phillips ADR. This mediation did not result in a resolution of the Action.

7 80. After nearly two years of additional litigation, including substantial
8 discovery and motion practice, and while the Settling Parties' trial preparations were
9 ongoing, Class Representative and Defendant Babich restarted their earlier discussions
10 concerning the possibility of resolving the Action. Following hard-fought, arm's-length
11 negotiations with the assistance of Michelle Yoshida of Phillips ADR, and Class
12 Counsel's due diligence into Defendant Babich's financial condition and ability to pay,
13 the Settling Parties agreed to resolve the Action against Defendant Babich for \$250,000
14 in cash. On July 14, 2020, the Settling Parties filed a Notice of Settlement informing the
15 Court that they had reached an agreement in principle to resolve the Action as to
16 Defendant Babich. Doc. 391.

17 **B. Preparation of Settlement Documentation**

18 81. Thereafter, Class Counsel began working on various documents in
19 connection with the Settling Parties' agreement in principle to settle the Action as well as
20 Class Representative's anticipated motion for preliminary approval of the Babich
21 Settlement.

22 82. Counsel for the Settling Parties negotiated the specific terms of the
23 Stipulation and exchanged drafts of the Stipulation (as well as the exhibits thereto).
24 Thereafter, the Settling Parties executed the Stipulation on July 21, 2020 setting forth
25 their final and binding agreement to settle the Action.
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1 **C. Class Counsel Seeks Preliminary Approval of the Babich Settlement**

2 83. On July 21, 2020, Class Representative filed the Stipulation (and related
3 exhibits) along with his motion for an order preliminarily approving settlement with
4 Defendant Babich and providing for notice and supporting memorandum (“Preliminary
5 Approval Motion”). Doc. 399. On July 24, 2020, the Court issued an Order requesting a
6 supplemental submission disclosing and explaining: (i) Defendant Babich’s assets;
7 (ii) “how and from what sources Defendant Babich can supply \$250,000.00 in settlement
8 in light of his negative net worth of \$49 million”; and (3) why Defendant Babich cannot
9 pay more, “bearing in mind that settlements must always leave defendants better off than
10 a total liquidation of assets.” Doc. 400. In response to the July 24, 2020 Order, Class
11 Counsel, on July 29, 2020, filed a supplemental submission providing the information
12 that the Court requested. Doc. 401.

13 84. On July 31, 2020, the Court entered the Preliminary Approval Order,
14 scheduling the final hearing on the Babich Settlement and related matters for November
15 18, 2020 at 1:30 p.m. Doc. 402. On the same day, the Court entered an Order vacating
16 the August 17, 2020 jury trial and all other deadlines and hearings leading up to it. Doc.
17 403.

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

19 85. As set forth in this Section and in the accompanying Settlement
20 Memorandum, the Babich Settlement is a favorable result for the Class when evaluated
21 in light of the risks, costs, and delays of continued litigation. The Settlement results from
22 a realistic assessment by both sides of the strengths and weaknesses of their respective
23 claims and defenses, as well as the risks of proceeding to trial (and on the likely appeals
24 that would follow), and is a fair, reasonable, and adequate resolution of the Action with
25 Defendant Babich.

26 86. At the time the Settling Parties reached their agreement in principle to
27 resolve this Action, Class Representative and Class Counsel were approximately one
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1 month from commencing trial and, therefore, had ample material to evaluate the strengths
2 and weaknesses of the claims alleged against Defendant Babich. Class Counsel's
3 exhaustive factual and legal research and analysis, the considerable record developed
4 through document and deposition discovery, expert discovery, and in extensive
5 preparation for trial, as well as Defendant Babich's legal and factual arguments in
6 connection with defendants' Summary Judgment Motion and the Settling Parties'
7 settlement discussions, informed Class Representative and Class Counsel that, while their
8 case against Defendant Babich had merit, there were also numerous factors that made the
9 outcome of continued litigation and ultimately a trial in the Action against Defendant
10 Babich uncertain. Class Representative and Class Counsel conscientiously evaluated
11 these factors in determining the course of action that was in the best interests of the Class.

12 87. While Class Representative and Class Counsel firmly believe that the
13 evidence they intended to offer at trial would fully support the Class's claims against
14 Defendant Babich, there was no way to predict which inferences, interpretations, or
15 testimony the Court or the jury would accept. Further, Defendant Babich was prepared to
16 mount aggressive defenses, particularly on the elements of falsity and loss causation,
17 which could have foreclosed a recovery for the Class against this defendant. If the jury at
18 trial sided with Defendant Babich on even one of his defenses, the Class would recover
19 nothing from this defendant.

20 88. Most significantly, and as set forth in the Settling Parties' July 29, 2020
21 supplement (Doc. 401), there were severe limitations on the ability of Defendant Babich
22 to pay a substantial judgment, and Class Representative faced a significant risk that he
23 would not be able to collect any payment at all from Defendant Babich following a trial
24 judgment in Class Representative's favor. *See infra* Section V.A. In addition, the
25 bankruptcy of the corporate defendant, Insys, seriously limited the sources of recovery in
26 this proceeding, and it created a number of other challenges to the successful prosecution
27 of claims against the remaining defendants.

28

1 **A. Risks of Non-Payment**

2 89. As noted above, Class Representative faced a real risk of collecting very
3 little (or nothing) from Defendant Babich following a trial judgment in the Class’s favor.

4 90. *First*, in light of his guilty plea in the Criminal Action stemming from
5 actions that he committed in connection with marketing Subsys, Defendant Babich’s
6 insurance carriers repeatedly denied him coverage in this matter based upon a number of
7 defenses, including a right of rescission based upon alleged misrepresentations in the
8 application for coverage. As a result, there were no insurance proceeds available to Mr.
9 Babich to fund any portion of a settlement or a judgment in the Action. *See* Doc. 399 at
10 10-12.

11 91. *Second*, as a result of his guilty plea in the Criminal Action, Defendant
12 Babich is obligated to pay \$74,535,817 in forfeiture and restitution.¹⁴ At the time the
13 Settling Parties agreed to the Settlement, Mr. Babich’s unsatisfied forfeiture and
14 restitution obligations exceeded his net worth by more than \$49 million, which directly
15 constrained Mr. Babich’s ability to pay a greater amount to resolve the claims against him
16 in this Action. Doc. 399 at 9-10; Doc. 401 at 1-2. Moreover, Class Counsel believed that
17 it was likely that the federal government would seek to collect on Mr. Babich’s more than
18 \$74 million obligation in the event that the jury rendered a verdict in the Class’s favor in
19 the Action. Doc. 401 at 7. In addition, at the time the Settling Parties entered into the
20 Stipulation, Mr. Babich also faced potential monetary consequences of more than \$1.4
21 billion in the aggregate from a Stipulated Consent Judgment with the State of Arizona
22 (Case No. CV2019-010695; the “AZAG Judgment”) and a Stipulation for Judgment with
23 the Mobile County Board of Health, pending approval in the Circuit Court of Mobile
24
25

26 ¹⁴ While Defendant Babich is jointly and severally liable for approximately
27 \$60 million in restitution, he is solely responsible for paying a more than \$14 million
28 forfeiture award.

1 County, Alabama (Case No. 02-CV-2019-902806.00; the “Alabama Stipulation”). Docs.
2 401 at 5-6; 401-2, ¶¶ 8.E, 13.¹⁵

3 92. *Third*, at the time the Settling Parties entered into the Stipulation, Mr.
4 Babich was a defendant in at least twenty other action across the country (i.e., the
5 “Concurrent Litigation”) representing aggregate estimated damages exceeding \$3
6 billion.¹⁶ Mr. Babich’s ability to pay more to fund a settlement in this Action was further
7 constrained by his collective financial exposure from and his ongoing need to fund a
8 defense of the claims against him in the Concurrent Litigation. Doc. 401 at 2. Indeed, a
9 payment from Mr. Babich greater than the costs of defending the claims against him in
10 this Action could create a run on Mr. Babich’s currently negative net worth from the
11 plaintiffs suing him in the Concurrent Litigation—ultimately driving Mr. Babich into
12 bankruptcy. Doc. 401 at 2-3.

13 93. Based upon Mr. Babich’s severely constrained personal financial means
14 and the absence of insurance coverage, there was a strong likelihood that Class
15 Representative would have recovered *less* than the Settlement Amount—or nothing at
16 all—from Mr. Babich even after a verdict in Class Representative’s favor. Thus, Class
17 Counsel concluded that accepting material proceeds from Mr. Babich now, rather than
18 pursuing a likely judgment-proof defendant after trial, was in the best interests of the
19 Class.

20 94. Additionally, any amount that Class Representative could have recovered
21 from Mr. Babich following a trial judgment in Class Representative’s favor would have

22 ¹⁵ The AZAG Judgment provides that if Mr. Babich files for bankruptcy within 120
23 days of his June 2020 payment of \$2,000,000, then such payment *will not be recognized*
24 as satisfying Mr. Babich’s \$644,200,000 in penalties and disgorgement if any creditor,
25 such as Class Representative here, files a petition for relief against Mr. Babich’s estate.
26 Doc. 401 at 5-7. In such instance, the State of Arizona would have a claim as to the
27 remaining \$642,000,000 under the AZAG Judgment. *Id.* With respect to the Alabama
28 Stipulation, Mr. Babich has agreed to have a judgment entered against him in the amount
of \$750,000,000 which, if approved, will result in a \$750,000,000 claim by Mobile
County against Mr. Babich if he files for bankruptcy. Doc. 401 at 6 n.5.

¹⁶ These actions are listed in an exhibit submitted by Class Representative with his
supplemental submission in support of the Babich Settlement. Doc. 401-2.

1 been diminished by the significant additional expenses that Class Counsel would have
2 incurred in presenting the case at trial. Among other things, the costs of trial would have
3 included: (i) the travel, lodging, and testimony of at least two expert witnesses; (ii) the
4 travel and lodging for Class Counsel; and (iii) the assistance of a trial consultant. Class
5 Counsel would also have incurred significant additional attorneys' fees.

6 **B. Risks Concerning Establishing Defendant Babich's Liability**

7 95. In addition to the significant risk of non-payment in the Action, Class
8 Representative faced litigation risks as well. Had the Action continued against Defendant
9 Babich, Class Representative faced significant challenges to proving that he made a
10 materially false or misleading statement. As set forth above, throughout the Action,
11 Defendant Babich maintained that the allegedly false or misleading statements
12 attributable to him were true and were otherwise not actionable, as a matter of law,
13 because they are vaguely optimistic, forward-looking statements that do not amount to a
14 securities violation and are, in any event, within the statutory "safe harbor." Defendant
15 Babich would have continued to press these defenses at trial.

16 96. Certain of Defendant Babich's defenses could have easily resonated with a
17 jury. For instance, Defendant Babich would have likely presented evidence showing that
18 Insys made efforts to convince oncologists to prescribe Subsys. Indeed, while the parties
19 disputed the efficacy of Insys' efforts on this front, discovery revealed that certain
20 programs were nonetheless in place during fiscal year 2014. Evidence existed, for
21 example, showing that Insys: (i) hired Brian Pipko as Vice President of Oncology;
22 (ii) maintained an oncology sales force; and (iii) attempted to market Subsys to
23 oncologists through the use of nurse educators and other programs within the oncology
24 setting that were designed to encourage oncologists to prescribe Subsys.

25 **C. Risks Concerning Loss Causation and Damages**

26 97. Even if Class Representative succeeded in establishing Defendant Babich's
27 liability at trial, there were considerable challenges to his ability to prove loss causation
28

1 and damages. On these issues, Class Representative would ultimately have to prove
2 (through expert testimony) that the revelation of the alleged fraud through the partial
3 Corrective Disclosures made on November 4, 2015, December 3, 2015, and January 25,
4 2016 proximately caused the substantial declines in the price of Insys common stock, and
5 that other information released and absorbed by the market on those days played little or
6 no role in the price declines.

7 98. Class Representative believed that he and his expert would bring forth
8 sufficient evidence to support a finding of loss causation and damages at trial. At the time
9 that the parties agreed to the Settlement, however, Defendant Babich had a pending
10 motion to present and rely upon the expert testimony of Kapoor's expert, Dr. Smith,
11 positioning the parties' proof on loss causation and damages to result in an uncertain
12 "battle of the experts" before the jury.

13 99. Among other things, Defendant Babich was prepared to present evidence
14 (through Dr. Smith's prior testimony) contending that none of the Corrective Disclosures
15 actually "corrected" the Form 10-K Statement because no disclosure mentioned Insys'
16 oncology efforts one way or the other. Similarly, Defendant Babich would have presented
17 evidence in an effort to prove that the Corrective Disclosures did not "correct" the Form
18 10-K Statement because no Corrective Disclosure identified the source or amount of any
19 Subsys sales, and gave no indication that Insys was not making efforts to have oncologists
20 prescribe the drug.

21 100. Moreover, Dr. Smith would have presented expert testimony that none of
22 the information revealed in the Corrective Disclosures was "new" information that could
23 explain the price declines on each of those days. In this regard, defendants have
24 consistently argued that information revealing defendants' off-label marketing, bribes to
25 prescribers, and insurance fraud was publicly available prior to the start of the Class
26 Period, and certainly before the Corrective Disclosures.

27
28

1 101. Finally, Defendant Babich would have argued that Class Representative
2 could not recover any damages from the final Corrective Disclosure on January 25, 2016
3 because Insys' stock price did not suffer a statistically significant decline that day.

4 102. If Class Representative were to lose one or more of the Corrective
5 Disclosures at trial, the Class's recoverable damages would have been greatly reduced. In
6 this regard, if the Class lost the January 25, 2016 alleged Corrective Disclosure, but
7 proved loss causation as to the first two alleged Corrective Disclosures, Class
8 Representative's damages expert estimates that aggregate damages would drop from
9 approximately \$189.5 million to approximately \$123.3 million. Likewise, if Defendant
10 Babich convinced a jury that the December 3, 2015 alleged Corrective Disclosure
11 revealed nothing new to the market, estimated damages tied solely to the remaining
12 November 4, 2015 alleged Corrective Disclosure would drop to approximately \$34.7
13 million.

14 **VI. COMPLIANCE WITH THE COURT'S PRELIMINARY APPROVAL**
15 **ORDER AND REACTION OF THE CLASS TO DATE**

16 103. By its Preliminary Approval Order, the Court authorized Class Counsel to
17 retain A.B. Data as the Claims Administrator to supervise and administer the notice
18 procedure in connection with the Babich Settlement, as well as the processing of Claims.
19 Doc. 402, ¶ 4.¹⁷ In accordance with the Preliminary Approval Order, A.B. Data, working
20 under Class Counsel's supervision: (i) mailed by First-Class mail a copy of the Postcard
21 Settlement Notice to potential Class Members who were previously mailed notice in
22 connection with Class Notice, the Baker Settlement, and/or the Kapoor Settlement and
23 any other potential Class Member who could be identified, as well as copies of the
24 Postcard Settlement Notice, in bulk, to brokers and other nominees ("Nominees") who
25 previously requested copies of the Class Notice, notice of the Baker Settlement, and/or

26 _____
27 ¹⁷ A.B. Data was previously approved by the Court to be the Administrator for Class
28 Notice, Doc. 331, and the Court approved A.B. Data's retention to disseminate notice of
both the Baker Settlement (Doc. 347) and the Kapoor Settlement (Doc. 373).

1 notice of the Kapoor Settlement in bulk; (ii) mailed a copy of the Settlement Notice and
2 Claim Form (together, the “Notice Packet”) to the Nominees contained in A.B. Data’s
3 Nominee database; (iii) published the Summary Settlement Notice in *Investor’s Business*
4 *Daily* and transmitted the same over the *PR Newswire*; and (iv) updated the Website for
5 the Action, www.InsysRXSecuritiesLitigation.com, to provide information about the
6 Babich Settlement, including downloadable copies of the Settlement Notice and Claim
7 Form. Schachter Decl., ¶¶ 3-14.

8 104. The Postcard Settlement Notice contains important information concerning
9 the Babich Settlement and, along with the Summary Settlement Notice, directs recipients
10 to the Website for additional information regarding the Settlement (and the Action),
11 including the long-form Settlement Notice, which includes, among other things, more
12 details about the Babich Settlement, the information required to submit a Claim, and a
13 copy of the Plan of Allocation as Appendix A. Collectively, the notices provide the Class
14 definition, a description of the Babich Settlement, information regarding the claims
15 asserted in the Action, and information to enable Class Members to determine whether
16 to: (i) participate in the Settlement by completing and submitting a Claim Form; or
17 (ii) object to any aspect of the Babich Settlement, the Plan of Allocation, and/or the
18 Expense Application. The notices also advise Class Members that if they already
19 submitted a Claim Form in connection with the Baker or Kapoor Settlements, their
20 previously submitted Claim Form will be processed for the Babich Settlement and they
21 do not need to resubmit their Claim Form.

22 105. The Postcard Settlement Notice and Settlement Notice also inform
23 prospective Class Members of Class Counsel’s intent to apply for reimbursement of
24 Litigation Expenses incurred by Plaintiffs’ Counsel in connection with the institution,
25 prosecution, and resolution of the claims in the Action, which were not previously sought
26 for reimbursement from the Baker or Kapoor Settlements, in an amount not to exceed
27 \$75,000. *See* Schachter Decl., Exs. A & B.

28

1 106. In accordance with the Preliminary Approval Order, A.B. Data began
2 mailing Postcard Settlement Notices to potential Class Members and Nominees, as well
3 as Notice Packets to Nominees, on August 10, 2020. Schachter Decl., ¶¶ 6-7. To date,
4 A.B. Data has disseminated more than 31,300 Postcard Settlement Notices and 4,200
5 Notice Packets to potential Class Members and Nominees. *Id.*, ¶ 10. In addition, a total
6 of 107 Settlement Notices have been downloaded from the Website. *Id.*, ¶ 14. A.B. Data
7 also caused the Summary Settlement Notice to be published in *Investor's Business Daily*
8 and transmitted over *PR Newswire* on August 17, 2020. *Id.*, ¶ 12.¹⁸

9 107. Contemporaneously with the mailing of the Postcard Settlement Notices,
10 A.B. Data updated the Website to provide Class Members and other interested parties
11 with information concerning the Babich Settlement and the important dates and deadlines
12 in connection therewith, as well as downloadable copies of the Settlement Notice, Claim
13 Form, Stipulation, and Preliminary Approval Order. Schachter Decl., ¶ 14.¹⁹
14 Additionally, A.B. Data updated the interactive voice-response system callers hear when
15 contacting the toll-free telephone helpline for this matter in order to respond to inquiries
16 regarding the Babich Settlement. *Id.*, ¶ 13. Class Members with questions regarding the
17 Settlement can also contact A.B. Data by sending an e-mail to
18 info@InsysRXSecuritiesLitigation.com.

19 108. As noted above, and as set forth in the notices, the deadline for Class
20 Members to submit an objection to the Babich Settlement, the Plan of Allocation, and/or
21 Class Counsel's Expense Application is October 28, 2020. To date, no objections of any
22
23
24

25 _____
26 ¹⁸ In accordance with the Stipulation, Defendant Babich issued notice of the
27 Settlement pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715(b) on August 10,
28 2020.

¹⁹ This filing will also be posted and available for downloading on the Website.

1 kind have been filed.²⁰ Should any objections be received after this submission, Class
2 Counsel will address them in its reply to be filed on or before November 11, 2020.

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

5 109. In accordance with the Preliminary Approval Order, and as explained in the
6 Settlement Notice, Class Members who wish to participate in the distribution of the Net
7 Settlement Fund (i.e., the Settlement Fund less: (i) any Taxes; (ii) any Notice and
8 Administration Costs; (iii) any attorneys' fees awarded by the Court; and (iv) any other
9 costs or fees approved by the Court) must submit a valid Claim Form and all required
10 supporting documentation to the Court-authorized Claims Administrator, A.B. Data,
11 postmarked (if mailed), or online through the Website, no later than November 7, 2020.
12 As further explained in the Settlement notices and as noted above, Class Members who
13 previously submitted or plan to submit a Claim Form for the Baker and/or Kapoor
14 Settlements, do not need to resubmit their Claim Form, and their Claim Form will
15 automatically be processed in connection with the Babich Settlement.

16 110. As provided in the Settlement Notice, the Net Settlement Fund will be
17 distributed to Authorized Claimants²¹ in accordance with the plan for allocating the Net
18 Settlement Fund among Authorized Claimants approved by the Court. The Plan proposed

19
20 ²⁰ As discussed above, in connection with the Court's Class Notice Order (Doc. 331),
21 Class Notice was previously disseminated to potential members of the Class to notify
22 them of, among other things: (i) the Action pending against the defendants; (ii) the Court's
23 certification of the Action to proceed as a class action on behalf of the Court-certified
24 Class; and (iii) their right to request to be excluded from the Class, the effect of remaining
25 in the Class or requesting exclusion, and the requirements for requesting exclusion. No
26 requests for exclusion were received in connection with the Class Notice. Pursuant to the
27 Order preliminarily approving the Baker Settlement, the Court exercised its discretion not
28 to provide Class Members with a second opportunity to exclude themselves from the
Class in connection with the settlement proceedings, including the Babich Settlement.
Doc. 347, ¶ 11.

²¹ As defined in ¶ 1.c of the Stipulation, an "Authorized Claimant" is a Class Member
who either: (i) submits a Claim to the Claims Administrator in connection with one of the
Non-Settling Defendants' Settlements; or (ii) submits a Claim to the Claims
Administrator in connection with this Settlement, and who is approved by the Court for
payment from the Net Settlement Fund.

1 by Class Representative is attached as Appendix A to the Settlement Notice and is the
2 exact same plan that is being proposed in connection with both the Baker and Kapoor
3 Settlements. *See* Schachter Decl., Ex. B. The Plan is designed to equitably distribute the
4 Net Settlement Fund among Authorized Claimants; however, the calculations made
5 pursuant to the Plan are not intended to be estimates of, nor indicative of, the amounts
6 that Class Members might have been able to recover after a trial with Defendant Babich.

7 111. As previously set forth in my declaration in support of the Baker Settlement
8 (Doc. 407, ¶¶ 111-12), Class Counsel developed the Plan in consultation with Class
9 Representative's damages expert. The Plan provides a method for equitably distributing
10 the Net Settlement Fund among Class Members who purportedly suffered economic
11 losses as a result of the alleged violations of the federal securities laws set forth in the
12 SAC, as opposed to economic losses caused by market or industry forces.

13 112. A Claimant's loss under the Plan (i.e., "Recognized Loss Amount") will
14 depend upon several factors, including the date(s) when the Claimant purchased or
15 acquired his, her, or its shares of Insys common stock during the Class Period, and
16 whether such shares were sold and if so, when and at what price.²² The estimated amount
17 of alleged artificial inflation in the per-share price of Insys common stock over the course
18 of the Class Period that was allegedly proximately caused by defendants' alleged
19 misleading statements and omissions (as calculated by Class Representative's damages
20 expert and set forth in Table 1 of the Plan) will be utilized in calculating each Claimant's
21 Recognized Loss Amount, and ultimately the Claimant's overall Recognized Claim. In
22 order to have a Recognized Claim under the Plan, and to be eligible to receive a payment
23 from the Settlement, a Claimant must have suffered damages proximately caused by the
24 disclosure of the relevant truth concealed by defendants' alleged fraud. Specifically,
25 shares of Insys common stock purchased or otherwise acquired during the Class Period

26 _____
27 ²² The calculation of Recognized Loss Amounts also takes into account the PSLRA's
28 statutory limitation on recoverable damages. *See* Section 21D(e)(1) of the Exchange Act.
The 90-Day Look-Back values by sale/disposition date are set forth in Table 2 of the Plan.

1 must have been held through at least one of the alleged corrective disclosure that removed
2 alleged artificial inflation related to that information from the price of Insys common
3 stock.²³

4 113. A.B. Data will determine each Authorized Claimant's *pro rata* share of the
5 Net Settlement Fund by dividing the Authorized Claimant's Recognized Claim (i.e., the
6 sum of the Claimant's Recognized Loss Amounts as calculated under the Plan) by the
7 total Recognized Claims of all Authorized Claimants, multiplied by the total amount in
8 the Net Settlement Fund. Class Representative's losses will be calculated in the same
9 manner. Once all submitted Claim Forms are processed and Claimants have had the
10 opportunity to cure any deficiencies in their Claims or challenge the rejection of their
11 Claims, Class Counsel will file a motion for approval of A.B. Data's determinations with
12 respect to all submitted Claims and authorization to distribute the Net Settlement Fund.²⁴

13 114. As discussed in the memorandum submitted in support of the Baker
14 Settlement (Doc. 405 at 15-16), the structure of the Plan is similar to the structure of plans
15 of allocation that have been used to apportion settlement proceeds in numerous other
16 securities class actions. To date, no objections to the Plan have been filed. In sum, Class
17 Counsel believes that the Plan provides a fair and reasonable method to equitably
18 distribute the Net Settlement Fund among Authorized Claimants, and respectfully
19 submits that the Plan should be approved by the Court.

20 ²³ For purposes of the Plan, Class Representative's damages expert identified
21 November 4, 2015, December 3, 2015, and January 25, 2016 as the dates on which alleged
22 corrective information removed artificial inflation from the per-share price of Insys
common stock.

23 ²⁴ As set forth in the Plan, if nine months after the initial distribution, there is a
24 balance remaining in the Net Settlement Fund (whether by reason of uncashed checks, or
25 otherwise), and if it is cost-effective to do so, Class Counsel will conduct a re-distribution
26 of the funds remaining after payment of any unpaid fees and expenses incurred in
27 administering the Settlement, including the costs for such re-distribution, to Authorized
28 Claimants who have cashed their initial distribution checks and would receive at least
\$10.00 from such re-distribution. Redistributions will be repeated until it is determined
that re-distribution of the funds remaining in the Net Settlement Fund would no longer be
cost effective. Thereafter, any remaining balance will be contributed to non-sectarian,
not-for-profit organization(s), to be recommended by Class Counsel and approved by the
Court.

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

2 115. In addition to seeking final approval of the Babich Settlement and the Plan
3 of Allocation, Class Counsel is also making an application to the Court for reimbursement
4 of a portion of Plaintiffs’ Counsel’s expenses not previously sought for reimbursement
5 from either the Baker or Kapoor Settlements, including expenses incurred from July 2,
6 2020 through Class’s Representative’s filing of his motion seeking preliminary approval
7 of the Babich Settlement on July 21, 2020. Specifically, Class Counsel respectfully
8 requests reimbursement of Litigation Expenses in the amount of \$75,000. Class Counsel’s
9 Expense Application is consistent with the expense amount set forth in the Settlement
10 notices and, to date, no objections to this expense request have been filed.

11 116. Through July 21, 2020, Plaintiffs’ Counsel have incurred a total of
12 \$1,202,389.60 in Litigation Expenses in connection with the prosecution and resolution
13 of the Action. Of this amount, \$1,124,606.29 in expenses were documented in connection
14 with the Baker Settlement (Docs. 407-3, 407-4) and \$59,317.58 in expenses were
15 documented in connection with the Kapoor Settlement (Doc. 411-3). Class Counsel
16 previously requested reimbursement of \$635,000 of Plaintiffs’ Counsel’s expenses from
17 the Baker Settlement, which request is currently pending before the Court. Class Counsel
18 did not make a request for reimbursement of expenses from the Kapoor Settlement, but
19 did file a request for an award of attorneys’ fees from the Kapoor Settlement.

20 117. In an effort to preserve proceeds of the Babich Settlement for the Class,
21 Class Counsel is *not* seeking an award of attorneys’ fees from the Babich Settlement.
22 Rather, as set forth above, Class Counsel is requesting reimbursement of \$75,000—a
23 portion of its Litigation Expenses not previously sought for reimbursement in connection
24 with the Baker or Kapoor Settlements, including expenses incurred from July 2, 2020
25 through July 21, 2020. It is well-settled that attorneys who have created a common fund
26 for the benefit of a class are entitled to be reimbursed for their out-of-pocket expenses
27 incurred in creating the fund, so long as the submitted expenses are reasonable, necessary
28

1 and directly related to the prosecution of the action. *See* Expense Reimbursement
2 Memorandum at Section II.

3 118. As noted above, Plaintiffs' Counsel's expenses through July 1, 2020 were
4 previously documented in connection with the Baker and Kapoor Settlements. Docs. 407-
5 3, 407-4 & 411-3. Plaintiffs' Counsel's previously documented expenses include charges
6 for, among other things: (i) experts and consultants in connection with various stages of
7 the litigation; (ii) establishing and maintaining a database to house the massive volume
8 of documents produced in discovery; (iii) online factual and legal research;
9 (iv) deposition-related expenses; (v) mediation; (vi) travel; and (vii) document
10 reproduction. Courts have consistently found that these kinds of expenses are payable
11 from a fund recovered by counsel for the benefit of a class.

12 119. Class Counsel has incurred additional expenses in the amount of
13 \$18,465.73 that were not documented in connection with the Baker and Kapoor
14 Settlements, including expenses incurred from July 2, 2020 through July 21, 2020.²⁵
15 These expenses are as follows:

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

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22
23 120. The expenses set forth above would normally be charged to a fee-paying
24 client in the private legal marketplace. Moreover, these expenses were reasonable and
25 necessary for the effective prosecution and resolution of this matter. As set forth in

26
27 ²⁵ *See* Declaration of Johnston de F. Whitman in Support of Class Counsel's Motion
28 for Reimbursement of Litigation Expenses in Connection with the Babich Settlement,
Filed on Behalf of Kessler Topaz Meltzer & Check, LLP, attached as Exhibit 3 hereto.

1 Exhibit 3 hereto, these expenses are reflected in the books and records of Kessler Topaz.
2 These books and records are prepared from receipts, expense vouchers, check records,
3 and other documents and are an accurate record of the expenses incurred.

4 **IX. CONCLUSION**

5 121. For all the reasons set forth above, Class Counsel respectfully submits that
6 the Babich Settlement and the Plan of Allocation should be approved as fair, reasonable,
7 and adequate. Class Counsel further submits that its Expense Application in the amount
8 of \$75,000 should also be approved as fair and reasonable.

9 122. I declare, under penalty of perjury, that the foregoing is true and correct to
10 the best of my knowledge.

11 DATED this 14th day of October 2020.

12

13

14

s/ Johnston de F. Whitman, Jr. _____
Johnston de F. Whitman, Jr.

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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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s/ Johnston de F. Whitman, Jr.