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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

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

Plaintiff,

v.

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

Defendants.

No. 16-cv-00302-NVW

CLASS ACTION

**REPLY MEMORANDUM OF
POINTS AND AUTHORITIES IN
FURTHER SUPPORT OF
(I) CLASS REPRESENTATIVE'S
MOTION FOR FINAL APPROVAL
OF SETTLEMENT WITH
DEFENDANT DARRYL S. BAKER
AND PLAN OF ALLOCATION;
AND (II) CLASS COUNSEL'S
MOTION FOR
REIMBURSEMENT OF
LITIGATION EXPENSES**

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Patel v. Axesstel, Inc.,
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1 Court-appointed Class Representative Clark Miller,¹ on behalf of himself and the
2 Court-certified Class, and Class Counsel respectfully submit this reply memorandum of
3 points and authorities in further support of: (i) Class Representative’s Motion for Final
4 Approval of Settlement with Defendant Darryl S. Baker and Plan of Allocation (Doc.
5 405); and (ii) Class Counsel’s Motion for Reimbursement of Litigation Expenses (Doc.
6 406) (together, the “Motions”).

7 **I. PRELIMINARY STATEMENT**

8 The proposed Settlement resolves this Action against Defendant Darryl S. Baker
9 (“Mr. Baker”) in exchange for a cash payment of \$2,000,000. As detailed in Class
10 Representative’s and Class Counsel’s August 19, 2020 opening papers in support of the
11 Motions (Docs. 405-407) (“Opening Papers”), the Settlement is the product of more than
12 four years of litigation efforts, and represents a favorable result for the Class in light of
13 the significant challenges to proceeding to trial against Mr. Baker, including the
14 substantial risk of non-payment. Notably, the Settlement represents more than 50% of the
15 insurance coverage available to Mr. Baker in connection with the Action—i.e., \$3.96
16 million remaining from a \$5 million policy. Had the Settlement not been reached, a
17 significant portion of the remaining insurance would have been used to fund Mr. Baker’s
18 defense at trial, and given his financial situation, the possibility of the Class obtaining
19 anything from Mr. Baker’s personal resources (outside of insurance) was highly unlikely.
20 Further, the Settlement—the first of three settlements reached in the Action that, together,
21 will resolve the Action in its entirety—represents the largest portion of the guaranteed
22 collective cash recovery for the Class.²

23 _____
24 ¹ Unless otherwise defined, all capitalized terms herein have the same meanings as
25 set forth in the Stipulation and Agreement of Settlement Between Lead Plaintiff and
26 Defendant Darryl S. Baker dated May 22, 2020 (Doc. 341-1), or in the Declaration of
27 Johnston de F. Whitman, Jr. in Support of (I) Class Representative’s Motion for Final
28 Approval of Settlement with Defendant Darryl S. Baker and Plan of Allocation; and
(II) Class Counsel’s Motion for Reimbursement of Litigation Expenses (Doc. 407).
Unless otherwise noted, all internal citations and quotations are omitted.

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

1 Pursuant to the Court’s June 5, 2020 Preliminary Approval Order (Doc. 347), the
2 Court-authorized Claims Administrator, A.B. Data, Ltd., under the supervision of Class
3 Counsel, conducted an extensive notice program, including mailing notice of the Baker
4 Settlement to more than 35,000 potential Class Members and nominees.³ Class
5 Representative and Class Counsel are pleased to advise the Court that, following this
6 notice program, *not a single member of the Class has objected to any aspect of the*
7 *Settlement, the Plan of Allocation, or Class Counsel’s request for reimbursement of*
8 *expenses*. And, as set forth in the Opening Papers, Class Representative has expressly
9 endorsed the Settlement and Class Counsel’s request for reimbursement of litigation
10 expenses. *See* Doc. 407-1, ¶¶ 6-7. The Class’s positive reaction is a further indication that
11 the Settlement, the Plan of Allocation, and Class Counsel’s expense reimbursement
12 request are fair and reasonable, and provides strong support for the Court’s approval of
13 both Motions.

14 **II. THE FAVORABLE REACTION OF THE CLASS PROVIDES**
15 **ADDITIONAL SUPPORT FOR APPROVAL OF THE MOTIONS**

16 Class Representative and Class Counsel respectfully submit that their Opening
17 Papers demonstrate that approval of the Motions is warranted. Given that the Motions
18 were unopposed by Mr. Baker, and do not face any objections by any Class Member,
19 Class Representative and Class Counsel will not restate any of their opening arguments
20 here. Instead, Class Representative files this reply to submit the additional point that the
21 lack of a single objection provides further support for approval of the Motions.⁴

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

23 As noted above, pursuant to the Court’s Preliminary Approval Order, over 35,000
24

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

27 ⁴ *See In re LifeLock, Inc. Mktg. & Sales Practices Litig.*, 2010 WL 11627648, at *5
28 (D. Ariz. Aug. 31, 2010) (“In assessing whether to grant approval of a settlement, courts
consider the reactions of the members of the class . . .”).

1 Settlement notices were mailed to potential Class Members and their nominees. *See* Supp.
2 Schachter Decl., ¶ 3. In addition, a summary notice was published in *Investor's Business*
3 *Daily* and transmitted over *PR Newswire* and the long-form Settlement Notice, along with
4 other relevant information and documents, were posted on the Website developed and
5 maintained for the Action, www.InsysRXSecuritiesLitigation.com. *See* Doc. 407-2,
6 ¶¶ 12-14

7 Collectively, the notices informed Class Members of the terms of the Settlement
8 and Plan of Allocation, and that Class Counsel would apply for reimbursement of
9 Litigation Expenses incurred by Plaintiffs' Counsel in connection with the institution,
10 prosecution, and resolution of the claims against Mr. Baker, in an amount not to exceed
11 \$650,000, which amount may include a request for reimbursement of the reasonable costs
12 incurred by Class Representative directly related to his representation of the Class in
13 accordance with 15 U.S.C. § 78u-4(a)(4), in an amount not to exceed \$15,000. *See*
14 Settlement Postcard Notice (Doc. 407-2, Ex. A); Settlement Notice (Doc. 407-2, Ex. B),
15 ¶¶ 5, 56.⁵ The notices also apprised Class Members of their right to object to the
16 Settlement, the Plan of Allocation, and/or the expense request, and that the deadline to do
17 so was September 2, 2020. *See* Settlement Postcard Notice (Doc. 407-2, Ex. A);
18 Settlement Notice (Doc. 407-2, Ex. B), ¶¶ 59-65. In addition, Class Representative's and
19 Class Counsel's Opening Papers—filed fourteen days prior to the objection deadline—
20 are and have been available on the public docket and on the Website. *See* Suppl. Schachter
21 Decl., ¶ 5. In accordance with the Court's September 14, 2020 Order (Doc. 413), the
22 Website was also updated on September 16, 2020 to inform Class Members that the
23 Settlement Fairness Hearing will be conducted telephonically and to provide the
24 necessary information for listening to the hearing. *Id.* As noted above, following this
25

26
27 ⁵ As set forth in the Opening Papers, in connection with the Settlement, Class
28 Counsel seeks reimbursement of only a portion of Plaintiffs' Counsel's total expenses of
\$1,124,606.29 incurred through May 22, 2020. Doc. 407, ¶¶ 118-127.

1 extensive notice program, *not a single Class Member* has objected to any aspect of the
2 Settlement.

3 **B. The Class’s Reaction Supports Approval of the Baker Settlement,
4 Plan of Allocation, and Class Counsel’s Expense Request**

5 The absence of any objections from Class Members strongly supports a finding
6 that the proposed Settlement is fair, reasonable, and adequate. *See e.g., Giroux v. Essex*
7 *Prop. Tr., Inc.*, 2019 WL 2106587, at *5 (N.D. Cal. May 14, 2019) (“The Court finds that
8 the absence of objections . . . indicate[s] overwhelming support among the Class Members
9 and weigh in favor of approval.”); *Destefano v. Zynga, Inc.*, 2016 WL 537946, at *13
10 (N.D. Cal. Feb. 11, 2016) (“By any standard, the lack of objection of the Class Members
11 favors approval of the Settlement.”); *In re Apollo Grp. Inc. Sec. Litig.*, 2012 WL 1378677,
12 at *3 (D. Ariz. Apr. 20, 2012) (“There have been no objections from Class Members or
13 potential class members, which itself is compelling evidence that the Proposed Settlement
14 is fair, just, reasonable, and adequate.”). In particular, the absence of objections from
15 institutional investors, who possessed ample means and incentive to object to the
16 Settlement if they deemed it unsatisfactory, is further evidence of the Settlement’s
17 fairness. *See, e.g., In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394,
18 410 (S.D.N.Y. 2018) (“That not one sophisticated institutional investor objected to the
19 Proposed Settlement is indicia of its fairness.”); *In re Cathode Ray Tube (CRT) Antitrust*
20 *Litig.*, 2017 WL 2481782, at *4 (N.D. Cal. June 8, 2017) (absence of any objections from
21 institutions means that “the inference that the class approves of the settlement is even
22 stronger”).

23 Likewise, there have been no objections to the Plan of Allocation or Class
24 Counsel’s request for reimbursement of expenses, which provides additional, strong
25 support for their approval. *See, e.g., Patel v. Axesstel, Inc.*, 2015 WL 6458073, at *7 (S.D.
26 Cal. Oct. 23, 2015) (approving plan of allocation where it “was laid out in detail in the
27 notice, and no class members objected”); *Destefano*, 2016 WL 537946, at *22 (noting
28 lack of objections in approving expense request). Similarly, the absence of any objection

1 to Class Representative's request for reimbursement of his reasonable costs in
2 representing the Class for the past four-plus years also supports approving the request.
3 *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1049 (N.D. Cal. 2008) (finding
4 it "appropriate to reimburse Lead Plaintiffs for their reasonable costs and expenses"
5 where "[t]he Notice adequately informed all potential Class Members that the Lead
6 Plaintiffs would seek to recover these costs, and no one objected").

7 Accordingly, the uniformly favorable reaction of the Class strongly supports
8 approval of the Settlement, Plan of Allocation, and Class Counsel's expense
9 reimbursement request.

10 **III. CONCLUSION**

11 For the foregoing reasons, and those set forth in their Opening Papers, Class
12 Representative and Class Counsel respectfully request the Court approve the Settlement
13 with Defendant Baker, the Plan of Allocation, and Class Counsel's request for
14 reimbursement of expenses.

15 DATED: September 16, 2020 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 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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