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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 JOHN N. KAPOOR  
AND PLAN OF ALLOCATION;  
AND (II) CLASS COUNSEL'S  
MOTION FOR AN AWARD OF  
ATTORNEYS' FEES**

**TABLE OF CONTENTS**

	<b>Page</b>
1	
2	
3	I. INTRODUCTION.....2
4	II. SUMMARY OF CLASS REPRESENTATIVE’S CLAIMS .....7
5	III. THE LITIGATION EFFORTS OF CLASS REPRESENTATIVE AND
6	PLAINTIFFS’ COUNSEL .....9
7	A. Commencement of the Action and Appointment of Lead Plaintiff
8	and Lead Counsel .....9
9	B. Class Representative’s Investigation, the Amended Complaint,
10	and Defendants’ Motion to Dismiss the Amended Complaint .....9
11	C. The Second Amended Complaint, Defendants’ Motion to Dismiss
12	the Second Amended Complaint, and the Court’s Ruling Thereon..... 10
13	D. Class Representative’s Extensive Discovery Efforts ..... 13
14	1. Federal Rule 26(f) Report, Protective Order, and Initial
15	Disclosures ..... 14
16	2. Class Representative’s Discovery Propounded on
17	Defendants..... 15
18	a. Document Discovery..... 15
19	b. Written Discovery ..... 17
20	c. Deposition Discovery..... 18
21	3. Discovery of Class Representative ..... 18
22	E. Class Counsel’s Work with Experts..... 19
23	F. Class Representative’s Motion to Certify the Class.....20
24	G. Insys Files for Bankruptcy and the August 9, 2019 Status
25	Conference .....22
26	H. Notice to the Class of the Pendency of the Action as a Class
27	Action and the Insys Dismissal Motion .....23
28	I. Defendants’ Motion for Summary Judgment.....24

1 J. Preparations for Trial .....26

2 IV. THE KAPOOR SETTLEMENT .....27

3 A. The Settlement Negotiations .....27

4 B. Preparation of Settlement Documentation .....27

5 C. Class Counsel Seeks Preliminary Approval of the Kapoor

6 Settlement.....28

7 V. RISKS FACED BY CLASS REPRESENTATIVE IN THE ACTION.....28

8 A. Risks Concerning Establishing Defendant Kapoor’s Liability .....29

9 B. Risks Concerning Loss Causation and Damages .....30

10 C. Risks of Non-Payment .....32

11 VI. COMPLIANCE WITH THE COURT’S PRELIMINARY APPROVAL

12 ORDER AND REACTION OF THE CLASS TO DATE .....34

13 VII. THE PLAN FOR ALLOCATING THE NET SETTLEMENT FUND

14 TO THE CLASS IS FAIR AND REASONABLE .....36

15 VIII. CLASS COUNSEL’S FEE APPLICATION IS FAIR AND

16 REASONABLE AND WARRANTS APPROVAL .....39

17 A. The Favorable Settlement Achieved .....41

18 B. The Risks of Litigation and the Need to Ensure the Availability

19 of Competent Counsel in High-Risk Contingent Cases.....43

20 C. The Time and Labor Devoted to the Action by Plaintiffs’

21 Counsel.....45

22 D. The Quality of Plaintiffs’ Counsel’s Representation .....46

23 E. Class Representative Supports the Fee Application.....47

24 F. Plaintiffs’ Counsel’s Litigation Expenses .....47

25 IX. CONCLUSION .....48

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28

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”).<sup>1</sup>

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 John N. Kapoor (“Defendant Kapoor” or “Dr. Kapoor”).

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 Kapoor (also  
14 referred to herein as the “Kapoor Settlement”). If approved, the Kapoor Settlement will  
15 resolve all claims asserted in the Action against Defendant Kapoor<sup>2</sup> on behalf of the  
16 Court-certified Class, which consists of all persons and entities who purchased or  
17 otherwise acquired Insys Therapeutics, Inc. (“Insys” or the “Company”) common stock  
18 during the period from March 3, 2015, through January 25, 2016, and were damaged  
19 thereby.<sup>3</sup> The Court preliminarily approved the Kapoor Settlement by Order dated July 2,  
20 2020 (Doc. 373) (“Preliminary Approval Order”).

21  
22 <sup>1</sup> Unless otherwise defined herein, capitalized terms have the meanings ascribed to  
23 them in the Stipulation and Agreement of Settlement Between Lead Plaintiff and  
24 Defendant John N. Kapoor, dated July 1, 2020 (Doc. 371-1) (“Stipulation”).

25 <sup>2</sup> This Settlement resolves claims against Defendant Kapoor only, and does not  
26 resolve claims against defendant Darryl S. Baker (“Baker”) or defendant Michael L.  
27 Babich (“Babich”). Separate settlements are pending before this Court with respect to  
28 Messrs. Baker and Babich (referred to herein together as the “Baker and Babich  
Settlements”). Docs. 341-1, 347, 399-1, 402.

<sup>3</sup> 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

1           4.     I also respectfully submit this Declaration in support of: (i) the proposed  
2 plan for allocating the net proceeds of the Kapoor Settlement to eligible Class Members  
3 (“Plan of Allocation” or “Plan”); and (ii) Class Counsel’s motion for an award of  
4 attorneys’ fees, which is *inclusive* of remaining unreimbursed litigation expenses incurred  
5 through May 22, 2020 (the date though which Class Counsel sought partial  
6 reimbursement of expenses in connection with the Baker Settlement) by Plaintiffs’  
7 Counsel for which reimbursement was not sought in connection with the Baker  
8 Settlement, as well as unreimbursed litigation expenses incurred from May 23, 2020  
9 through the Settling Parties’ execution of the Stipulation on July 1, 2020 (“Fee  
10 Application”).

11           5.     For the reasons discussed below and in the accompanying memoranda,<sup>4</sup> I,  
12 on behalf of Class Counsel, respectfully submit that: (i) the terms of the Kapoor  
13 Settlement are fair, reasonable, and adequate in all respects and should be approved by  
14 the Court; (ii) the proposed Plan of Allocation is fair, reasonable, and adequate and should  
15 be approved by the Court; and (iii) the Fee Application is reasonable, supported by the  
16 facts and the law, and should be granted.

17 **I.     INTRODUCTION**

18           6.     Following more than four years of hard-fought litigation, Class  
19 Representative and Class Counsel have succeeded in resolving the Action against Dr.  
20 Kapoor for a cash payment from Dr. Kapoor’s personal assets of at least \$700,000  
21 (“Minimum Settlement Amount”), with the potential to increase to \$10,000,000, in  
22 recovery to the Class.

23 \_\_\_\_\_  
24 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.

25 <sup>4</sup> In addition to this Declaration, Class Representative and Class Counsel are  
26 submitting: (i) Class Representative’s Motion for Final Approval of Settlement with  
27 Defendant John N. Kapoor and Plan of Allocation and Memorandum of Points and  
Authorities in Support Thereof (“Settlement Memorandum”); and (ii) Class Counsel’s  
28 Motion for an Award of Attorneys’ Fees and Memorandum of Points and Authorities in  
Support Thereof (“Fee Memorandum”).

1           7.       Structuring a settlement with Dr. Kapoor was extremely challenging  
2 because of: (i) his current and expected future financial condition; (ii) his Criminal  
3 Conviction and nearly \$62 million Criminal Obligation;<sup>5</sup> and (iii) the unavailability of  
4 *any* insurance coverage in light of Dr. Kapoor’s criminal indictment and subsequent  
5 conviction. Indeed, even if Class Representative was successful in obtaining a judgment  
6 against Dr. Kapoor at trial, there was a substantial likelihood that the U.S. Department of  
7 Justice (“DOJ”) would seize and ultimately liquidate the entirety of Dr. Kapoor’s  
8 remaining assets in order to satisfy his Criminal Obligation. And, because the Criminal  
9 Obligation is *substantially larger* than the value of Dr. Kapoor’s liquid assets, the DOJ’s  
10 interest in Dr. Kapoor’s assets could have left the Class with no source of potential  
11 recovery for its claims against Dr. Kapoor. In light of the foregoing, and in order to secure  
12 a meaningful recovery for the Class, the Settlement was structured as follows: (i) a  
13 \$250,000 immediate cash payment;<sup>6</sup> (ii) additional cash payments totaling \$250,000  
14 pursuant to monthly payments made over a period of ten months; (iii) a guaranteed payment  
15 based upon the results of Dr. Kapoor’s Criminal Conviction appeal—i.e., \$2,000,000 if he  
16 prevails or \$200,000 if he loses; and (iv) a Savings Payment representing 50% of any  
17 savings Dr. Kapoor’s realizes in connection with his Criminal Obligation (capped at  
18 \$7,500,000).<sup>7</sup>

19           8.       In exchange for the Settlement Consideration, the Settlement resolves all  
20 claims asserted in the Action (and related claims) by Class Representative and the Class  
21 against Defendant Kapoor and the other Settling Defendant’s Releasees. The Kapoor  
22

23 <sup>5</sup> In connection with Defendant Kapoor’s Criminal Conviction in *United States of*  
24 *America v. Babich, et al.*, No. 1:16-cr-10343-ADB (D. Mass.), Defendant Kapoor’s  
25 sentencing included an obligation to pay \$59,755,362.45 in restitution, \$1,914,771.20 in  
26 forfeiture, and a fine of \$250,000.00.

25 <sup>6</sup> Pursuant to the Stipulation and Preliminary Approval Order, the first \$250,000 of  
26 the Settlement Consideration was received on July 7, 2020, and is currently being held in  
27 the Escrow Account.

27 <sup>7</sup> Additional details, including the timing of each payment, is set forth in ¶ 7 of the  
28 Stipulation.

1 Settlement is the second of three settlements reached in the Action, and represents the  
2 largest potential recovery for the Class.<sup>8</sup>

3 9. From the date the Action was filed until the date of their agreement in  
4 principle to settle on June 25, 2020, the Settling Parties actively litigated the Action. At  
5 the time the Kapoor Settlement was reached, trial preparation was nearing completion,  
6 and motions in limine had been filed. Prior to reaching the Settlement, Class Counsel,  
7 under the supervision of Class Representative, had, among other things: (i) conducted an  
8 extensive legal and factual investigation into the Class's claims; (ii) drafted two detailed  
9 amended complaints, including the operative Second Amended Complaint for Violation  
10 of the Federal Securities Laws (Doc. 77) ("Second Amended Complaint" or "SAC");  
11 (iii) opposed two rounds of motions to dismiss; (iv) participated in hotly-contested fact  
12 and expert discovery, which included reviewing more than 14 million pages of  
13 documents, hundreds of written discovery requests and responses, and taking or  
14 defending ten fact and six expert depositions; (v) briefed a motion to certify the Class and  
15 opposed a petition for permission to appeal the Court's order certifying the Class pursuant  
16 to Rule 23(f); (vi) engaged experienced bankruptcy counsel to protect the Class's interests  
17 in Insys' bankruptcy proceedings; (vii) conducted an extensive Class-notice program  
18 advising prospective Class Members of the Action's pendency and Class Representative's  
19 motion to voluntarily dismiss Insys from the Action with prejudice; (viii) opposed  
20 defendants' summary judgment motion; (ix) engaged in hard-fought, arm's-length  
21 settlement negotiations overseen by an experienced third party neutral mediator; and  
22 (x) prepared for a trial set to commence on August 17, 2020. As a result of these extensive  
23 efforts and others discussed herein, Class Counsel had a thorough understanding of the  
24 strengths and weaknesses of the Class's claims against Defendant Kapoor, his  
25 considerable financial constraints, and the low potential to secure payment from

26 <sup>8</sup> The Kapoor Settlement combined with the Baker and Babich Settlements provides  
27 for a Class recovery of at least \$2.95 million, with the potential to increase to up to \$12.25  
28 million, and will resolve this Action in its entirety.



1 Defendant Kapoor following a trial victory, at the time the Settling Parties agreed to the  
2 Settlement.

3 10. Moreover, in agreeing to the Settlement, Class Representative and Class  
4 Counsel carefully considered the significant risks associated with advancing the Class’s  
5 claims against Defendant Kapoor, particularly the uncertainties of trial and post-trial  
6 appeals, as well as Defendant Kapoor’s limited ability to pay all or a portion of any trial  
7 judgment against him. Had the Settlement not been reached, Defendant Kapoor would  
8 have continued to vigorously contest Class Representative’s claims against him.

9 11. At trial, Defendant Kapoor would have argued, as he did throughout the  
10 course of the Action, that the alleged misstatement he made (discussed more fully below  
11 in Section V.A) was not actionable because it was a forward-looking statement protected  
12 by the PSLRA safe harbor, and was otherwise a vague statement of corporate optimism  
13 (puffery). Defendant Kapoor, supported by his economic expert, Dr. David C. Smith,  
14 Ph.D. (“Dr. Smith”), would also have argued that Class Representative would be unable  
15 to prove either loss causation or damages. Additionally, there were severe limitations on  
16 Defendant Kapoor’s ability to pay a judgment, and Class Representative faced the real  
17 risk that he would be unable to collect any payment at all from Defendant Kapoor—even  
18 after obtaining a judgment against Defendant Kapoor at trial.<sup>9</sup> Thus, recovery from  
19 Defendant Kapoor was highly uncertain in this case, and could not have been achieved  
20 without incurring substantial additional costs and considerable delay.

21 12. Class Counsel believes that the Settlement, particularly when viewed in the  
22 context of the risks and uncertainties of continued litigation and trial against Defendant  
23 Kapoor, is a favorable result for the Class. Here, Class Counsel was able to resolve the  
24 claims against Defendant Kapoor for at least \$700,000 in cash, with the potential to  
25 increase to \$10,000,000 in cash. Class Representative’s damages expert estimates the  
26

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27 <sup>9</sup> In connection with the Settling Parties’ settlement discussions, Defendant  
28 Kapoor’s Counsel shared details of Dr. Kapoor’s financial condition with Class Counsel.



1 Class's aggregate damages to range between approximately \$34.7 million and  
2 approximately \$189.5 million based on Class Representative's ability to establish  
3 damages relating to one or more of the alleged partial corrective disclosures. Accordingly,  
4 the recovery from Defendant Kapoor represents between approximately 0.37% and  
5 2.02% of the Class's estimated aggregate damages (assuming only the minimum  
6 \$700,000 cash payment is made) and potentially between approximately 5.28% and  
7 28.82% of the Class's estimated aggregate damages (if the Class receives the maximum  
8 \$10,000,000). These percentage of recovery ranges—on their own and without taking  
9 into consideration the additional recoveries from Messrs. Baker and Babich—are directly  
10 in line with the median ratio of securities class action settlements to investor losses in  
11 recent years as reported by NERA Economic Consulting.<sup>10</sup>

12 13. Class Counsel has worked with the Court-authorized Claims Administrator,  
13 A.B. Data, Ltd. ("A.B. Data"), to disseminate notice of the Kapoor Settlement to Class  
14 Members as directed in the Preliminary Approval Order. In this regard, A.B. Data has  
15 mailed over 29,900 Postcard Settlement Notices and 4,200 Settlement Notices to  
16 prospective Class Members and nominees.<sup>11</sup> Additionally, the Summary Settlement  
17 Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire* on  
18 July 20, 2020. *Id.* ¶ 12. Finally, the long-form Settlement Notice, Claim Form, Stipulation,  
19 and Preliminary Approval Order were posted to the Website for the Action,  
20 [www.InsysRXSecuritiesLitigation.com](http://www.InsysRXSecuritiesLitigation.com). *Id.* ¶ 14. As ordered by the Court and stated in  
21 the Settlement notices, objections are due to be received no later than September 24, 2020.

22 \_\_\_\_\_  
23 <sup>10</sup> See Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action*  
24 *Litigation: 2019 Full-Year Review*, NERA Economic Consulting, 20 (Feb. 12, 2020),  
25 [https://www.nera.com/content/dam/nera/publications/2020/PUB\\_Year\\_End\\_Trends\\_01\\_2120\\_Final.pdf](https://www.nera.com/content/dam/nera/publications/2020/PUB_Year_End_Trends_01_2120_Final.pdf) (finding between 2015 and 2018, the median ratio of settlements to  
investor losses increased from 1.6% in 2015 to 2.6% in 2018 and declined to 2.1% in  
2019).

26 <sup>11</sup> See Declaration of Eric Schachter Regarding: (A) Mailing of Settlement Notices  
27 for Kapoor Settlement; (B) Updates to Website and Toll-Free Telephone Hotline;  
28 (C) Posting of Settlement Notice and Claim Form on Website; and (D) Publication of  
Summary Settlement Notice ("Schachter Decl."), attached as Exhibit 2 hereto, ¶ 10.

1 To date, no objections have been filed with respect to any aspect of the Kapoor  
2 Settlement, the Plan of Allocation, or Class Counsel’s request for attorneys’ fees.<sup>12</sup>  
3 Moreover, the Kapoor Settlement has the full support of Class Representative Clark  
4 Miller. *See* Declaration of Clark Miller (“Miller Declaration”), attached as Exhibit 1  
5 hereto, ¶ 6.

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

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

13 15. This Action was brought by Insys investors against Insys and certain of the  
14 Company’s executive officers, including Dr. Kapoor—Insys’ co-founder, and Executive  
15 Chairman of the Board of Directors and Chief Executive Officer (“CEO”) during the  
16 Class Period<sup>14</sup>—for alleged violations of the federal securities laws. Class Representative  
17 alleged that defendants made materially false or misleading statements during the relevant  
18 time period regarding the marketing and sale of Subsys, including the source of Subsys  
19 sales growth. Class Representative further alleged that when the relevant truth was  
20 revealed, the price of Insys common stock declined, causing damages to Insys  
21 shareholders.

22  
23  
24 <sup>12</sup> In accordance with the Preliminary Approval Order, Class Counsel will provide  
25 the Court with further information on the Class’s response to the Kapoor Settlement,  
including any objections that may be received after this submission, by no later than  
October 8, 2020.

26 <sup>13</sup> *See* SAC, ¶¶ 1, 2.

27 <sup>14</sup> *See* SAC, ¶ 32. Dr. Kapoor assumed the role of Insys’ CEO on November 5, 2015.  
28 *Id.*

1           16. More specifically, after the Court’s August 1, 2017 ruling on defendants’  
2 motion to dismiss the SAC (discussed in detail below in Section III.C), the Action alleged  
3 securities fraud claims against Dr. Kapoor based upon a statement made in Insys’ 2014  
4 Form 10-K, issued on March 3, 2015, and signed by Dr. Kapoor (“Form 10-K  
5 Statement”). In the Form 10-K Statement, Dr. Kapoor and others represented that Insys’  
6 efforts to educate oncologists on the attributes of Subsys were a “key factor[]” in  
7 generating 2014 Subsys sales growth. Class Representative alleged that defendants’  
8 efforts to educate oncologists concerning Subsys were *not* a key factor in 2014 sales  
9 growth. Rather, Class Representative alleged that the Form 10-K Statement was:  
10 (i) misleading, because defendants failed to disclose that the overwhelming majority of  
11 Insys’ 2014 revenues, and, therefore, sales growth, arose from off-label Subsys  
12 prescriptions, including those generated by bribes and insurance fraud (“Criminal  
13 Enterprise”); and (ii) false, because Subsys prescriptions that oncologists wrote generated  
14 only negligible revenues for Insys in 2014, including during the fourth quarter of 2014.  
15 Class Representative further alleged that Dr. Kapoor made the Form 10-K Statement  
16 knowing or recklessly disregarding that it was materially false or misleading.

17           17. Class Representative also alleged that information correcting the Form 10-  
18 K Statement—i.e., that oncologist prescriptions were not a key factor in generating fourth  
19 quarter and full year 2014 Subsys revenues and/or revenue growth, and that such revenues  
20 and growth instead resulted from the Criminal Enterprise—entered the market through  
21 alleged disclosures made on November 4, 2015, December 3, 2015, and January 25, 2016  
22 (“Corrective Disclosures”). Each Corrective Disclosure revealed previously concealed  
23 and/or misrepresented material information, and as Class Representative asserted, caused  
24 the Class to suffer damages.

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27  
28

1 **III. THE LITIGATION EFFORTS OF CLASS REPRESENTATIVE AND**  
2 **PLAINTIFFS' COUNSEL**

3 **A. Commencement of the Action and Appointment of Lead Plaintiff and**  
4 **Lead Counsel**

5 18. On February 2, 2016, this securities class action was commenced in this  
6 Court with Richard DiDonato's filing of the initial complaint against Insys and individual  
7 defendants Baker, Babich, and Kapoor, asserting violations of Sections 10(b) and 20(a)  
8 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78j(b) and 78t(a),  
9 and Rule 10b-5, promulgated thereunder by the U.S. Securities and Exchange  
10 Commission ("SEC"), 17 C.F.R. § 240.10b-5. Doc. 1.

11 19. On April 4, 2016, Clark Miller (as well as others) moved to be appointed as  
12 lead plaintiff. Docs. 27-34. On June 3, 2016, the Court appointed Clark Miller as Lead  
13 Plaintiff pursuant to the PSLRA, and approved Lead Plaintiff's selection of Kessler Topaz  
14 as Lead Counsel for the proposed class and Bonnett, Fairbourn, Friedman & Balint, P.C.  
15 ("Bonnett Fairbourn") as Liaison Counsel for the proposed class. Doc. 40.<sup>15</sup>

16 20. The Court set a deadline of June 24, 2016 for filing an amended complaint  
17 in the Action. Doc. 41.

18 **B. Class Representative's Investigation, the Amended Complaint, and**  
19 **Defendants' Motion to Dismiss the Amended Complaint**

20 21. Prior to filing the Amended Complaint for Violation of the Federal  
21 Securities Laws ("Amended Complaint"), Class Counsel conducted an exhaustive  
22 investigation into the facts underlying this Action. As part of its investigation, Class  
23 Counsel reviewed voluminous publicly available information regarding the defendants,  
24 including: (i) Insys' public filings with the SEC; (ii) securities analysts' reports about  
25 Insys; (iii) transcripts of Insys' conference calls with securities analysts and investors;

26 <sup>15</sup> Lead Plaintiff and Lead Counsel were subsequently appointed Class  
27 Representative and Class Counsel, respectively, pursuant to the Court's September 20,  
28 2019 Order (Doc. 271) (*see* ¶ 61 below). For consistency and to avoid confusion, Lead  
Plaintiff and Lead Counsel will be referred to as Class Representative and Class Counsel,  
respectively, throughout the remainder of this Declaration.

1 (iv) Insys' press releases and other public statements; (v) media reports concerning Insys;  
2 (vi) court documents filed in several matters, including *United States v. Alfonso*, No. 3:15-  
3 cr-00111-MPS (D. Conn.), *United States v. Perhacs*, 1:16-cr-00024-CG (S.D. Ala.),  
4 *United States v. Roper*, 1:16-mj-03628 (S.D.N.Y.), *United States v. Serrano*, 1:16-mj-  
5 03629 (S.D.N.Y.), *United States v. Couch*, 1:15-cr-00088 (S.D. Ala.), and *Insys*  
6 *Therapeutics, Inc. v. Ferraro*, 7:15-cv-03613 (S.D.N.Y.); and (vii) the Notice of Unlawful  
7 Trade Practices and Proposed Resolution issued to Insys on July 10, 2015 by the Oregon  
8 Department of Justice in the matter captioned *In re Insys Therapeutics, Inc.*

9 22. Based upon Class Counsel's thorough investigation, Class Representative  
10 filed the Amended Complaint on June 24, 2016. Doc. 49.

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

16 **C. The Second Amended Complaint, Defendants' Motion to Dismiss the**  
17 **Second Amended Complaint, and the Court's Ruling Thereon**

18 24. Prior to a ruling on defendants' motion to dismiss the Amended Complaint,  
19 and based on information that became available after its filing—most notably, the  
20 indictments of defendant Babich and Alec Burlakoff<sup>16</sup> in the action *United States v.*  
21 *Babich, et al.*, No. 16-cr-10343-ADB (D. Mass.)—Class Representative, with the consent  
22 of all defendants, filed the operative complaint in the Action, the Second Amended  
23 Complaint (or, SAC), on December 22, 2016. The SAC asserts claims under Sections  
24 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5  
25 promulgated thereunder by the SEC, 17 C.F.R. § 240.10b-5. *See generally* SAC.

26 \_\_\_\_\_  
27 <sup>16</sup> 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           25. Defendants moved to dismiss the SAC for failure to state a claim pursuant  
2 to Rules 9(b) and 12(b)(6) of the Federal Rules and pursuant to the pleading requirements  
3 of the PSLRA on January 18, 2017. Doc. 85. Defendants' arguments for dismissing the  
4 SAC included that:

- 5           • the SAC did not sufficiently plead actionable misstatements because Insys  
6 disclosed to investors: (i) the risk that the alleged misconduct at issue could  
7 occur, including, specifically, the risks associated with employee  
8 misconduct in marketing and sales practices; (ii) that Insys was under  
9 investigation by certain government agencies, including the U.S.  
10 Attorney's Office for the District of Massachusetts and the U.S. Department  
11 of Health and Human Services; and (iii) that Insys had been sued in civil  
12 litigation for substantially similar misconduct at issue in this case;
- 13           • certain of the challenged misstatements were neither false nor misleading,  
14 as Insys had purported programs in place to market and sell Subsys to  
15 oncologists during fiscal year 2014;
- 16           • many of the statements challenged by Class Representative were "forward-  
17 looking statements," protected by the PSLRA's statutory "safe harbor";
- 18           • the SAC failed to plead facts giving rise to a "strong inference" of scienter  
19 as to Defendant Kapoor because the SAC did not contain any allegations of  
20 his actual knowledge of the alleged fraud;
- 21           • the SAC failed to plead loss causation because the information conveyed in  
22 the alleged Corrective Disclosures was already known to the market (i.e.,  
23 not "new") and not corrective of defendants' prior alleged misstatements;  
24 and
- 25           • the SAC's Section 20(a) claims for "control person liability" were  
26 unsustainable because the SAC failed to plead a primary violation of  
27 Section 10(b).  
28

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

- 6           • the SAC pleaded actionable misstatements because defendants: (i) failed to  
7 disclose the true source of Subsys sales, which was derived primarily from  
8 the Criminal Enterprise; (ii) defendants’ statements were not protected by  
9 the PSLRA “safe harbor” or “bespeaks caution” doctrine because, *inter*  
10 *alia*, they were not accompanied by adequate cautionary language and  
11 were made with actual knowledge of their falsity; and (iii) defendants’  
12 factually intensive truth-on-the-market argument could not be resolved at  
13 the pleading stage;
- 14           • the SAC sufficiently alleged scienter, based on: (i) defendants’ actual  
15 knowledge or reckless disregard of the fraud; and (ii) the “core operations”  
16 inference, including, specifically, that it would have been “absurd” for  
17 defendants not to have been aware of the true source of and “key factors”  
18 in Insys’ revenues; and
- 19           • the SAC adequately alleged loss causation, based on ten corrective  
20 disclosures which allegedly revealed new information to the market and  
21 caused the price of Insys common stock to decline.

22           27. On February 9, 2017, defendants filed their reply in further support of their  
23 motion to dismiss. Doc. 95. In their reply, defendants advanced further arguments in  
24 support of their purported bases for dismissing the SAC.

25           28. Following full briefing on the motion and oral argument, the Court, on  
26 August 1, 2017, granted in part and denied in part defendants’ motion to dismiss the SAC.  
27 Doc. 107. Specifically, the Court sustained the SAC’s allegations as to Defendant Kapoor  
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1 and defendants Baker and Babich with respect to two statements made during the Class  
2 Period. As relevant to Defendant Kapoor, the Court sustained Class Representative’s  
3 claims based upon the representation in the Form 10-K Statement that “expanding the  
4 usage of Subsys for BTCP by building awareness among oncologists” was one of the  
5 “key factors in generating continued growth in Subsys usage.” SAC ¶ 272. As the Court  
6 observed in sustaining Class Representative’s claims based upon the Form 10-K  
7 Statement: “Subsys’s growth had little—if anything—to do with breakthrough cancer  
8 pain and instead depended chiefly on doctors prescribing it off-label . . . .” Doc. 107 at  
9 21.

10 29. With respect to Defendant Kapoor’s scienter, the Court concluded that “it  
11 is absurd to think he would not have known that Subsys’s revenue, which was glaringly  
12 high among comparable fentanyl products, was being driven by fraud.” *Id.* at 27. The  
13 Court further concluded that loss causation had been adequately alleged with respect to  
14 three corrective disclosures: (i) on November 4, 2015, in a CNBC article;  
15 (ii) on December 3, 2015, in a Southern Investigative Reporting Foundation (“SIRF”)  
16 article; and (iii) on January 25, 2016, also in a SIRF article. *Id.* at 33, 35, 39. Finally, the  
17 Court held that the SAC adequately alleged control person claims as to Defendant Kapoor  
18 under Section 20(a). *Id.* at 39.

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

#### 21 **D. Class Representative’s Extensive Discovery Efforts**

22 31. Through its efforts, Class Counsel obtained more than 14 million pages of  
23 documents from defendants and nonparties. As set forth below, Class Counsel reviewed  
24 and analyzed these documents, as well as defendants’ responses to the extensive written  
25 discovery that Class Representative served, in order to engage experts, prepare for  
26 depositions, prepare for and oppose defendants’ motion for summary judgment, and  
27 develop the record for trial. These discovery efforts provided Class Counsel with a  
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1 thorough understanding of the strengths and weaknesses of Class Representative’s  
2 claims, including his claims against Defendant Kapoor specifically, and assisted Class  
3 Counsel in considering and evaluating the fairness of the Kapoor Settlement. A summary  
4 of Class Counsel’s discovery efforts follows.

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

7 32. On May 9, 2018 the parties exchanged comprehensive initial disclosures  
8 pursuant to Federal Rule 26(a)(1).

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

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

20 35. On May 30, 2018, the parties participated in an in-person Rule 16  
21 conference with the Court. Doc. 145. Following the conference, the Court issued an Order  
22 approving the parties’ Joint Discovery Plan and endorsing the parties’ proposed schedule.  
23 Doc. 147.

24 36. On July 5, 2018, after several rounds of negotiations, the exchange of  
25 multiple drafts and rounds of edits, and several telephonic meet and confer sessions, the  
26 parties entered into a Stipulated Protective Order to govern confidentiality in the case,  
27 which the Court signed on July 18, 2018. Docs. 153-1, 156.  
28

1                   **2. Class Representative’s Discovery Propounded on Defendants**

2                   **a. Document Discovery**

3           37. Class Representative served his First Set of Requests for the Production of  
4 Documents on May 16, 2018 (“First Requests”). Class Representative thereafter  
5 negotiated with defendants’ prior counsel, Cravath Swaine & Moore LLP (“Cravath”)  
6 regarding defendants’ responses and objections to his First Requests and the scope of  
7 defendants’ document production in response thereto.

8           38. In connection with the numerous ongoing governmental and regulatory  
9 actions against and investigations of Insys at the time that Class Representative served  
10 his First Requests, the Company had previously collected and produced a significant  
11 volume of documents (“Regulatory Production”) potentially relevant to Class  
12 Representative’s claims. During meet and confers regarding the parties’ Joint Discovery  
13 Plan and the First Requests, the parties discussed how to make efficient use of the  
14 Regulatory Production in this Action.

15           39. Class Counsel and defendants (through then-counsel, Cravath) ultimately  
16 agreed that document discovery in this case would proceed in two phases. First,  
17 defendants would produce to Class Representative the entirety of the Regulatory  
18 Production. Second, the parties agreed that after Class Representative had an opportunity  
19 to review the Regulatory Production, they would meet and confer concerning any  
20 additional documents that Class Representative believed were necessary for defendants  
21 to produce to satisfy their document production obligations in this case.

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

25           41. On March 21, 2019, Class Representative served his Second Set of  
26 Requests for Production of Documents (“Second Requests”). In response to Class  
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1 Representative's Second Requests, counsel for Insys produced more than 200,000  
2 additional documents.

3 42. Class Counsel's document review, which proceeded according to the  
4 protocols discussed below, began shortly after receiving the first installment of the  
5 Regulatory Production in November 2018.

6 43. First, Class Counsel solicited bids from database vendors for a document-  
7 management system that could accommodate the size of the production and offer the  
8 latest coding, review, and search capabilities for electronic discovery management.  
9 Ultimately, Class Counsel negotiated a favorable pricing arrangement with KLDDiscovery  
10 ("KLD"), a third-party vendor, to host this significant volume of information on its  
11 sophisticated electronic database and litigation support platform. Class Counsel used this  
12 electronic database to organize and search the large volume of documents, which allowed  
13 attorneys performing document review to categorize documents by issues and level of  
14 relevance, and to identify the critical documents supporting Class Representative's  
15 claims.

16 44. Second, once the documents were loaded into the database, Class Counsel  
17 utilized the algorithm-based "technology assisted review" (frequently referred to as  
18 "TAR" or "active learning") to rank documents by relevance and priority. This allowed  
19 Class Counsel to focus its review on the most relevant documents first, and to exclude  
20 potentially irrelevant material by prioritizing documents based on their relative  
21 importance.

22 45. Third, to facilitate the document review, Class Counsel developed a  
23 detailed review protocol. Initially, Class Counsel created a comprehensive coding  
24 manual, with explanatory notes covering: (i) the key facts at issue in the Action;  
25 (ii) relevance coding instructions; and (iii) "tags" covering approximately fifteen unique  
26 issues and sub-issues.

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1           46.     Next, Class Counsel assembled a team of experienced attorneys to review  
2 and analyze defendants’ documents. Many of these attorneys analyzed defendants’  
3 production full time. These lawyers reported directly to senior associates and partners,  
4 participated in weekly meetings to discuss their findings, and prepared memoranda on  
5 key factual issues.

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

17                           **b.     Written Discovery**

18           48.     Class Representative also served extensive written discovery on  
19 defendants, including 96 interrogatories (many of which were contention interrogatories)  
20 and 534 requests for admission (“RFAs”). The parties held numerous meet and confers  
21 with respect to Class Representative’s written discovery requests, which resulted in  
22 defendants’ agreement to amend certain of their discovery responses.

23           49.     Defendants’ responses to Class Representative’s contention interrogatories  
24 were ultimately instrumental in framing expert discovery, particularly with respect to  
25 Class Representative’s accounting and industry experts who relied on and evaluated  
26 evidence cited by defendants regarding the source of Insys’ revenues and defendants’  
27 purported efforts with oncologists. Defendants’ RFA responses were also critical to Class  
28

1 Representative's arguments at summary judgment and (had the parties reached that stage)  
2 trial.

3 **c. Deposition Discovery**

4 50. As summarized below, Class Counsel also took or defended sixteen  
5 depositions. Many of these depositions required Class Counsel to travel to locations such  
6 as Arizona, Florida, California, and New York.

7 <b>Deponent</b>	<b>Role</b>	<b>Date</b>	<b>Location</b>
8 Miller, Clark	Class Representative	9/28/2018	Larkspur, CA
9 Coffman, CFA, Chad	Expert (Class Representative)	10 10/4/2018	New York, NY
11 Smith, Ph.D., David C.	Expert (defendants)	11/15/2018	New York, NY
12 Brumm, Adam	Rule 30(b)(6) (Insys)	6/6/2019	Phoenix, AZ
13 Kizior, Eric	Rule 30(b)(6) (Insys)	6/7/2019	Phoenix, AZ
14 Sharpsten, Kevin	Nonparty	6/12/2019	Los Angeles, CA
15 Pipko, Brian	Nonparty	6/14/2019	West Palm Beach, FL
16 Baker, Darryl S.	defendant	6/18/2019	Phoenix, AZ
17 Yu, Xun	Nonparty	6/20/2019	Miami, FL
Kapoor, John N.	defendant	6/20/2019	Phoenix, AZ
18 Babich, Michael L.	defendant	6/21/2019	Phoenix, AZ
Burlakoff, Alec	Nonparty	6/21/2019	West Palm Beach, FL
19 Russell, John	Expert (Class Representative)	9/17/2019	Radnor, PA
20 Devor, CPA, Harris L.	Expert (Class Representative)	9/18/2019	Radnor, PA
21 Smith, Ph.D., David C.	Expert (defendants)	10/22/2019	New York, NY
22 Russell, John	Expert (Class Representative)	6/30/2020	Telephonic

23 **3. Discovery of Class Representative**

24  
25  
26 51. Defendants also sought extensive discovery from Class Representative.  
27 Most significantly, on May 16, 2018, defendants served Class Representative with  
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1 twenty-eight document requests, which covered subjects including: (i) Class  
2 Representative's investments in Insys securities; (ii) Class Representative's investment  
3 strategies and records; (iii) Class Representative's participation in the Action; and (iv) all  
4 lawsuits that Class Representative had participated in ("defendants' First Requests").  
5 Class Representative served responses and objections to defendants' First Requests on  
6 June 15, 2018.

7 52. The parties thereafter met and conferred regarding the scope of defendants'  
8 First Requests. In response to defendants' documents requests, Class Representative, with  
9 the help of Class Counsel, performed an extensive search and review of documents in his  
10 possession, custody, or control. Such documents were located in both hard copy and  
11 electronic format, and were produced to defendants.

12 **E. Class Counsel's Work with Experts**

13 53. Class Representative retained three testifying experts: (i) Chad Coffman,  
14 CFA, of Global Economics Group ("Coffman"), who was engaged to testify concerning  
15 market efficiency, loss causation, and damages; (ii) Harris L. Devor, CPA ("Devor"), who  
16 was engaged to testify concerning Insys' efforts to quantify the revenue growth, if any,  
17 generated by oncologists during the relevant period, including efforts to artificially  
18 increase Subsys prescriptions and revenues attributed to the oncology specialty group, as  
19 well as in comparison to the revenues that non-oncologists generated for the Company;  
20 and (iii) John Russell ("Russell"), who was engaged to testify about Insys' oncology  
21 marketing efforts, including whether any of the Company's programs to promote the drug  
22 to oncologists were "unique."

23 54. Coffman issued reports on August 31, 2018 (Expert Report on the issue of  
24 market efficiency), November 30, 2018 (Expert Rebuttal Report on the issue of market  
25 efficiency), July 26, 2019 (Expert Report on loss causation and damages), and November  
26 1, 2019 (Expert Rebuttal Report on loss causation and damages). Devor issued reports on  
27 July 26, 2019 (Statement) and November 1, 2019 (Supplemental Statement). Russell  
28



1 likewise issued reports on July 26, 2019 (Expert Report) and November 1, 2019  
2 (Supplemental Report).

3 55. In addition to serving Class Representative's experts' opening,  
4 supplemental, and rebuttal reports, Class Counsel defended depositions of Class  
5 Representative's experts, including the deposition of Coffman on October 4, 2018,  
6 depositions of Russell on September 17, 2019 and June 30, 2020, and the deposition of  
7 Devor on September 18, 2019. Prior to each of the foregoing depositions, Class Counsel  
8 engaged in thorough preparation with each expert. Class Counsel also successfully  
9 defended against motions to strike the supplemental reports of Messrs. Devor and Russell  
10 (*see* Docs. 276-88, 293-94, and 340).

11 56. In response to Class Representative's experts, Insys and, subsequently,  
12 Kapoor retained Dr. Smith to respond to Coffman's opinions on the issues of market  
13 efficiency, loss causation, and damages. Smith issued reports on October 26, 2018 and  
14 September 20, 2019. Each of these reports required Class Counsel to confer extensively  
15 with Coffman in order to formulate an appropriate response. Class Counsel deposed  
16 Smith on November 15, 2018 in connection with class certification, and on October 22,  
17 2019 in connection with loss causation and damages.

18 **F. Class Representative's Motion to Certify the Class**

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

3 58. Defendants opposed Class Representative's Class Certification Motion on  
4 October 26, 2018 (Doc. 165), supported by the Expert Rebuttal Report of David C. Smith,  
5 Ph.D. (Doc. 165-2). Defendants did not challenge Class Representative's arguments that  
6 he would be an adequate class representative or that his claims were typical of the claims  
7 of other Class Members. Rather, in their opposition submission, defendants argued,  
8 among other things, that:

- 9 • the question of reliance is not common to the putative class because it  
10 cannot invoke the presumption of reliance recognized in *Basic v. Levinson*  
11 because Class Representative failed to establish that the market for Insys  
12 stock was efficient during the Class Period and he is not entitled to a  
13 presumption of reliance under *Affiliated Ute Citizens of the State of Utah v.*  
14 *United States* because the alleged misstatements at issue are affirmative  
15 misrepresentations, not omissions;
- 16 • even if Class Representative was able to invoke the *Basic v. Levinson*  
17 presumption, defendants have rebutted the presumption by producing direct  
18 empirical evidence that the alleged misstatements, both made on March 3,  
19 2015, did not cause a statistically significant increase in the price of Insys'  
20 stock; and
- 21 • Class Representative has not shown that the question of damages is  
22 common to the putative class because he has failed to articulate a classwide  
23 damages methodology that is consistent with his theory of liability, as  
24 required under *Comcast Corp. v. Behrend*.

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

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

12 61. On September 20, 2019, the Court granted Class Representative's Class  
13 Certification Motion ("Class Certification Order")—certifying the Class, appointing Lead  
14 Plaintiff (and then-proposed Class Representative) Clark Miller as Class Representative,  
15 and appointing Kessler Topaz as Class Counsel and Bonnett Fairbourn as Liaison  
16 Counsel. Doc. 271. The Court's Class Certification Order, however, made clear that it did  
17 not apply to Insys based upon the automatic stay provisions of 11 U.S.C. § 362(a) of the  
18 United States Code. *Id.* See Section III.G below.

19 62. Thereafter, on October 4, 2019, Defendant Kapoor filed with the United  
20 States Court of Appeals for the Ninth Circuit a petition for permission to appeal the  
21 Court's Class Certification Order pursuant to Federal Rule 23(f) ("Petition"). Doc. 273.  
22 Class Representative opposed Defendant Kapoor's Petition on October 15, 2019. On  
23 December 18, 2019, the Ninth Circuit denied Defendant Kapoor's Petition.

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

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

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

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

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

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

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

16         68. Also, on May 14, 2020, Class Counsel reported to the Court that there were  
17 no objections to the Insys Dismissal Motion. Doc. 337. On May 14, 2020, the Court  
18 granted the Insys Dismissal Motion. Doc. 338.

### 19         **I. Defendants’ Motion for Summary Judgment**

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

24         70. On December 4, 2019, the Court held an in-person conference to discuss  
25 the contemplated motions for summary judgment. At that hearing, the Court set a briefing  
26 schedule for defendants’ motion for summary judgment.

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

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

17           72. Class Representative opposed the Summary Judgment Motion on February  
18 3, 2020. Docs. 324-27. In opposing the Summary Judgment Motion, Class Representative  
19 argued, among other things, that:

- 20          • the alleged misstatements were materially misleading because they omitted  
21          information regarding the “key factors” in Insys’ revenues (i.e., the  
22          Criminal Enterprise);
- 23          • the alleged misstatements were false because no more than 6% of Insys’  
24          revenues was generated by oncologists;
- 25          • the alleged misstatements were objectively verifiable, and thus not forward-  
26          looking, puffery, or statements of opinion; and

- each of the alleged corrective disclosures revealed new information to the market that partially corrected defendants’ prior misstatements.

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

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

**J. Preparations for Trial**

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

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

77. Prior to the Court’s July 2, 2020 order preliminarily approving the Settlement with Defendant Kapoor (Doc. 373), the parties completed all of the work required to submit the PTO to the Court on June 18, 2020. Among other things, Class Counsel and Defendant Kapoor’s Counsel exchanged: (i) witness lists; (ii) exhibit lists, objections thereto, and copies of the exhibits; (iii) deposition designations, objections thereto, and counter-designations; (iv) lists of contemplated motions in limine; and (v) drafts of items A-Q of the PTO. Counsel for the parties also conducted a lengthy meet and confer session on June 3, 2020 to discuss the draft sections of the PTO that they had



1 prepared and exchanged. The parties filed their respective motions in limine, and Class  
2 Representative had completed his oppositions to Defendant Kapoor's motions in limine,  
3 which he was prepared to file on July 2, 2020, the same day that the Court preliminarily  
4 approved the Settlement with Defendant Kapoor.

#### 5 **IV. THE KAPOOR SETTLEMENT**

##### 6 **A. The Settlement Negotiations**

7 78. On July 15, 2019, while the parties' discovery efforts were ongoing and  
8 Lead Plaintiff's Class Certification Motion was pending, Lead Plaintiff and Defendant  
9 Kapoor participated in a full-day mediation in New York, New York before Michelle  
10 Yoshida ("Ms. Yoshida") of Phillips ADR. This mediation did not result in a resolution  
11 of the Action.

12 79. Shortly following the Court's denial of defendants' Summary Judgment  
13 Motion, and while the Settling Parties' trial preparations were well underway, Class  
14 Representative and Defendant Kapoor restarted their earlier discussions concerning the  
15 possibility of resolving the Action. Following approximately two months of additional  
16 hard-fought, arm's-length negotiations overseen by Ms. Yoshida, Class Representative  
17 and Defendant Kapoor agreed to resolve the Action against Defendant Kapoor. The  
18 Settling Parties memorialized their agreement in principle to resolve the Action in a term  
19 sheet (subject to additional terms and conditions to be set forth in a detailed settlement  
20 agreement), that the Settling Parties executed on the evening of June 24, 2020. On June  
21 25, 2020, the Settling Parties filed a notice of settlement informing the Court that they  
22 had reached an agreement in principle to resolve the Action as to Dr. Kapoor. Doc. 364.

##### 23 **B. Preparation of Settlement Documentation**

24 80. Thereafter, Class Counsel began working on various documents in  
25 connection with the Settling Parties' agreement to settle the Action as well as Class  
26 Representative's anticipated motion for preliminary approval of the Kapoor Settlement.  
27  
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1           81. Counsel for the Settling Parties negotiated the specific terms of the  
2 Stipulation and exchanged drafts of the Stipulation (as well as the exhibits thereto). After  
3 negotiating the specific terms of their agreement, the Settling Parties executed the  
4 Stipulation setting forth their final and binding agreement to settle the Action against  
5 Defendant Kapoor on July 1, 2020.

6           **C. Class Counsel Seeks Preliminary Approval of the Kapoor Settlement**

7           82. On July 1, 2020, Class Representative filed the Stipulation (and related  
8 exhibits) along with his motion for an order preliminarily approving settlement with  
9 Defendant Kapoor and providing for notice and supporting memorandum (“Preliminary  
10 Approval Motion”). Doc. 371. The following day, July 2, 2020, the Court entered the  
11 Preliminary Approval Order, scheduling the final hearing on the Kapoor Settlement and  
12 related matters for October 15, 2020 at 9:30 a.m. Doc. 373. On the same day, the Court  
13 entered an Order severing the claims against Dr. Kapoor from the August 17, 2020 trial  
14 of the claims against Defendant Babich. Doc. 374.<sup>17</sup>

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

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

23           84. At the time the Settling Parties reached their agreement in principle to  
24 resolve this Action, Class Representative and Class Counsel had ample material to  
25 evaluate the strengths and weaknesses of the claims alleged in the SAC. Class Counsel’s  
26

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27 <sup>17</sup> The Court previously severed the claims against defendant Baker from the August  
28 17, 2020 trial in connection with the Baker Settlement. Doc. 348.

1 exhaustive factual and legal research and analysis, the considerable record developed  
2 through document and deposition discovery, expert discovery, and in extensive  
3 preparation for trial, as well as Defendant Kapoor's legal and factual arguments in  
4 connection with defendants' Summary Judgment Motion and the Settling Parties'  
5 settlement discussions, informed Class Representative and Class Counsel that, while their  
6 case against Defendant Kapoor had merit, there were also numerous factors that made the  
7 outcome of continued litigation and ultimately a trial in the Action against Defendant  
8 Kapoor uncertain. Class Representative and Class Counsel conscientiously evaluated  
9 these factors in determining the course of action that was in the best interests of the Class.

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

18 86. There were also severe limitations on the ability of Defendant Kapoor to  
19 pay a substantial judgment, and Class Representative faced a significant risk that he  
20 would not be able to collect any payment at all from Defendant Kapoor—even if a  
21 judgment was obtained against him at trial. In addition, the bankruptcy of the corporate  
22 defendant, Insys, seriously limited the sources of recovery in this proceeding, and it  
23 created a number of other challenges to the successful prosecution of claims against the  
24 remaining defendants.

25 **A. Risks Concerning Establishing Defendant Kapoor's Liability**

26 87. Had the Action continued against Defendant Kapoor, Class Representative  
27 faced significant challenges to proving that he made a materially false or misleading  
28

1 statement. As set forth above, throughout the Action, Defendant Kapoor maintained that  
2 the only allegedly false or misleading statement attributable to him was: (i) forward  
3 looking; (ii) puffery; and, in any event, (iii) literally true. Class Counsel anticipates  
4 Defendant Kapoor would have continued to press these defenses at trial.

5 88. Certain of Defendant Kapoor's defenses could have easily resonated with a  
6 jury. For instance, Defendant Kapoor would have likely have presented evidence showing  
7 that Insys made efforts to convince oncologists to prescribe Subsys. Indeed, while the  
8 parties disputed the efficacy of Insys' efforts on this front, discovery revealed that certain  
9 programs were nonetheless in place during fiscal year 2014. Evidence existed, for  
10 example, showing that Insys: (i) hired Brian Pipko as Vice President of Oncology;  
11 (ii) maintained an oncology sales force; and (iii) attempted to market Subsys to  
12 oncologists through the use of nurse educators.

13 89. Further, Defendant Kapoor would likely have continued to point to the lack  
14 of traditional indicia of scienter, including that he did not sell any of his Insys shares  
15 during the Class Period. This also could have resonated with a jury. In fact, according to  
16 Insys' 2015 Proxy Statement Pursuant to Section 14(a) of the Exchange Act, Dr. Kapoor  
17 owned approximately 60% of Insys' common stock as of March 1, 2015.

18 **B. Risks Concerning Loss Causation and Damages**

19 90. Even if Class Representative succeeded in establishing Defendant Kapoor's  
20 liability at trial, there were considerable challenges to his ability to prove loss causation  
21 and damages. On these issues, Class Representative would ultimately have to prove  
22 (through expert testimony) that the revelation of the alleged fraud through the partial  
23 Corrective Disclosures made on November 4, 2015, December 3, 2015, and January 25,  
24 2016 proximately caused the substantial declines in the price of Insys common stock, and  
25 that other information released and absorbed by the market on those days played little or  
26 no role in the price declines.

1           91. Class Representative believed that he and his expert would bring forth  
2 sufficient evidence to support a finding of loss causation and damages at trial. At the time  
3 that the parties agreed to the Settlement, however, Defendant Kapoor was positioned to  
4 present and rely upon the expert testimony of his expert, Dr. Smith, leading the parties'  
5 proof on loss causation and damages to result in an uncertain "battle of the experts" before  
6 the jury.

7           92. Among other things, Defendant Kapoor was prepared to present evidence  
8 (through Dr. Smith) contending that none of the Corrective Disclosures actually  
9 "corrected" the Form 10-K Statement because no disclosure mentioned Insys' oncology  
10 efforts one way or the other. Similarly, Defendant Kapoor would have presented evidence  
11 in an effort to prove that the Corrective Disclosures did not "correct" the Form 10-K  
12 Statement because no Corrective Disclosure identified the source or amount of any  
13 Subsys sales, and gave no indication that Insys was not making efforts to have oncologists  
14 prescribe the drug.

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

21           94. Finally, Defendant Kapoor would have argued that Class Representative  
22 could not recover any damages from the final Corrective Disclosure on January 25, 2016  
23 because Insys' stock price did not suffer a statistically significant decline that day.

24           95. If Class Representative were to lose one or more of the Corrective  
25 Disclosures at trial, the Class's recoverable damages would have been greatly reduced. In  
26 this regard, if the Class lost the January 25, 2016 alleged corrective disclosure, but proved  
27 loss causation as to the first two alleged corrective disclosures, Class Representative's  
28

1 damages expert estimates that aggregate damages would drop from approximately  
2 \$189.5 million to approximately \$123.3 million. Likewise, if Dr. Kapoor convinced a  
3 jury that the December 3, 2015 alleged corrective disclosure revealed nothing new to the  
4 market, estimated damages tied solely to the remaining November 4, 2015 alleged  
5 corrective disclosure would drop to approximately \$34.7 million.

6 **C. Risks of Non-Payment**

7 96. In addition to facing the risks of establishing liability, loss causation, and  
8 damages, Class Representative faced a real risk of collecting very little from Defendant  
9 Kapoor following a trial judgment in the Class's favor.

10 97. *First*, based upon his Criminal Conviction stemming from actions that he  
11 allegedly committed in connection with marketing Subsys and other coverage defenses,  
12 there were no insurance proceeds available to Dr. Kapoor to fund any portion of a  
13 settlement or a judgment in the Action. *See* Doc. 371 at 10-13.

14 98. *Second*, in connection with his Criminal Conviction, Dr. Kapoor is  
15 obligated to pay up to \$61,920,133.65 in restitution, forfeiture, and fines (i.e., the  
16 "Criminal Obligation"). Through his counsel, Dr. Kapoor has represented that his  
17 Criminal Obligation far exceeds his liquid assets and represents the vast majority of his  
18 net worth. In connection with the Kapoor Settlement, Defendant Kapoor's Counsel  
19 further represented that Dr. Kapoor was working with the DOJ to create a payment  
20 schedule that would require him to liquidate his assets over time in order to maximize the  
21 likelihood that the Criminal Obligation will be satisfied in full.

22 99. Reflecting these constraints, before agreeing to the Kapoor Settlement,  
23 Defendant Kapoor's Counsel advised the DOJ of the Settlement Consideration, and  
24 confirmed to the DOJ that the consideration at issue here will not interfere with Dr.  
25 Kapoor's obligation to satisfy his Criminal Obligation. Without such confirmation, Dr.  
26 Kapoor would have been subject to the risk of immediate seizure of his assets by the DOJ.  
27 Given Dr. Kapoor's limited resources in light of the Criminal Obligation, Defendant  
28

1 Kapoor's Counsel could not make such a representation to the DOJ if the Down Payment,  
2 Monthly Payments, or Appeal Payment (as defined in the Stipulation) were higher. Based  
3 on all the information at their disposal, Defendant Kapoor's Counsel informed Class  
4 Counsel that they believe the consideration that Dr. Kapoor is providing in the Settlement  
5 is the maximum amount of consideration Dr. Kapoor could pay. Based upon its own  
6 independent review of Dr. Kapoor's current financial condition, Class Counsel concluded  
7 that, absent some future reduction or independent source of funding, the Criminal  
8 Obligation would exceed Dr. Kapoor's assets if he were forced to liquidate them to satisfy  
9 the Criminal Obligation—a result that likely would have occurred if Class Representative  
10 demanded a larger upfront payment as part of the Settlement.

11       100. Likewise, Defendant Kapoor's Counsel anticipated that, if the Action had  
12 proceeded to trial with a verdict in the Class's favor, then the DOJ would most likely have  
13 sought to seize Dr. Kapoor's assets in their entirety, in which case the assets liquidated  
14 likely would not be sufficient to satisfy the Criminal Obligation, let alone any portion of  
15 a judgment in this matter. Thus, Class Counsel concluded that accepting material  
16 proceeds now, particularly with the potential for upside in the future, rather than pursuing  
17 a likely judgment-proof defendant after trial, is in the best interests of the Class.

18       101. Based upon Dr. Kapoor's constrained personal means and the absence of  
19 insurance coverage, there was a strong likelihood that Class Representative would have  
20 recovered *less* from Dr. Kapoor after a verdict in Class Representative's favor than the  
21 amount recovered for the benefit of the Class through the Settlement. Moreover, any  
22 amount that Class Representative could have recovered from Dr. Kapoor following a trial  
23 judgment in Class Representative's favor would have been diminished by the significant  
24 additional expenses that Class Counsel would have incurred in presenting the case at trial.  
25 Among other things, the costs of trial would have included: (i) the travel, lodging, and  
26 testimony of at least two expert witnesses; (ii) the travel and lodging for Class Counsel;

27  
28



1 and (iii) the assistance of a trial consultant. Class Counsel would also have incurred  
2 significant additional attorneys' fees.

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

5 102. By its Preliminary Approval Order, the Court authorized Class Counsel to  
6 retain A.B. Data as the Claims Administrator to supervise and administer the notice  
7 procedure in connection with the Kapoor Settlement, as well as the processing of Claims.  
8 Doc. 373, ¶ 4.<sup>18</sup> In accordance with the Preliminary Approval Order, A.B. Data, working  
9 under Class Counsel's supervision: (i) mailed by First-Class mail a copy of the Postcard  
10 Settlement Notice to potential Class Members who were previously mailed notice in  
11 connection with Class Notice and/or the Baker Settlement and any other potential Class  
12 Member who may be identified, as well as copies of the Postcard Settlement Notice, in  
13 bulk, to brokers and other nominees ("Nominees") who previously requested copies of  
14 the Class Notice and/or notice of the Baker Settlement in bulk; (ii) mailed a copy of the  
15 Settlement Notice and Claim Form (together, the "Notice Packet") to the Nominees  
16 contained in A.B. Data's Nominee database; (iii) published the Summary Settlement  
17 Notice in *Investor's Business Daily* and transmitted the same over the *PR Newswire*; and  
18 (iv) updated the Website for the Action, [www.InsysRXSecuritiesLitigation.com](http://www.InsysRXSecuritiesLitigation.com), to  
19 provide information about the Kapoor Settlement, including downloadable copies of the  
20 Settlement Notice and Claim Form. Schachter Decl., ¶¶ 4-14.

21 103. The Postcard Settlement Notice contains important information concerning  
22 the Kapoor Settlement and, along with the Summary Settlement Notice, directs recipients  
23 to the Website for additional information regarding the Settlement (and the Action),  
24 including the long-form Settlement Notice, which includes, among other things, details  
25 about the Kapoor Settlement, including details of the Settlement Consideration and timing

26 \_\_\_\_\_  
27 <sup>18</sup> A.B. Data was previously approved by the Court to be the Administrator for Class  
28 Notice, Doc. 331, and the Court preliminarily approved A.B. Data disseminate notice of  
the Baker Settlement, Doc. 347.

1 of payment, the information required to submit a Claim, and a copy of the Plan of  
2 Allocation as Appendix A. Collectively, the notices provide the Class definition, a  
3 description of the Kapoor Settlement, information regarding the claims asserted in the  
4 Action, and information to enable Class Members to determine whether to: (i) participate  
5 in the Settlement by completing and submitting a Claim Form; or (ii) object to any aspect  
6 of the Kapoor Settlement, the Plan of Allocation, and/or the Fee Application. The notices  
7 also advise Class Members that if they already submitted a Claim Form in connection  
8 with the Baker Settlement, their Baker Settlement Claim Form will be processed for the  
9 Kapoor Settlement and they do not need to resubmit their Claim Form.

10 104. The Postcard Settlement Notice and Settlement Notice also inform  
11 prospective Class Members of Class Counsel's intent to apply for an award of attorneys'  
12 fees, *inclusive* of any remaining litigation expenses incurred by Plaintiffs' Counsel in  
13 connection with the institution, prosecution, and resolution of the claims against  
14 Defendant Kapoor which were not sought to be reimbursed in connection with the Baker  
15 Settlement, in an amount not to exceed 30% of the Settlement Fund in the aggregate. *See*  
16 *Schachter Decl.*, Exs. A & B.

17 105. In accordance with the Preliminary Approval Order, A.B. Data began  
18 mailing Postcard Settlement Notices to potential Class Members and Nominees, as well  
19 as Notice Packets to Nominees, on July 13, 2020. *Schachter Decl.*, ¶¶ 6-7. To date, A.B.  
20 Data has disseminated more than 29,900 Postcard Settlement Notices and 4,200 Notice  
21 Packets to potential Class Members and Nominees. *Id.*, ¶ 10. In addition, A.B. Data  
22 caused the Summary Settlement Notice to be published in *Investor's Business Daily* and  
23 transmitted over *PR Newswire* on July 20, 2020. *Id.*, ¶ 12.<sup>19</sup>

24 106. Contemporaneously with the mailing of the Postcard Settlement Notices,  
25 A.B. Data updated the Website to provide Class Members and other interested parties

26 <sup>19</sup> In accordance with the Stipulation, Defendant Kapoor issued notice of the  
27 Settlement pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715(b) on July 9,  
28 2020.

1 with information concerning the Kapoor Settlement and the important dates and deadlines  
2 in connection therewith, as well as downloadable copies of the Settlement Notice, Claim  
3 Form, Stipulation, and Preliminary Approval Order. Schachter Decl., ¶ 14. Additionally,  
4 A.B. Data updated the interactive voice-response system callers hear when contacting the  
5 toll-free telephone helpline for this matter in order to respond to inquiries regarding the  
6 Kapoor Settlement. *Id.*, ¶ 13. Class Members with questions regarding the Settlement can  
7 also contact A.B. Data by sending an e-mail to info@InsysRXSecuritiesLitigation.com.

8 107. As noted above, and as set forth in the notices, the deadline for Class  
9 Members to submit an objection to the Kapoor Settlement, the Plan of Allocation, and/or  
10 Class Counsel's Fee Application is September 24, 2020. To date, no objections of any  
11 kind have been filed.<sup>20</sup> Should any objections be received after this submission, Class  
12 Counsel will address them in its reply to be filed on or before October 8, 2020.

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

15 108. In accordance with the Preliminary Approval Order, and as explained in the  
16 Settlement Notice, Class Members who wish to participate in the distribution of the Net  
17 Settlement Fund (i.e., the Settlement Fund less: (i) any Taxes; (ii) any Notice and  
18 Administration Costs; (iii) any attorneys' fees awarded by the Court; and (iv) any other  
19 costs or fees approved by the Court) must submit a valid Claim Form and all required  
20 supporting documentation to the Court-authorized Claims Administrator, A.B. Data,  
21 postmarked (if mailed), or online through the Website, no later than October 10, 2020.

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

1 As provided in the Settlement Notice, the Net Settlement Fund will be distributed to  
2 Authorized Claimants<sup>21</sup> in accordance with the plan for allocating the Net Settlement  
3 Fund among Authorized Claimants approved by the Court.

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

11 110. As previously set forth in my declaration in support of the Baker Settlement  
12 (Doc. 407), Class Counsel developed the Plan in consultation with Class Representative's  
13 damages expert, Coffman, and his team at Global Economic Group. The Plan provides a  
14 method for equitably distributing the Net Settlement Fund among Class Members who  
15 purportedly suffered economic losses as a result of the alleged violations of the federal  
16 securities laws set forth in the SAC, as opposed to economic losses caused by market or  
17 industry forces. To that end, Class Representative's damages expert calculated the  
18 estimated amount of alleged artificial inflation in the per-share price of Insys common  
19 stock over the course of the Class Period that was allegedly proximately caused by  
20 defendants' alleged misleading statements and omissions (as set forth in Table 1 of the  
21 Plan) and these amounts will be utilized in calculating each Claimant's Recognized Loss  
22 Amount, and ultimately the Claimant's overall Recognized Claim.

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23  
24 <sup>21</sup> As defined in paragraph 1.c of the Stipulation, an "Authorized Claimant" is a Class  
25 Member who either: (i) submits a Claim to the Claims Administrator in connection with  
26 the Baker Settlement; or (ii) submits a Claim to the Claims Administrator in connection  
27 with this Settlement, and who is approved by the Court for payment from the Net  
28 Settlement Fund. Once the claims-administration process is complete, Class Counsel will  
file a motion for entry of the Class Distribution Order, which will seek the Court's  
approval of the claim determinations and authorization to conduct a distribution of the  
Net Settlement Fund to Authorized Claimants.

1           111. A Claimant's Recognized Loss Amount will depend upon several factors,  
2 including the date(s) when the Claimant purchased or acquired his, her, or its shares of  
3 Insys common stock during the Class Period, and whether such shares were sold and if  
4 so, when and at what price.<sup>22</sup> In order to have a Recognized Claim under the Plan, a  
5 Claimant must have suffered damages proximately caused by the disclosure of the  
6 relevant truth concealed by defendants' alleged fraud. Specifically, shares of Insys  
7 common stock purchased or otherwise acquired during the Class Period must have been  
8 held through at least one of the alleged corrective disclosure that removed alleged  
9 artificial inflation related to that information.<sup>23</sup>

10           112. A.B. Data will determine each Authorized Claimant's *pro rata* share of the  
11 Net Settlement Fund by dividing the Authorized Claimant's Recognized Claim (i.e., the  
12 sum of the Claimant's Recognized Loss Amounts as calculated under the Plan) by the  
13 total Recognized Claims of all Authorized Claimants, multiplied by the total amount in  
14 the Net Settlement Fund. Class Representatives' losses will be calculated in the same  
15 manner. Once all submitted Claim Forms are processed and Claimants provided the  
16 opportunity to cure any deficiencies in their Claims or challenge the rejection of their  
17 Claims, Class Counsel will file a motion for approval of A.B. Data's determinations with  
18 respect to all submitted Claims and authorization to distribute the Net Settlement Fund.

19           113. As set forth in the Plan, if nine months after the initial distribution, there is  
20 a balance remaining in the Net Settlement Fund (whether by reason of uncashed checks,  
21 or otherwise), and if it is cost-effective to do so, Class Counsel will conduct a re-  
22 distribution of the funds remaining after payment of any unpaid fees and expenses  
23

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24 <sup>22</sup> The calculation of Recognized Loss Amounts also takes into account the PSLRA's  
25 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.

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

1 incurred in administering the Settlement, including the costs for such re-distribution, to  
2 Authorized Claimants who have cashed their initial distribution checks and would receive  
3 at least \$10.00 from such re-distribution. Redistributions will be repeated until it is  
4 determined that re-distribution of the funds remaining in the Net Settlement Fund would  
5 no longer be cost effective. Thereafter, any remaining balance will be contributed to non-  
6 sectarian, not-for-profit organization(s), to be recommended by Class Counsel and  
7 approved by the Court.

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

15 **VIII. CLASS COUNSEL’S FEE APPLICATION IS FAIR AND REASONABLE**  
16 **AND WARRANTS APPROVAL**

17 115. In addition to seeking final approval of the Kapoor Settlement and approval  
18 of the Plan of Allocation, Class Counsel, on behalf of Plaintiffs’ Counsel, is applying for  
19 an award of attorneys’ fees in connection with services rendered by Plaintiffs’ Counsel in  
20 the Action. Specifically, Class Counsel is applying for attorneys’ fees in the amount of  
21 30% of the Settlement Fund, *inclusive* of the portion of Plaintiffs’ Counsel’s Litigation  
22 Expenses, which were documented but not previously sought to be reimbursed in  
23 connection with the Baker Settlement, and any additional expenses incurred since the  
24 May 22, 2020 cut-off used for the Baker Settlement through July 1, 2020, when Class  
25 Representative moved for preliminary approval of the Kapoor Settlement (the “Kapoor  
26  
27  
28



1 Expenses”). Given that the Kapoor Expenses total \$548,923.82,<sup>24</sup> Class Counsel’s Fee  
2 Application will not result in an award of any attorneys’ fees unless the Settlement  
3 Consideration ultimately exceeds \$1,829,746.07. Class Counsel will not receive any  
4 “fees” if the Settlement Consideration is below this amount, as any amount received  
5 pursuant to the Fee Application, if approved, will only serve to reimburse the Kapoor  
6 Expenses. As set forth in ¶ 17 of the Stipulation, any attorneys’ fees awarded by the Court  
7 shall be paid to Class Counsel from the Down Payment, and thereafter, from any other  
8 proceeds obtained through the Settlement as those proceeds are received into the Escrow  
9 Account (without the need for additional Court orders).

10 116. As noted above, Class Counsel’s Fee Application is consistent with the  
11 amount set forth in the Settlement notices and, to date, not one objection to this amount  
12 of attorneys’ fees has been filed.

13 117. Through July 1, 2020—the date Class Representative moved for  
14 preliminary approval of the Kapoor Settlement—Plaintiffs’ Counsel devoted more than  
15 22,306 hours to the Action, resulting in a total lodestar of \$11,539,774.75.<sup>25</sup> Accordingly,  
16

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17 <sup>24</sup> This amount reflects the \$489,606.29 in expenses that were documented in  
18 connection with the Baker Settlement, but for which Class Counsel did not seek  
19 reimbursement from the Baker Settlement (*see* Docs. 407, ¶¶ 121-22; 407-3; 407-4), as  
20 well as an additional \$59,317.58 in expenses that were incurred by Class Counsel after  
21 the cut-off used for the Baker Settlement (i.e., May 22, 2020) through July 1, 2020 and in  
22 connection with its settlement efforts with Dr. Kapoor. *See infra* ¶ 137.

23 <sup>25</sup> The lodestar submissions of: (i) Johnston de F. Whitman, Jr. (“Whitman Lodestar  
24 Decl.”), on behalf of Kessler Topaz; (ii) Andrew S. Friedman (“Friedman Lodestar  
25 Decl.”), on behalf of Bonnett Fairbourn; and (iii) Brian Schall (“Schall Lodestar Decl.”),  
26 on behalf of The Schall Law Firm, are attached hereto as Exhibits 3 through 5. These  
27 declarations set forth the names of the attorneys and professional support staff employees  
28 who worked on the Action and their current hourly rates, the lodestar value of the time  
expended by such attorneys and professional support staff, and the background and  
experience of the firms. These declarations also provide a breakdown of the time spent in  
the Action, by timekeeper, for each of the following sixteen categories of litigation  
efforts: (1) Investigation and Factual Research; (2) Lead Plaintiff Motion; (3) Complaints;  
(4) Lead Plaintiff Document Review; (5) Defendant and Non-Party Document Review;  
(6) Discovery; (7) Depositions and Preparation; (8) Motions to Dismiss; (9) Class  
Certification; (10) Court Appearances and Preparation; (11) Litigation Strategy and Case  
Management/Administration; (12) Mediation, Settlement, and Settlement  
Administration; (13) Experts and Expert Motions; (14) Summary Judgment; (15) Trial  
Preparation; and (16) Communications with Class Representative. Plaintiffs’ Counsel’s



1 the 30% fee requested here (which, if granted, would range from \$210,000 to \$3,000,000  
2 depending on the ultimate amount of the Settlement Consideration) equates to a *negative*  
3 “multiplier”—i.e., a discount on what counsel would have earned had counsel been  
4 compensated by a paying client using counsel’s hourly billing rates. And, considering that  
5 Plaintiffs’ Counsel will not receive “fees” exceeding the Kapoor Expenses unless the  
6 Settlement Consideration exceeds \$1,829,746.07 (*see* ¶ 115, *supra*), this “multiplier” is  
7 even further in the red. The Fee Application is consistent with the retention agreement  
8 Class Representative entered into with counsel at the outset of the Action, and has his  
9 support. *See* Miller Decl., ¶ 7.

10 118. Below is a summary of the primary factual bases for Class Counsel’s Fee  
11 Application. A full analysis of the factors considered by courts in this Circuit when  
12 evaluating requests for attorneys’ fees from a common fund, as well as the supporting  
13 legal authority, is presented in the accompanying Fee Memorandum.<sup>26</sup>

14 **A. The Favorable Settlement Achieved**

15 119. As described above and in the accompanying Fee Memorandum, the  
16 Settlement with Defendant Kapoor is a favorable result for the Class. Here, Class  
17 Representative truly faced the risk that without a settlement he would be unable to collect  
18 *any* payment from Dr. Kapoor—even if a judgment was obtained against him at trial.

19 120. *First*, as noted above, in connection with his Criminal Conviction, Dr.  
20 Kapoor is obligated to pay nearly \$62 million in restitution, forfeiture, and fines (i.e. the  
21 Criminal Obligation). The Criminal Obligation far exceeds Dr. Kapoor’s liquid assets and

22 \_\_\_\_\_  
23 Daily time records—which are voluminous and total more than 5,000 entries for Class  
Counsel alone)—are available upon the Court’s request.

24 <sup>26</sup> Courts in this Circuit consider the following factors when determining whether a  
25 fee percentage sought from a common fund is fair and reasonable: (i) the results achieved;  
26 (ii) the risks of litigation; (iii) the skill required and quality of work; (iv) the contingent  
27 nature of the fee and financial burden carried by the plaintiffs; (v) the awards made in  
28 similar cases; (vi) the reaction of the class; and (vii) the amount of a lodestar cross-check.  
*See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002). *See also* Fee  
Memorandum § II.B.

1 represents the vast majority of his net worth. If the case had proceeded to trial and the  
2 Class obtained a favorable judgment, it could be expected that the DOJ would seek to  
3 seize Dr. Kapoor's assets in their entirety, in which case the assets liquidated likely would  
4 not be sufficient to satisfy the Criminal Obligation, let alone a judgment in this matter.

5 121. *Second*, in light of Dr. Kapoor's criminal indictment and subsequent  
6 conviction, there are no insurance proceeds available to fund a settlement or satisfy a  
7 future judgment against Defendant Kapoor. Despite repeated efforts to obtain insurance  
8 coverage, Dr. Kapoor was denied coverage, including from Old Republic Insurance  
9 Company, which agreed to fund the Baker Settlement. Accordingly, Dr. Kapoor is  
10 funding the Settlement *entirely* from his limited, and diminishing, personal resources.  
11 Indeed, it is exceedingly rare that individuals pay anything that is not covered by  
12 insurance to resolve securities class actions.<sup>27</sup>

13 122. *Third*, the Kapoor Settlement represents the largest *potential* recovery for  
14 the Class (i.e., \$10 million of the \$12.25 million total potential recovery) and provides a  
15 meaningful percentage of the Class's aggregate damages as estimated by Class  
16 Representative's damages expert. Indeed, the Kapoor Settlement, when viewed on its  
17 own, represents between approximately 0.37% and 2.02% (assuming only the minimum  
18 \$700,000 payment is made) of the Class's estimated aggregate damages (i.e., \$34.7  
19 million to \$189.5 million) and comprises between approximately 5.28% and 28.82% of  
20 the Class's estimated aggregate damages (if the Class receives the maximum  
21 \$10,000,000).

22 123. *Finally*, the Kapoor Settlement is also significant when considered in view  
23 of the substantial risks and obstacles to proving Defendant Kapoor's liability, and  
24 resulting damages, at trial. *See supra* ¶¶ 83-95. Here, as a result of the Kapoor Settlement,

25  
26 <sup>27</sup> *See, e.g., In re American Realty Capital Properties, Inc. Litig.*, No. 1:15-mc-  
27 00040-AKH, Report of Professor Charles Silver, Doc. 1289, ¶ 77 (S.D.N.Y. Dec. 17,  
28 2019) ("Historically, securities class actions have settled without contributions from  
individuals.").

1 numerous Class Members will benefit and receive compensation for their losses and avoid  
2 the substantial risks to recovering anything from this defendant in the absence of the  
3 Settlement.

4 **B. The Risks of Litigation and the Need to Ensure the Availability of**  
5 **Competent Counsel in High-Risk Contingent Cases**

6 124. The risks faced by Class Counsel in prosecuting this Action against all  
7 defendants, including Dr. Kapoor, are also relevant to the Court's consideration of an  
8 award of attorneys' fees, as well as its approval of the Settlement. Here, defendants have  
9 adamantly denied any wrongdoing and, if the Action had continued, they would have  
10 aggressively litigated their defenses through trial and the appeals that would likely follow.  
11 As detailed in Section V above, Class Counsel and Class Representative faced significant  
12 risks to proving Defendant Kapoor's liability, as well as loss causation and damages. In  
13 addition, the risks faced by Class Counsel in the Action were exacerbated with the  
14 bankruptcy filing of the corporate defendant, Insys.

15 125. These case-specific litigation risks are in addition to the risks  
16 accompanying securities litigation generally, such as the fact that this Action is governed  
17 by stringent PSLRA requirements and case law interpreting the federal securities laws,  
18 and was undertaken on a contingent-fee basis. From the outset, Class Counsel understood  
19 that this would be a complex, expensive, and potentially lengthy litigation with no  
20 guarantee of ever being compensated for the substantial investment of time and money  
21 that vigorous prosecution of the case would require. In undertaking that responsibility,  
22 Class Counsel was obligated to ensure that sufficient resources (in terms of attorney and  
23 support staff time) were dedicated to prosecuting the Action, and that funds were  
24 available to compensate vendors, experts, and consultants and to cover the other  
25 considerable out-of-pocket costs that a case like this typically demands. With an average  
26 lag time of several years for these cases to conclude, the financial burden on contingent-  
27 fee counsel is far greater than on a firm that is paid on an hourly, ongoing basis. Class  
28

1 Counsel alone has dedicated over 22,224 hours in prosecuting this Action (and over \$1  
2 million in expenses) for the benefit of the Class, yet has received no compensation for its  
3 efforts.

4 126. Here, Plaintiffs' Counsel also fully bore the risk that no recovery would be  
5 achieved. Class Counsel is aware that despite the most vigorous and competent efforts, a  
6 law firm's success in contingent litigation such as this is never guaranteed. Moreover, it  
7 takes hard work and diligence by skilled counsel to develop the facts and theories required  
8 to sustain a complaint or win at trial, or to persuade sophisticated defendants to engage in  
9 serious settlement negotiations at meaningful levels. Class Counsel is aware of many  
10 hard-fought lawsuits in which, because of the discovery of facts unknown when the case  
11 commenced, or changes in the law during the pendency of the case, or a decision of a  
12 judge or jury following a trial on the merits, excellent professional efforts by a plaintiff's  
13 counsel produced no fee for counsel.

14 127. It is in the public interest to have experienced and able counsel enforce the  
15 securities laws and regulations pertaining to the duties of officers and directors of public  
16 companies. Vigorous private enforcement of the federal securities laws can only occur if  
17 private investors can obtain some parity in representation with that available to large  
18 corporate defendants. If this important public policy is to be carried out, courts should  
19 award fees that adequately compensate plaintiffs' counsel, taking into account the risks  
20 undertaken in prosecuting a securities class action as well as the economics involved.

21 128. Plaintiffs' Counsel's efforts, in the face of substantial risks and  
22 uncertainties, have resulted in what Class Counsel believes to be a favorable and certain  
23 recovery for the Class from Defendant Kapoor. In these circumstances, and in  
24 consideration of Plaintiffs' Counsel's hard work, Class Counsel believes the 30% fee  
25 request (*inclusive* of the Kapoor Expenses) is fair and reasonable and should be approved.  
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27  
28

**C. The Time and Labor Devoted to the Action by Plaintiffs' Counsel**

1  
2 129. Plaintiffs' Counsel devoted substantial time to the prosecution of the  
3 Action. As more fully described above, Plaintiffs' Counsel: (i) conducted a thorough  
4 investigation into the claims asserted in the Action; (ii) drafted two detailed complaints;  
5 (iii) opposed two rounds of briefing on defendants' motions to dismiss the complaints;  
6 (iv) conducted significant document discovery, which included reviewing more than 14  
7 million pages of documents; (v) deposed and/or defended sixteen depositions;  
8 (vi) successfully moved for class certification and retained and consulted with an expert  
9 in connection therewith; (vii) exchanged expert reports on class certification and  
10 participated in depositions of the parties' class certification experts; (viii) briefed and  
11 prevailed against Defendant Kapoor's petition for permission to appeal the class  
12 certification order to the Ninth Circuit; (ix) exchanged expert reports; (x) opposed  
13 defendants' summary judgment motion; (xi) briefed motions *in limine*; (xii) participated  
14 in extensive pre-trial preparations; and (xiii) prepared for and engaged in settlement  
15 negotiations, including formal mediation. *See supra* ¶¶ 9, 21-77. At all times throughout  
16 the Action, Plaintiffs' Counsel's efforts were driven and focused on advancing the  
17 litigation to achieve the most successful outcome for the Class, whether through  
18 settlement or trial, by the most efficient means possible.

19 130. The time devoted to this Action by Plaintiffs' Counsel is set forth in the  
20 Lodestar Declarations attached hereto as Exhibits 3 through 5. Included with the Lodestar  
21 Declarations are schedules that summarize the time expended by the attorneys and  
22 professional support staff employees at each firm (in the aggregate and by litigation  
23 category) ("Lodestar Schedules"). The Lodestar Schedules report the amount of time  
24 spent by each attorney and professional support staff employee who worked on the Action  
25 and their resulting "lodestar," i.e., their hours multiplied by their hourly rates.

26 131. The hourly rates of Plaintiffs' Counsel here range from \$500 to \$920 per  
27 hour for partners, \$350 to \$690 per hour for other attorneys, \$85 to \$305 per hour for  
28

1 paralegals and law clerks, and \$300 to \$325 per hour for in-house investigators. *See*  
2 Whitman Lodestar Decl., Ex. A; Friedman Lodestar Decl., Ex. A; and Schall Lodestar  
3 Decl., Ex. A. These hourly rates are reasonable for this type of complex litigation. *See*  
4 Fee Memorandum, § II.B, n. 9.

5 132. In total, from the inception of this Action through July 1, 2020, Plaintiffs’  
6 Counsel expended over 22,306 hours on the investigation, prosecution, and resolution of  
7 the claims for a total lodestar of \$11,539,774.75.<sup>28</sup> Thus, pursuant to a lodestar “cross-  
8 check,” Class Counsel’s fee request of 30% of the Settlement Fund, if awarded, would  
9 yield “negative” multipliers of approximately 0.018 on Plaintiffs’ Counsel’s lodestar  
10 (when considering the minimum \$700,000 recovery under the Settlement) and  
11 approximately 0.26 on Plaintiffs’ Counsel’s lodestar (when considering the maximum  
12 \$10 million recovery under the Settlement). These negative multipliers fall substantially  
13 below the range of positive multipliers awarded in other complex cases, including other  
14 securities class actions, by courts in this Circuit and elsewhere. *See* Fee Memorandum,  
15 II.B.

16 **D. The Quality of Plaintiffs’ Counsel’s Representation**

17 133. The skill and diligence of Plaintiffs’ Counsel also supports the requested  
18 fee. In particular, as set forth in its firm résumé, Class Counsel is an experienced and  
19 skilled firm in the area of complex litigation, including securities class actions, and has a  
20 successful track record in these actions throughout the country. *See* Doc. 407-3, Ex. H.  
21 The favorable result achieved for the Class here reflects the superior quality of this  
22 representation.

23  
24  
25 <sup>28</sup> Class Counsel will continue to perform legal work on behalf of the Class should  
26 the Court approve the Kapoor Settlement. For example, additional resources will be  
27 expended assisting Class Members with their Claim Forms and related inquiries and  
28 working with the Claims Administrator, A.B. Data, to ensure the smooth progression of  
claims processing. No additional legal fees will be sought for this work.

1           134. The quality of the work performed by Class Counsel in obtaining the  
2 Settlement should also be evaluated in light of the quality of opposing counsel. Defendant  
3 Kapoor in this case was represented by experienced counsel from the prominent defense  
4 firms, Nixon Peabody LLP, Ropes & Gray LLP, Cravath, Swaine & Moore LLP, Osborn  
5 Maledon, P.A., and Snell & Wilmer L.L.P. These firms vigorously and ably defended the  
6 Action for over four years. In the face of this formidable defense, Class Counsel was  
7 nonetheless able to develop a case that was sufficiently strong to defeat Defendant  
8 Kapoor's summary judgment motion and persuade him to settle the Action on terms that  
9 are favorable to the Class.

10           **E. Class Representative Supports the Fee Application**

11           135. Class Representative has supervised and monitored both the prosecution  
12 and the settlement of this Action. Class Representative believes the present Fee  
13 Application to be fair and reasonable. In addition, the 30% fee request is authorized by  
14 and made pursuant to a retention agreement entered into between Class Representatives  
15 and Class Counsel at the outset of the Action. *See* Miller Decl., ¶ 7. Accordingly, Class  
16 Representative's support of Class Counsel's fee request further demonstrates its  
17 reasonableness.

18           **F. Plaintiffs' Counsel's Litigation Expenses**

19           136. As previously documented in connection with the Baker Settlement (Docs.  
20 407, ¶¶ 121-22; 407-3; 407-4), Plaintiffs' Counsel incurred \$1,124,606.29 in aggregate  
21 expenses in prosecuting and resolving the Action through May 22, 2020. In connection  
22 with the \$2 million Baker Settlement, Class Counsel requested reimbursement of  
23 \$635,000 of Plaintiffs' Counsel's aggregate expenses. This expense request is currently  
24 pending before the Court.

25           137. Since May 22, 2020 (the cut-off used for the Baker Settlement), Class  
26 Counsel has incurred additional expenses. Specifically, Class Counsel has incurred:  
27 (i) \$36,779.86 for document hosting/management; (ii) \$8,260.00 for experts;  
28



1 (iii) \$1,320.99 for on-line legal and factual research; (iv) \$314.00 for service of process;  
2 (v) \$229.40 for reproduction costs; and (vi) \$93.33 for overnight mail. Class Counsel has  
3 also incurred \$12,320.00 in mediation costs exclusively in connection with their  
4 settlement efforts with Dr. Kapoor. *See* Whitman Lodestar Decl., ¶ 7. In total, Plaintiffs’  
5 Counsel have incurred a total of \$548,923.82 in litigation expenses through July 1, 2020  
6 which ***have not*** been sought for reimbursement in connection with the Baker Settlement.

7 138. The expenses set forth above would normally be charged to a fee-paying  
8 client in the private legal marketplace. Moreover, these expenses were reasonable and  
9 necessary for the effective prosecution and resolution of this matter. As set forth in the  
10 previous Baker Settlement submissions and the accompanying Whitman Lodestar  
11 Declaration (*see* ¶ 8), these expenses are reflected in the books and records of Plaintiffs’  
12 Counsel.

13 139. As noted above, Class Counsel is not seeking reimbursement of the Kapoor  
14 Expenses separately. Class Counsel’s Fee Application—for 30% of the Settlement  
15 Fund—is *inclusive* of such expenses.

16 **IX. CONCLUSION**

17 140. For all the reasons set forth above, Class Counsel respectfully submits that  
18 the Kapoor Settlement and the Plan of Allocation should be approved as fair, reasonable,  
19 and adequate. Class Counsel further submits that its Fee Application should also be  
20 approved as fair and reasonable.

21 141. I declare, under penalty of perjury, that the foregoing is true and correct to  
22 the best of my knowledge.

23 DATED this 10th day of September 2020.

24  
25 *s/ Johnston de F. Whitman, Jr.* \_\_\_\_\_

26 Johnston de F. Whitman, Jr.  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on September 10, 2020, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to those persons who are CM/ECF registrants:

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