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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

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

Plaintiff,

v.

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

Defendants.

No. 16-cv-00302-NVW

**CLASS ACTION**

**CLASS REPRESENTATIVE'S  
MOTION FOR FINAL APPROVAL  
OF SETTLEMENT WITH  
DEFENDANT MICHAEL L.  
BABICH AND PLAN OF  
ALLOCATION; AND  
MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT THEREOF**

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17 *In re Volkswagen “Clean Diesel” Mktg., Sales Practices,*  
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25 Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class*  
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 26 (Feb. 12, 2020), [https://www.nera.com/content/dam/nera/publications/](https://www.nera.com/content/dam/nera/publications/2020/PUB_YEAR_END_Trends_012_120_Final.pdf)  
 27 2020/PUB\_YEAR\_END\_Trends\_012\_120\_Final.pdf ..... 12

28

1 Court-appointed Class Representative Clark Miller, on behalf of himself and the  
2 Court-certified Class, respectfully moves this Court, pursuant to Federal Rule of Civil  
3 Procedure (“Rule”) 23, for: (i) final approval of the proposed settlement of this securities  
4 class action with Michael L. Babich on the terms set forth in the Stipulation and  
5 Agreement of Settlement Between Lead Plaintiff and Defendant Michael L. Babich dated  
6 July 21, 2020 (Doc. 399-1) (“Stipulation”); and (ii) approval of the proposed plan for  
7 allocating the net Settlement proceeds to the Class (“Plan of Allocation” or “Plan”).<sup>1</sup>

8 **I. PRELIMINARY STATEMENT**

9 Subject to Court approval, Class Representative, through his counsel, has agreed  
10 to settle all claims asserted in the Action against defendant Michael L. Babich (“Mr.  
11 Babich”) in exchange for \$250,000 in cash from Mr. Babich’s personal resources  
12 (“Settlement” or “Babich Settlement”). This Settlement is the third—and final—  
13 settlement reached in the Action and, if approved, the Babich Settlement, combined with  
14 the settlements with defendants Darryl S. Baker and John N. Kapoor, will provide the  
15 Class with a collective recovery of at least \$2.95 million, with the potential to increase to  
16 as much as \$12.25 million, and will resolve the Action in its entirety.

17 The Babich Settlement follows more than four years of litigation—including an  
18 extensive investigation, the completion of fact and expert discovery, hard-fought motion  
19 practice, substantial trial preparation, and mediation efforts, and was reached just weeks  
20 before trial was set to commence. Class Representative believes the Settlement is a  
21 favorable result for the Class, particularly in light of the severe limitations Class  
22 Representative faced in collecting any recovery from Mr. Babich.

23  
24  
25 <sup>1</sup> All capitalized terms not defined herein have the meanings ascribed to them in the  
26 Stipulation or in the Declaration of Johnston de F. Whitman, Jr. in Support of (I) Class  
27 Representative’s Motion for Final Approval of Settlement with Defendant Michael L.  
28 Babich and Plan of Allocation; and (II) Class Counsel’s Motion for Reimbursement of  
Litigation Expenses (“Whitman Declaration”). The Whitman Declaration is an integral  
part of this submission. Citations to “¶ \_” herein refer to paragraphs in the Whitman  
Declaration. Unless otherwise noted, all internal citations and quotations are omitted.

1           Indeed, as a result of Mr. Babich’s guilty plea in *United States v. Babich, et al.*,  
2 No. 16-cr-10343-ADB (D. Mass.) (“Criminal Action”) stemming from actions he  
3 committed in connection with marketing Subsys, Mr. Babich is obligated to pay more  
4 than \$74 million in forfeiture and restitution (“Criminal Obligation”)<sup>2</sup>—an amount that  
5 exceeded his net worth by more than \$49 million at the time the Settling Parties entered  
6 into the Stipulation. Doc. 401 at 2.<sup>3</sup> Had Class Representative succeeded in obtaining a  
7 judgment against Mr. Babich at trial, the Class would likely have recovered nothing, as it  
8 was likely that the federal government would seek to collect on Mr. Babich’s Criminal  
9 Obligation, almost certainly driving Mr. Babich into bankruptcy. Docs. 401 at 7; 401-2,  
10 ¶ 8.<sup>4</sup> At the time of the Settlement, Mr. Babich was also a defendant in at least twenty  
11 other pending actions, providing a further limitation on Mr. Babich’s ability to satisfy a  
12 judgment in the Action due to this additional financial exposure (estimated to exceed \$3  
13 billion in damages) and his ongoing need to fund a defense in these actions. Doc. 401 at  
14 2. Moreover, there was no insurance available to fund any portion of a settlement or a  
15 judgment against Mr. Babich in the Action, and any recovery obtained from Mr. Babich  
16 had to come entirely from his limited, constrained, and diminishing personal resources.  
17 Doc. 399 at 10-12.

18           In addition to the risk of non-payment, Class Representative and Class Counsel, in  
19 reaching the Settlement, also carefully considered the risks of taking the Action to trial  
20 against Mr. Babich. Had the Action proceeded to trial, Mr. Babich was prepared to mount  
21 aggressive defenses, particularly on the elements of falsity and loss causation. If the jury  
22

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23 <sup>2</sup> While Mr. Babich is jointly and severally liable for approximately \$60 million in  
24 restitution, he is solely responsible for paying a more than \$14 million forfeiture award.  
Doc. 401-2, ¶ 6.

25 <sup>3</sup> As of June 2020, Mr. Babich had approximately \$23.1 million in assets, consisting  
26 of approximately \$21.6 million in marketable and unmarketable securities, a significant  
portion of which was substantially illiquid, and \$1.5 million in cash assets. Doc. 401-2,  
27 ¶ 5.

28 <sup>4</sup> Mr. Babich’s Criminal Obligation is in addition to his obligations in connection  
with stipulated judgments entered into with the State of Arizona and a public health  
authority (with covenants not to execute unless Mr. Babich voluntarily files for  
bankruptcy). Doc. 401 at 5-6; *see also infra* Section II.C.1.b.

1 sided with Mr. Babich on any of his defenses, the Class would recover nothing. ¶¶ 87,  
2 95-102; *see also infra* Section II.C.1.b. The Settlement eliminates these risks.

3 In its July 31, 2020 Preliminary Approval Order, the Court found the Babich  
4 Settlement likely to be finally approved as fair, reasonable, and adequate to the Class.  
5 Doc. 402, ¶ 1. The Settlement has the full support of Class Representative, and to date,  
6 the reaction of the Class has been positive. While the October 28, 2020 objection deadline  
7 has not yet passed, following the dissemination of more than 31,300 Postcard Settlement  
8 Notices and 4,200 Settlement Notices to Class Members and Nominees, as well as  
9 publication of the Summary Notice, no Class Member has yet objected to any aspect of  
10 the Settlement or the Plan of Allocation. ¶¶ 12, 108.

11 Given the foregoing considerations and the factors addressed below, Class  
12 Representative and Class Counsel respectfully submit that: (i) the Babich Settlement  
13 meets the standards for final approval under Rule 23, and is a fair, reasonable, and  
14 adequate result for the Class; and (ii) the Plan of Allocation is a fair and reasonable  
15 method for equitably distributing the Net Settlement Fund.

## 16 **II. THE BABICH SETTLEMENT WARRANTS FINAL APPROVAL**

17 Rule 23(e)(2) requires judicial approval of any proposed class action settlement.  
18 Whether to grant such approval lies within the district court's sound discretion. *See In re*  
19 *Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597,  
20 611 (9th Cir. 2018) ("[d]eciding whether a settlement is fair is ultimately 'an amalgam of  
21 delicate balancing, gross approximations and rough justice,' . . . best left to the district  
22 judge, who has . . . a firsthand grasp of the claims, the class, the evidence, and the course  
23 of the proceedings"). Such discretion should be guided by this Circuit's "strong judicial  
24 policy that favors settlements, particularly where complex class action litigation is  
25 concerned." *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019);  
26 *Juvera v. Salcido*, 2013 WL 6628039, at \*9 (D. Ariz. Dec. 17, 2013) ("The Ninth Circuit  
27 has declared that a strong judicial policy favors settlement of class actions.").

28 "Under . . . [Rule] 23(e)(2), a district court may approve a class action settlement



1 only after finding that the settlement is fair, reasonable, and adequate.” *Campbell v.*  
2 *Facebook, Inc.*, 951 F.3d 1106, 1120-21 (9th Cir. 2020). In making that determination,  
3 Rule 23(e)(2) provides that a court should consider whether:

- 4 (A) the class representatives and class counsel have adequately represented the  
5 class;
- 6 (B) the proposal was negotiated at arm’s length;
- 7 (C) the relief provided for the class is adequate, taking into account:
- 8 (i) the costs, risks, and delay of trial and appeal;
- 9 (ii) the effectiveness of any proposed method of distributing relief to the  
10 class, including the method of processing class-member claims;
- 11 (iii) the terms of any proposed award of attorney’s fees, including timing of  
12 payment;
- 13 (iv) any agreement required to be identified under Rule 23(e)(3); and
- 14 (D) the proposal treats class members equitably relative to each other.

15 Consistent with this guidance, the Ninth Circuit has identified similar factors for  
16 courts to consider in deciding whether to approve a class action settlement:

- 17 (1) the strength of the plaintiffs’ case; (2) the risk, expense,  
18 complexity, and likely duration of further litigation; (3) the  
19 risk of maintaining class action status throughout the trial; (4)  
20 the amount offered in settlement; (5) the extent of discovery  
completed and the stage of the proceedings; (6) the  
experience and views of counsel; (7) the presence of a  
governmental participant; and (8) the reaction of the class  
members to the proposed settlement.

21 *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).<sup>5</sup> Moreover, in  
22 approving a settlement, a court “need not reach any ultimate conclusions on the contested  
23 issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty  
24 of outcome in litigation and avoidance of wasteful and expensive litigation that induce  
25 consensual settlements.” *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir.  
26 1992); *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012).

27 \_\_\_\_\_  
28 <sup>5</sup> “District courts may consider some or all of these factors.” *Campbell*, 951 F.3d at  
1121.

1 At the preliminary approval stage, this Court considered the Rule 23(e)(2) factors  
2 in assessing the Settlement, and found it to be fair, reasonable, and adequate, subject to  
3 further consideration at the Settlement Fairness Hearing. Doc. 402, ¶ 1. That conclusion  
4 applies equally now. *See, e.g., In re Chrysler-Dodge-Jeep Ecodiesel® Mktg., Sales*  
5 *Practices, & Prods. Liab. Litig.*, 2019 WL 2554232, at \*2 (N.D. Cal. May 3, 2019)  
6 (finding “conclusions [made in granting preliminary approval] stand and counsel equally  
7 in favor of final approval now”). Accordingly, Class Representative respectfully submits  
8 that the Settlement is fair, reasonable, adequate, and warrants final approval.

9 **A. Class Representative and Class Counsel Have Adequately**  
10 **Represented the Class in this Action**

11 In determining whether to approve a class action settlement, the court must first  
12 consider whether “class representatives and class counsel have adequately represented  
13 the class.” Rule 23(e)(2)(A). The adequacy requirement is satisfied if the representative  
14 parties and counsel have fairly and adequately protected the interests of the class. *See*  
15 *Knapper v. Cox Commc’ns, Inc.*, 329 F.R.D. 238, 243 (D. Ariz. 2019).

16 As previously addressed in the Baker and Kapoor Settlement submissions, Class  
17 Representative and Class Counsel have adequately represented the Class in both their  
18 prosecution and resolution of the Action. Class Representative has monitored and  
19 supervised the prosecution of the Action since its outset. *See* Declaration of Clark Miller  
20 (“Miller Decl.”), attached as Ex. 1 to the Whitman Decl., ¶¶ 3-5. Further, Class  
21 Representative—whose claims are based on a common course of alleged wrongdoing by  
22 defendants and are typical of other Class Members—has no interests antagonistic to the  
23 Class. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (adequacy  
24 of representation depends on “an absence of antagonism” and “a sharing of interest”  
25 between representatives and absent class members).<sup>6</sup> Likewise, Class Counsel has  
26

27 <sup>6</sup> *See also In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) (“Where  
28 plaintiffs and class members share the common goal of maximizing recovery, there is no  
conflict of interest between the class representatives and other class members.”).

1 actively litigated this Action to the brink of trial, resulting in a well-developed  
2 understanding of the strengths and weaknesses of the Action, the risks, costs, and delays  
3 of trial, and the obstacles to obtaining any recovery—let alone a recovery greater than the  
4 Settlement Amount—from Mr. Babich. Class Representative and Class Counsel firmly  
5 believe the Babich Settlement represents a favorable result for the Class and warrants  
6 approval. ¶ 5; Miller Decl., ¶ 6; *see also Churchill*, 361 F.3d at 576-77 (instructing courts  
7 to consider “*experience and views of counsel*”) (emphasis in original).<sup>7</sup>

### 8 **B. The Babich Settlement Was Negotiated at Arm’s-Length**

9 In the Ninth Circuit, a “strong presumption of fairness” attaches to a class action  
10 settlement reached through arm’s-length negotiations between “experienced and well-  
11 informed counsel.” *de Rommerswael v. Auerbach*, 2018 WL 6003560, at \*3 (C.D. Cal.  
12 Nov. 5, 2018); *Taylor v. Shippers Transp. Express, Inc.*, 2015 WL 12658458, at \*10 (C.D.  
13 Cal. May 14, 2015) (“A settlement following sufficient discovery and genuine arms-  
14 length negotiation is presumed fair.”). Here, settlement negotiations were undertaken by  
15 experienced counsel on both sides, each with a well-developed understanding of the  
16 strengths and weaknesses of their respective claims and defenses.

17 Following an August 2018 mediation before retired federal Judge Layn R. Phillips  
18 of Phillips ADR—which did not resolve any portion of the Action—the parties continued  
19 to aggressively litigate the case for nearly two more years. ¶¶ 79-80. Thereafter, while  
20 actively preparing for an August 2020 trial, Class Representative and Mr. Babich restarted  
21 their earlier settlement discussions. ¶ 80. With the assistance of Michelle Yoshida of  
22 Phillips ADR, and after Class Counsel conducted due diligence into Defendant Babich’s  
23 financial condition and ability to pay, the Settling Parties agreed to resolve the Action  
24 against Defendant Babich. *Id.* After reaching their agreement to settle, the Settling Parties,  
25

26 <sup>7</sup> “Great weight is accorded to the recommendation of counsel, who are most closely  
27 acquainted with the facts of the underlying litigation. This is because parties represented  
28 by competent counsel are better positioned than courts to produce a settlement that fairly  
reflects each party’s expected outcome in the litigation.” *Rodriguez v. Bumble Bee Foods,  
LLC*, 2018 WL 1920256, at \*4 (S.D. Cal. Apr. 24, 2018).

1 while simultaneously preparing for trial, negotiated the specific terms of the Stipulation  
 2 before moving for preliminary approval. ¶¶ 81-82.<sup>8</sup> This Settlement is “not the product of  
 3 fraud or overreaching by, or collusion between, the negotiating parties.” *Officers for*  
 4 *Justice v. Civil Serv. Comm’n of the City & Cty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982).

5 **C. The Babich Settlement Provides the Class Adequate Relief,**  
 6 **Considering the Costs, Risks, and Delay of Litigation and Other**  
 7 **Relevant Factors**

8 The remaining Rule 23(e)(2) factors overlap considerably with those articulated  
 9 by the Ninth Circuit, and all entail “a ‘substantive’ review of the terms of the proposed  
 10 settlement” that evaluate the fairness of the “relief that the settlement is expected to  
 11 provide to” the Class. *See* Rule 23(e)(2), advisory comm.’s note to 2018 amendments;  
 12 *Churchill*, 361 F.3d at 575-77. To perform such an evaluation, a court must:

13 [C]onsider the vagaries of litigation and compare the  
 14 significance of immediate recovery by way of the  
 15 compromise to the mere possibility of relief in the future,  
 after protracted and expensive litigation. In this respect, [i]t  
 has been held proper to take the bird in hand instead of a  
 prospective flock in the bush.

16 *Rodriguez*, 2018 WL 1920256, at \*3; *see also Moreno v. S.F. Bay Area Rapid Transit*  
 17 *Dist.*, 2019 WL 343472, at \*4 (N.D. Cal. Jan. 28, 2019) (“considering the likelihood of a  
 18 plaintiffs’ or defense verdict, the potential recovery, and the chances of obtaining it,  
 19 discounted to a present value”). The Babich Settlement is a favorable result, especially in  
 20 light of the costs, risks, and delay of further litigation, and the other relevant factors.

21 **1. The Risks of Continued Litigation**

22 “To determine whether the proposed settlement is fair, reasonable, and adequate,  
 23 the Court must balance the continuing risks of litigation (including the strengths and  
 24 weaknesses of the Plaintiffs’ case), with the benefits afforded to members of the Class,  
 25 and the immediacy and certainty of a substantial recovery.” *Velazquez v. Int’l Marine &*  
 26

27 <sup>8</sup> At the Court’s direction, the Settling Parties supplemented their motion for  
 28 preliminary approval of the Babich Settlement on July 29, 2020. Doc. 401.

1 *Indus. Applicators, LLC*, 2018 WL 828199, at \*4 (S.D. Cal. Feb. 9, 2018). While Class  
2 Representative and Class Counsel believe in their claims and were prepared to take their  
3 case against Mr. Babich to trial, they also acknowledge that doing so posed major  
4 challenges and risks. *In re OmniVision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041 (N.D.  
5 Cal. 2008) (“merely reaching trial is no guarantee of recovery”).<sup>9</sup>

6 **a. The Significant Risk of Non-Payment**

7 Here, aside from overcoming Mr. Babich’s defenses to liability and damages (as  
8 discussed below), Class Representative faced significant hurdles to obtaining *any*  
9 recovery from Mr. Babich *even if* a judgment was obtained against him at trial. *First*, Mr.  
10 Babich’s ability to contribute anything to a settlement or judgment in the Action was  
11 severely constrained by his considerable existing financial obligations to federal and state  
12 regulators. As a result of his guilty plea in the Criminal Action, Defendant Babich is  
13 obligated to pay \$74,535,817 in forfeiture and restitution. Doc. 399 at 9-10; Doc. 401 at  
14 1-2. In addition, at the time the Settling Parties entered into the Stipulation, Mr. Babich  
15 faced potential monetary consequences of more than \$1.4 billion in the aggregate from a  
16 Stipulated Consent Judgment with the State of Arizona (Case No. CV2019-010695; the  
17 “AZAG Judgment”) and a Stipulation for Judgment with the Mobile County Board of  
18 Health, pending approval in the Circuit Court of Mobile County, Alabama (Case No. 02-  
19 CV-2019-902806.00; the “Alabama Stipulation”). Docs. 401 at 5-6; 401-2, ¶¶ 8.E, 13.<sup>10</sup>  
20 *Second*, Mr. Babich was defending himself at the time of settlement against claims in at

21 \_\_\_\_\_  
22 <sup>9</sup> Class Counsel is well aware that a securities class action with sound claims can  
23 proceed to trial and result in the class recovering nothing. *See, e.g., In re BankAtlantic*  
24 *Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (overturning jury  
25 verdict for plaintiff class, and granting judgment as a matter of law to defendants), *aff’d*  
26 *on other grounds, Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012).

27 <sup>10</sup> The AZAG Judgment provides that if Mr. Babich files for bankruptcy within 120  
28 days of his June 2020 payment of \$2,000,000, then such payment *will not be recognized*  
as satisfying Mr. Babich’s \$644,200,000 in penalties and disgorgement if any creditor,  
such as Class Representative here, files a petition for relief against Mr. Babich’s estate.  
Doc. 401 at 5-7. In such instance, the State of Arizona would have a claim as to the  
remaining \$642,000,000 under the AZAG Judgment. *Id.* With respect to the Alabama  
Stipulation, Mr. Babich has agreed to have a judgment entered against him in the amount  
of \$750,000,000 which, if approved, will result in a \$750,000,000 claim by Mobile  
County against Mr. Babich if he files for bankruptcy. Doc. 401 at 6 n.5.

1 least twenty other actions representing aggregate estimated damages exceeding \$3 billion  
2 (i.e., the “Concurrent Litigation”), further limiting his ability to pay more here. Docs. 401  
3 at 2-3; *see also* Doc. 401-2 (listing actions). *Finally*, Mr. Babich’s insurance carriers have  
4 repeatedly denied him coverage in this Action based upon a number of defenses and, as  
5 a result, there were no insurance proceeds available to Mr. Babich to fund any portion of  
6 a settlement or a judgment obtained against him. Doc. 399 at 10-12.

7       Indeed, given Mr. Babich’s constrained assets and existing financial obligations, a  
8 payment from Mr. Babich greater than the Settlement Amount (i.e., the cost of defending  
9 the claims against Mr. Babich in the Action to conclusion as estimated by his counsel  
10 (Doc. 401-2, ¶ 8)) could create a run on Mr. Babich’s currently negative net worth from  
11 federal and state regulators as well as the plaintiffs suing him in the Concurrent  
12 Litigation—ultimately driving Mr. Babich into bankruptcy. Docs. 401 at 3, 401-2, ¶¶ 13-  
13 14. In this instance, Class Representative’s claims against Mr. Babich’s estate would be,  
14 at best, competing with the State of Arizona’s and the federal government’s aggregate  
15 claims of approximately \$716 million,<sup>11</sup> all but assuring that Class Representative would  
16 receive nothing from a trial victory in this Action

17                   **b.       Risks to Establishing Liability and Damages**

18       As detailed in the Whitman Declaration, Class Representative also faced  
19 significant challenges to establishing Mr. Babich’s liability and the Class’s full amount  
20 of damages at trial. With respect to liability, Mr. Babich would have likely asserted, as he  
21 did throughout the Action, that the allegedly false or misleading statements attributable  
22 to him were forward-looking (and protected by the PSLRA’s “safe harbor” provision)  
23 and inactionable statements of opinion. Mr. Babich would also have offered evidence  
24 suggesting he believed the statements at issue were true when made. ¶¶ 95-96. With  
25 respect to loss causation and damages, Class Representative would have to prove that the  
26

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27 <sup>11</sup> And, if the Alabama Stipulation is approved, then Class Representative would be,  
28 at best, competing with aggregate claims of more than \$1.4 billion against Mr. Babich’s  
bankruptcy estate.



1 revelation of fraud-related information proximately caused the declines in Insys' stock  
 2 price in response to the alleged Corrective Disclosures, and that those fraud-related causes  
 3 could be parsed out from any potential non-fraud related news or publicly released  
 4 information. ¶¶ 97-102.<sup>12</sup> While Class Representative believes that he could have  
 5 provided sufficient evidence to support a finding of loss causation and damages at trial,  
 6 at the time of settlement, Mr. Babich had a pending motion to present and rely upon the  
 7 expert testimony of Dr. Kapoor's expert, Dr. Smith, positioning the parties' proof on loss  
 8 causation and damages to result in an uncertain "battle of the experts" before the jury.  
 9 ¶ 98. *See In re Celera Corp. Sec. Litig.*, 2015 WL 7351449, at \*6 (N.D. Cal. Nov. 20,  
 10 2015) (risks related to "battle of the experts" favored settlement approval). If realized,  
 11 any of these litigation risks could have precluded a recovery from Mr. Babich.<sup>13</sup>

## 12 2. The Amount Offered in Settlement

13 "[T]he critical component of any settlement is the amount of relief obtained by the  
 14 class." *Destefano v. Zynga, Inc.*, 2016 WL 537946, at \*11 (N.D. Cal. Feb. 11, 2016).  
 15 However, it "is well-settled law that a proposed settlement may be acceptable even though  
 16 it amounts to only a fraction of the potential recovery that might be available to the class  
 17 members at trial." *Rodriguez*, 2018 WL 1920256, at \*4; *see also In re Mego Fin. Corp.*  
 18 *Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). By definition, a settlement "embodies a  
 19 compromise; in exchange for the saving of cost and elimination of risk, the parties each  
 20 give up something they might have won had they proceeded with litigation." *Officers of*

21 \_\_\_\_\_  
 22 <sup>12</sup> *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (plaintiff bears the  
 23 burden of proving "that the defendant's misrepresentations caused the loss for which the  
 24 plaintiff seeks to recover"). Among other things, Mr. Babich would have presented  
 25 evidence, potentially through the prior testimony of David C. Smith, Ph.D. ("Dr. Smith")  
 that: (i) none of the Corrective Disclosures actually "corrected" the Form 10-K Statement;  
 and (ii) none of the Corrective Disclosures revealed "new" information that could explain  
 the price declines on each of those days. ¶¶ 99-100. Mr. Babich also would have argued  
 that Insys' stock price did not suffer a statistically significant decline on January 25, 2016.  
 ¶ 101.

26 <sup>13</sup> The third Ninth Circuit factor (i.e., the risk of maintaining class action status  
 27 throughout the trial) also supports the Settlement, as a court may exercise its discretion to  
 re-evaluate the appropriateness of class certification at any time. *See OmniVision*, 559 F.  
 28 Supp. 2d at 1041 ("there is no guarantee the certification would survive through trial, as  
 Defendants might have sought decertification or modification of the class").

1 *Justice*, 688 F.2d at 624; *see also Schaffer v. Litton Loan Servicing, LP*, 2012 WL  
2 10274679, \*11 (C.D. Cal. Nov. 13, 2012) (“Estimates of what constitutes a fair settlement  
3 figure are tempered by factors such as the risk of losing at trial, the expense of litigating  
4 the case, and the expected delay in recovery (often measured in years).”). Moreover, as  
5 the Court has recognized, “settlements must always leave defendants better off than a  
6 total liquidation of assets.” Doc. 400 at 2.

7 The Settlement provides for a payment of \$250,000 from Mr. Babich’s personal  
8 assets. As noted above, Mr. Babich’s constrained assets and existing financial obligations,  
9 as well as his inability to access any insurance coverage, made obtaining anything more  
10 than the Settlement Amount highly unlikely. Thus, accepting material proceeds now,  
11 rather than pursuing a likely judgment-proof defendant after trial, is in the best interests  
12 of the Class. *See, e.g., Singh v. Roadrunner Intermodal Servs., LLC*, 2019 WL 316814, at  
13 \*4 (E.D. Cal. Jan. 24, 2019) (noting risk of continued litigation “on defendants’ financial  
14 condition and, in turn, upon defendant’s ability to pay the settlement” as favoring  
15 approval of settlement).

16 Moreover, the Babich Settlement combined with the settlements reached in the  
17 Action with defendants Baker and Kapoor will provide the Class with a collective  
18 recovery of at least \$2.95 million, with the potential to increase to as much as \$12.25  
19 million. This collective recovery represents a meaningful percentage of the Class’s  
20 estimated aggregate damages—ranging from approximately \$34.7 million to  
21 approximately \$189.5 million based on Class Representative’s ability to establish  
22 damages based on certain of the Corrective Disclosures as estimated by Class  
23 Representative’s damages expert. Specifically, the collective recovery represents between  
24 approximately 1.6% and 8.5% of the Class’s aggregate damages (when assessed as a  
25 \$2.95 million recovery) and between approximately 6.5% and 35.3% the Class’s  
26 aggregate damages (when assessed as a \$12.25 million recovery). At the low end, this  
27 recovery range is directly in line with the median ratio of securities class action  
28



1 settlements to investor losses in recent years as reported by NERA Economic Consulting.  
2 On the high end, the recovery range exceeds the median ratio by many multiples. ¶ 11.<sup>14</sup>

### 3           **3.       The Complexity, Expense, and Duration of Continued Litigation**

4           The “expense, complexity and likely duration of further litigation” or “delay of  
5 trial and appeal” also should be taken into account when assessing a proposed settlement.  
6 *See Churchill*, 361 F.3d at 575; Rule 23(e)(2)(C)(i). Courts have consistently found  
7 securities fraud actions “notoriously complex[]” and the settlement of such actions  
8 appropriate to “circumvent[] the difficulty and uncertainty inherent in long, costly trials.”  
9 *In re AOL Time Warner, Inc. Sec. & “ERISA” Litig.*, 2006 WL 903236, at \*8 (S.D.N.Y.  
10 Apr. 6, 2006); *see also In re Heritage Bond Litig.*, 2005 WL 1594403, at \*6 (C.D. Cal.  
11 June 10, 2005) (class actions have a well-deserved reputation as being the most complex).  
12 “Generally, unless the settlement is clearly inadequate, its acceptance and approval are  
13 preferable to lengthy and expensive litigation with uncertain results.” *In re LinkedIn User*  
14 *Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015).

15           Here, trial was less than a month away when the Settlement was reached. A trial  
16 of this Action would invariably be followed by post-trial motions and appeals, resulting  
17 in additional years of complex and expensive litigation. *In re Amgen, Inc. Sec. Litig.*, 2016  
18 WL 10571773, at \*3 (C.D. Cal. Oct. 25, 2016) (“A trial of a complex, fact-intensive case  
19 like this could have taken weeks, and the likely appeals of rulings on summary judgment  
20 and at trial could have added years to the litigation.”). Further, the expense of litigating  
21 this Action for more than four years has been significant, with Plaintiffs’ Counsel  
22 incurring more than \$1.2 million in Litigation Expenses pursuing claims in the Action on  
23 behalf of the Class. A trial would have increased those expenses considerably. ¶ 94. *See*  
24 *Hartless v. Clorox Co.*, 273 F.R.D. 630, 640 (S.D. Cal. 2011), *aff’d in part*, 473 F. App’x

25 \_\_\_\_\_  
26 <sup>14</sup> *See also* Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class*  
27 *Action Litigation: 2019 Full-Year Review*, NERA Economic Consulting, 20 (Feb. 12,  
28 2020), [https://www.nera.com/content/dam/nera/publications/2020/PUB\\_YEAR\\_END\\_](https://www.nera.com/content/dam/nera/publications/2020/PUB_YEAR_END_Trends_012_120_Final.pdf)  
[Trends\\_012\\_120\\_Final.pdf](https://www.nera.com/content/dam/nera/publications/2020/PUB_YEAR_END_Trends_012_120_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  
from 2.6% to 2.1% in 2019).

1 716 (9th Cir. 2012) (“Considering these risks, expenses and delays, an immediate and  
2 certain recovery for class members . . . favors settlement of this action.”). This factor  
3 weighs in favor of approving the Settlement.

#### 4 **4. The Extent of Discovery Completed and Stage of Proceedings**

5 The Babich Settlement was reached after more than four years of litigation,  
6 including complete fact and expert discovery. Before reaching the Settlement, Class  
7 Representative reviewed and analyzed more than 14 million pages of documents, took or  
8 defended sixteen fact and expert depositions, served detailed expert reports pertaining to  
9 liability and damages issues, and litigated numerous motions, including defendants’  
10 Summary Judgment Motion. ¶¶ 20-73. Indeed, at the time of settlement, the Settling  
11 Parties were actively preparing for trial, and had already filed their proposed Final Pretrial  
12 Order, their respective in limine motions (and oppositions thereto), and other key pretrial  
13 disclosures. Docs. 350-52, 354-58, 361-62, 372, 375-78, 380-81, 392-94. In addition,  
14 Class Counsel prepared extensively for the Final Pretrial Conference held on July 9, 2020  
15 (Doc. 390), at which the Court and counsel for the Settling Parties discussed extensively  
16 matters relating to the August 2020 trial, including the Court’s determination of the  
17 Settling Parties’ in limine motions. ¶¶ 74-78. Thus, the Settling Parties’ respective  
18 positions were clear and known, as was the evidence they would use to prove their case,  
19 and they had sufficient information to properly assess the Settlement. *See Kmiec v.*  
20 *Powerwave Techs., Inc.*, 2016 WL 5938709, at \*4 (C.D. Cal. July 11, 2016) (“[T]he fact  
21 that the parties did not settle until after the conclusion of fact discovery indicates that  
22 Plaintiffs were well aware of the merits of their case and the difficulties awaiting them at  
23 trial.”); *Amgen*, 2016 WL 10571773, at \*4 (finding “in favor of granting final approval”  
24 where discovery was complete and “case was on the verge of trial”). This factor strongly  
25 weighs in favor of the Settlement.

#### 26 **5. Presence of a Governmental Participant**

27 Although there were regulatory investigations and criminal charges in connection  
28 with Insys’ off-label marketing of Subsys, there was no parallel action by the SEC. Also,

1 pursuant to the Class Action Fairness Act (“CAFA”), Mr. Babich was required to provide  
2 notice of the Settlement to appropriate state and federal officials. *See* Stipulation, ¶ 20.  
3 To date, none of these officials has raised any objection or concern regarding the  
4 Settlement. *LinkedIn*, 309 F.R.D. at 589 (finding no objections favored settlement).

## 5 **6. The Reaction of Class Members**

6 Courts in the Ninth Circuit typically consider the class’s reaction to the settlement  
7 at the final approval stage. *See Morgan v. Childtime Childcare, Inc.*, 2020 WL 218515,  
8 at \*2 (C.D. Cal. Jan. 6, 2020) (“Lack of objection speaks volumes for a positive class  
9 reaction to the settlement.”). The deadline for Class Members to object to the Settlement  
10 is October 28, 2020. ¶ 12. To date, there have been no objections. *Id.* Class Representative  
11 will address objections, if any, in his reply submissions to be filed by November 11, 2020.

### 12 **D. The Remaining Rule 23(e)(2) Factors Support Final Approval**

13 Amended Rule 23(e)(2) also instructs courts to consider: (i) the effectiveness of  
14 the proposed method of distributing the relief provided to the class, including the method  
15 of processing class member claims; (ii) the terms of any proposed award of attorney’s  
16 fees, including the timing of payment; (iii) any other agreement made in connection with  
17 the proposed settlement; and (iv) whether class members are treated equitably relative to  
18 each other. *See* Rule 23(e)(2)(C)(ii)-(iv), (e)(2)(D). These factors also support final  
19 approval of the Babich Settlement.

20 *First*, the proposed method of distribution and claims processing ensures equitable  
21 treatment of Class Members, whose claims will be processed pursuant to a standard  
22 method routinely found effective in securities class actions. A.B. Data will review and  
23 process all Claims received, provide Claimants with an opportunity to cure any deficiency  
24 or request judicial review of the denial of their Claims, if applicable, and will ultimately  
25 mail or wire Authorized Claimants their *pro rata* share of the Net Settlement Fund, as  
26 calculated under the Plan. *See infra* Section III; ¶¶ 109-14. Importantly, none of the  
27 Settlement proceeds will revert to Mr. Babich. *See* Doc. 399-1, ¶ 12.

28

1           *Second*, in an effort to preserve proceeds of the Babich Settlement for the Class,  
2 Class Counsel is not seeking any award of attorneys’ fees from the Babich Settlement.  
3 Rather, Class Counsel is seeking reimbursement of \$75,000 in Litigation Expenses that  
4 were not previously sought for reimbursement from either the Baker or Kapoor  
5 Settlements, including expenses incurred from July 2, 2020 through July 21, 2020. As  
6 detailed in the Expense Reimbursement Memorandum, these expenses were reasonably  
7 incurred in prosecuting and resolving the Action. *See OmniVision*, 559 F. Supp. 2d at  
8 1048 (“Attorneys may recover their reasonable expenses that would typically be billed to  
9 paying clients in non-contingency matters.”). Further, any expense award is separate from  
10 the approval of the Settlement, and neither Class Counsel nor Class Representative may  
11 terminate the Settlement based on this Court’s or any appellate court’s ruling with respect  
12 to expenses. Doc. 399-1, ¶ 16. *Third*, the Stipulation is the only agreement concerning the  
13 Settlement entered into by the Settling Parties.

14           For the reasons above and in the Whitman Declaration, the Babich Settlement is  
15 fair, reasonable, and adequate and, therefore, warrants the Court’s final approval.

### 16 **III. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION**

17           A plan for allocating settlement proceeds under Rule 23 is evaluated under the  
18 same standard of review applicable to the settlement as a whole—the plan must be fair  
19 and reasonable. *See Class Plaintiffs*, 955 F.2d at 1284; *Amgen*, 2016 WL 10571773, at  
20 \*7. An allocation formula need only have a “reasonable, rational basis, particularly if  
21 recommended by experienced and competent counsel.” *Nguyen v. Radiant Pharm. Corp.*,  
22 2014 WL 1802293, at \*5 (C.D. Cal. May 6, 2014). “A plan of allocation that reimburses  
23 class members based on the extent of their injuries is generally reasonable.” *In re Oracle*  
24 *Sec. Litig.*, 1994 WL 502054, at \*1 (N.D. Cal. June 18, 1994).

25           The Plan proposed here provides an equitable basis to allocate the Net Settlement  
26 Fund among all Authorized Claimants, and was developed by Class Counsel with the  
27 assistance of its damages expert. ¶ 111. The Plan (as set forth in Appendix A to the  
28 Settlement Notice) is the same plan that Class Representative proposed for approval in

1 connection with the Baker Settlement, which the Court stated it was “disposed to  
2 approve.” Doc. 417.

3 To have a loss under the Plan, a Claimant must have purchased or otherwise  
4 acquired Insys common stock during the Class Period and held those shares through at  
5 least one of the alleged Corrective Disclosures. ¶ 111. A Claimant’s loss under the Plan  
6 will depend upon several factors, including the date(s) when the Claimant  
7 purchased/acquired their shares of Insys common stock during the Class Period, whether  
8 such shares were sold and if so, when and at what price, taking into account the PSLRA’s  
9 statutory limitation on recoverable damages. *Id.* Losses under the Plan are based upon the  
10 estimated amount of artificial inflation in the price of Insys common stock during the  
11 Class Period. ¶ 110. Authorized Claimants will recover their proportional “pro rata”  
12 amount of the Net Settlement Fund based on their loss. *See In re Audioeye, Inc., Sec.*  
13 *Litig.*, 2017 WL 5514690, at \*2 (D. Ariz. May 8, 2017) (finding plan of allocation  
14 providing for distribution to claimants on a pro rata basis to be fair and reasonable).

15 The Plan is similar to those utilized in other securities class actions. *See, e.g.,*  
16 *Hefler v. Wells Fargo & Co.*, 2018 WL 4207245, at\*11 (N.D. Cal. Sept. 4, 2018); *Nguyen,*  
17 *2014 WL 1802293*, at \*5; *Ansell v. Laikin*, 2012 WL 13034812, at \*9 (C.D. Cal. July 11,  
18 2012). To date, no objections to the Plan have been filed, warranting approval. ¶ 114.

#### 19 **IV. SETTLEMENT NOTICE SATISFIED RULE 23 AND DUE PROCESS**

20 Notice of the Babich Settlement satisfied both: (i) Rule 23 as it was “the best notice  
21 . . . practicable under the circumstances” and directed “in a reasonable manner to all class  
22 members who would be bound by the” Settlement, *see* Rule 23(c)(2)(B), (e)(1)(B); *Eisen*  
23 *v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974); and (ii) due process as it was  
24 “reasonably calculated, under all the circumstances, to apprise interested parties of the  
25 pendency of the action and afford them an opportunity to present their objections.”  
26 *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

27 In accordance with the Preliminary Approval Order, A.B. Data mailed Postcard  
28 Settlement Notices to the potential Class Members, and Nominees (in bulk), who

1 previously received the Class Notice and/or notice of the Baker and Kapoor Settlements,  
 2 as well as any other identified Class Members. A.B. Data also mailed copies of the  
 3 Settlement Notice and Claim Form to Nominees. *See* Schachter Decl. (attached as Ex. 2  
 4 to Whitman Decl.), ¶¶ 3-11. In addition, the Summary Settlement Notice was published  
 5 in *Investor's Business Daily* and transmitted over *PRNewswire*. *Id.*, ¶ 12. A.B. Data also  
 6 updated the Website, [www.InsysRXSecuritiesLitigation.com](http://www.InsysRXSecuritiesLitigation.com), and toll-free helpline for  
 7 this matter, with information about the Babich Settlement. *Id.*, ¶¶ 13-14.<sup>15</sup>

8 The content disseminated through this notice campaign was also more than  
 9 adequate, as it “generally describe[d] the terms of the settlement in sufficient detail to  
 10 alert those with adverse viewpoints to investigate and to come forward and be heard.”  
 11 *Young v. LG Chem Ltd.*, 783 F. App'x 727, 736 (9th Cir. 2019). Collectively, the notices  
 12 provide the necessary information for Class Members to make an informed decision  
 13 regarding the Settlement, as required by the PSLRA (*see* 15 U.S.C. § 78u-4(a)(7)), and  
 14 fairly apprises them of their rights with respect to the Settlement. *See, e.g., In re Apollo*  
 15 *Grp. Inc. Sec. Litig.*, 2012 WL 1378677, at \*3 (D. Ariz. Apr. 20, 2012).

## 16 V. CONCLUSION

17 For the reasons stated herein and in the Whitman Declaration, Class  
 18 Representative respectfully requests that the Court grant final approval of the Babich  
 19 Settlement and the proposed Plan of Allocation. Proposed Orders are attached.<sup>16</sup>

20 DATED: October 14, 2020

Respectfully submitted,

**KESSLER TOPAZ  
 MELTZER & CHECK, LLP**

*s/ Johnston de F. Whitman, Jr.*  
 Johnston de F. Whitman, Jr. (admitted *Pro Hac Vice*)

24 \_\_\_\_\_  
 25 <sup>15</sup> Copies of the Settlement Notice and Claim Form are also available on Class  
 Counsel's website, [www.ktmc.com](http://www.ktmc.com).

26 <sup>16</sup> Per the Court's instruction during the September 23, 2020 hearing in connection  
 27 with the Baker Settlement, the attached proposed Orders have been combined with the  
 proposed orders previously submitted in connection with the Baker and Kapoor  
 28 Settlements. Counsel for Defendants have reviewed and approve of the [Proposed]  
 Judgment Approving Class Action Settlements with Defendants Darryl S. Baker, John N.  
 Kapoor, and Michael L. Babich submitted herewith.

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 14, 2020, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to those persons who are CM/ECF registrants:

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