

GURBIR S. GREWAL, ATTORNEY
GENERAL OF NEW JERSEY, on behalf
of the State of New Jersey, and
PAUL R. RODRÍGUEZ, ACTING
DIRECTOR OF THE NEW JERSEY
DIVISION OF CONSUMER AFFAIRS,

*Plaintiffs,*¹

v.

INSYS THERAPEUTICS, INC., a
Delaware corporation, and JOHN
N. KAPOOR,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY

DOCKET NO. MID-C-1-18

Civil Action

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT AGAINST DEFENDANT JOHN N. KAPOOR**

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Plaintiffs
Division of Law
124 Halsey Street, 5th Floor
Newark, New Jersey 07101
(609) 647-9136
lara.fogel@law.njoag.gov

Lara J. Fogel (ID # 038292006)
Chief, Government & Healthcare Fraud
Eric Boden (ID # 205702017)
Brian DeVito (ID # 044832010)
Dana Vasers (ID # 274362019)
Deputy Attorneys General

On the Brief

¹ The case caption has been revised under R. 4:34-4 to reflect the current Attorney General and Acting Director.

TABLE OF CONTENTS

PRELIMINARY STATEMENT ii

PROCEDURAL HISTORY 3

 I. Plaintiffs' Civil Case..... 3

 II. Federal Criminal Case..... 4

STATEMENT OF FACTS 7

ARGUMENT 45

 I. NO ISSUE OF MATERIAL FACT EXISTS AND PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW..... 45

 II. ADVERSE INFERENCES SHOULD BE DRAWN FROM KAPOOR'S INVOCATION OF HIS FIFTH AMENDMENT PRIVILEGE AT HIS DEPOSITION..... 48

 III.KAPOOR HAS INDISPUTABLY ENGAGED IN NUMEROUS ACTS AND PRACTICES IN VIOLATION OF THE CONSUMER FRAUD ACT..... 54

 A. Kapoor is Liable for Unconscionable Commercial Practices in Violation of the CFA 57

 1.The Insidious Practices that Kapoor Directed at Insys are Precisely the Kinds of Acts That Qualify as Unconscionable Commercial Practices Under the CFA 59

 i. There is No Question That Kapoor Directed and Implemented Numerous Schemes to Push Subsys onto New Jersey Consumers, Regardless of Medical Need. 59

 ii. There is No Doubt that Kapoor's Conduct Amounts to Unconscionable Commercial Practices Under the CFA . 61

CONCLUSION 63

TABLE OF AUTHORITIES**Cases**

<u>Allen v. V & A Bros., Inc.,</u> 208 N.J. 114 (2011)	58
<u>Assocs. Home Equity Svcs., Inc. v. Troup,</u> 343 N.J. Super. 254 (App. Div. 2001)	57
<u>Barry v. Arrow Pontiac, Inc.,</u> 100 N.J. 57 (1985)	56
<u>Brill v. Guardian Life Ins. Co. of America,</u> 142 N.J. 520 (1995)	46, 47
<u>Centennial Life Ins. Co. v. Nappi,</u> 956 F. Supp. 222 (N.D.N.Y. 1997)	49
<u>Cho v. Holland,</u> No. 04-c-5227, 2006 U.S. Dist. LEXIS 76054 (N.D. Ill. Oct. 3, 2006)	53
<u>D'Ercole Sales, Inc. v. Fruehauf Corp.,</u> 206 N.J. Super 11 (App. Div. 1985)	58
<u>Demarquet v. Roque,</u> 2017 N.J. Super. Unpub. LEXIS 2881 (App. Div. 2017)	49
<u>Duratron Corp. v. Republic Stuyvesant Corp.,</u> 95 N.J. Super. 527 (App. Div. 1967)	48, 49
<u>Gonzalez v. Wilshire Credit Corp.,</u> 207 N.J. 557 (2011)	55
<u>Herner v. HouseMaster of Am., Inc.,</u> 349 N.J. Super. 89 (App. Div. 2002)	58, 62
<u>Hundred East Credit Corp. v. Eric Schuster Corp.,</u> 212 N.J. Super. 350 (App. Div. 1986)	58, 62
<u>Hyland v. Aquarian Age 2000, Inc.,</u> 148 N.J. Super. 186 (Ch. Div. 1977)	58, 62

Kugler v. Romain,
58 N.J. 522 (1971) 54

Lemelledo v. Benefit Mgmt. Corp.,
150 N.J. 255 (1997) 55

Mahne v. Mahne,
66 N.J. 53 (1974) 48, 49, 53

Martinez v. Triple B Fabricating,
2018 N.J. Super. Unpub. LEXIS 3131
(Law Div. July 20, 2018)..... 49

Meshinsky v. Nicholas Yacht Sales, Inc.,
110 N.J. 464 (1988) 56

Milgram v. Comfort Direct, Inc.,
No. A-0360-07T2, 2008 N.J. Super. Unpub. LEXIS 556
(App. Div. Oct. 28, 2008)..... 58

Perez v. Rent-A-Center, Inc.,
186 N.J. 188 (2006) 55

SEC v. Chester Holdings, Ltd.,
41 F. Supp. 2d 505 (D.N.J. 1999) 49

SEC v. Roor,
No. 99-cv-3372 (HB), 2004 U.S. Dist. LEXIS 17416
(S.D.N.Y. Aug. 30, 2004)..... 53

SEC v. Suman,
684 F. Supp. 2d 378 (S.D.N.Y. 2010) 53

SEC v. Weintraub,
No. 11-21549, 2011 U.S. Dist. LEXIS 149999
(S.D. Fla. Dec. 30, 2011)..... 53

Skeer v. EMK Motors, Inc.,
187 N.J. Super. 465 (App. Div. 1982) 56

State, Dep't of Law & Pub. Safety, Div. of Gaming Enforcement
v. Merlino,
216 N.J. Super. 579 (App. Div. 1987) 48

Wozniak v. Pennella,
373 N.J. Super. 445 (App. Div. 2004) 58, 62

Statutes

18 U.S.C. § 1962(d) 5
21 C.F.R. 1308.12(c)(9) 8
21 U.S.C.A. 812 8
Consumer Fraud Act,
N.J.S.A. 56:8-1 to -224 ("CFA") 2, 54, 55, 56, 57
False Claims Act,
N.J.S.A. 2A:32C-1 to -18 ("FCA") 3
N.J.A.C. 24:21-6 8

Rules

R. 4:46-2(c) 45, 47

PRELIMINARY STATEMENT

Defendant John N. Kapoor ("Kapoor") was the mastermind of a pernicious campaign to push inappropriate prescriptions for the dangerous and addictive synthetic opioid drug, Subsys. Kapoor was the Chief Executive Officer of Insys Therapeutics, Inc. ("Insys"), the manufacturer of Subsys. The incontrovertible evidentiary material demonstrates that through an unlawful and aggressive promotional campaign and bribery scheme, in conjunction with a scheme to lie to insurers about patient diagnoses and treatment histories, Kapoor caused a vast increase in the dangerous and unjustified writing, use, and approval of Subsys prescriptions. In so doing, Kapoor sought profit above all else while disregarding the safety and well-being of large numbers of New Jersey patients who took Subsys. The record shows that, at all relevant times, Kapoor directed and approved:

- The fraudulent marketing of the highly-potent fentanyl product, Subsys, to high volume opioid prescribers who did not typically treat patients with breakthrough cancer pain (the only condition that the Food and Drug Administration ("FDA") approved Subsys to treat), and pushing of dangerously high doses of Subsys to increase profits.
- An incentive compensation plan that promoted non-compliant activity within Insys.
- The payment of bribes to New Jersey prescribers through the Insys Speaker Program, buying his way to higher, medically unnecessary prescription counts for New Jersey patients.

- The implementation of an entire unit known as the Insys Reimbursement Unit ("IRC"), whose sole objective was to lie to insurance companies and pharmacy benefit managers ("PBMs") to elicit insurance coverage for Subsys.

The harm that Kapoor's scheme has inflicted on New Jersey and its residents continues to this day. Thousands of New Jerseyans die annually from drug overdoses - most of them opioid overdoses. And tens of thousands more would be dead but for emergency medical interventions and costly treatment for opioid addiction.

The business practices of Kapoor and his company that fomented our opioid epidemic were nothing if not unconscionable. The undisputed evidentiary material submitted with this motion demonstrate beyond contention the facts and consequences of Kapoor's wrongdoing. The Attorney General of the State of New Jersey ("Attorney General") and the Acting Director of the New Jersey Division of Consumer Affairs ("Acting Director") (collectively, "Plaintiffs") therefore ask this Court to enter partial summary judgment against Kapoor for his numerous unconscionable commercial practices in directing Insys's unscrupulous sales of Subsys in violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -224 ("CFA"), as enumerated in Count I of the First Amended Complaint (the "Complaint").²

² In this motion, Plaintiffs seek only a liability judgment against Kapoor for his unconscionable commercial practices in violation of the CFA. Plaintiffs intend at a later date to file another

PROCEDURAL HISTORY

I. Plaintiffs' Civil Case

On October 5, 2017, Plaintiffs filed a Complaint against Insys, alleging violations of the New Jersey CFA and False Claims Act, N.J.S.A. 2A:32C-1 to -18 ("FCA"). Plaintiffs amended the Complaint on November 16, 2017, to add Kapoor as a defendant. Following motion practice, including a stay motion and motions to dismiss, the parties commenced discovery. Shortly thereafter, on June 10, 2019, Insys commenced chapter 11 cases in the United States Bankruptcy Court in the District of Delaware, staying the present action against Insys. (Case No. 19-11292-KG.) Insys subsequently filed a Second Amended Joint Chapter 11 Plan of Liquidation, which was confirmed by the Bankruptcy Court on January 16, 2020, and is currently in effect.

While the bankruptcy case stayed Plaintiffs' litigation against Insys, Plaintiffs continued to engage in extensive discovery with Kapoor, including exchanging interrogatories, document requests, requests for admissions and depositions.

motion or motions, quantifying Kapoor's unconscionable commercial practices and seeking (i) permanent injunctive relief, (ii) the imposition of the maximum civil penalties available under the CFA, and (iii) reimbursement of attorneys' fees and investigative costs from Kapoor, as well as establishing Kapoor's liability as to additional Counts in the First Amended Complaint.

Plaintiffs also produced voluminous documents in response to Kapoor's discovery requests.

On July 8, 2020, Plaintiffs deposed Kapoor, and elicited Fifth Amendment invocations to almost 400 questions. Since then, Plaintiffs made a number of supplemental productions of responsive documents, which are now complete. To date, Plaintiffs have produced almost 1.8 million pages of documents to Kapoor.

II. Federal Criminal Case

On October 26, 2017, the United States Department of Justice arrested Kapoor and charged him with conspiracy to violate the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), as well as other federal felonies, including conspiracy to commit mail and wire fraud.³ Those charges were contained in a superseding indictment in which Kapoor was added to the previously-alleged conspiracy involving Insys's former Chief Executive Officer, Michael Babich ("Babich"), and Insys's former Vice President of Sales, Alec Burlakoff ("Burlakoff"), as well as other former Insys executives.⁴ On October 29, 2017, Kapoor resigned from Insys's Board of Directors.⁵

³ Certification of Lara J. Fogel ("Fogel Cert"), submitted herewith, Ex. 1 (16-CR-10343-ADB (D. Mass.) ("Criminal Docket"), ECF No. 214 (Arrest Warrant) & Ex. 2 (ECF No. 419 (Second Superseding Indictment, which is the operative indictment).

⁴ Id., Ex. 2 (Second Superseding Indictment).

⁵ Id., Ex. 3 ("INSYS founder resigns from Board after charges in

The criminal case was filed in the United States District Court for the District of Massachusetts in the matter entitled, United States of America v. Michael J. Gurry, Richard M. Simon, Sunrise Lee, Joseph A. Rowan and John Kapoor, Docket No. 16-CR-10343-ADB.⁶ After a fifty-day trial (the "Criminal Trial") before Judge Allison Burroughs, a jury found Kapoor guilty of conspiring to violate RICO in violation of 18 U.S.C. § 1962(d).⁷ In so doing, the jury found Kapoor guilty of conspiring to commit each of the charged predicate acts, which included illegal distribution of a controlled substance, mail fraud, wire fraud, and honest services mail and wire fraud.⁸

Kapoor and his co-defendants moved for judgment of acquittal and for a new trial.⁹ In a November 26, 2019 Memorandum and Order on Defendants' Motions for Judgment of Acquittal and for a New Trial ("Memorandum and Order"), Judge Burroughs granted a partial judgment of acquittal, and in relevant part, vacated Kapoor's

U.S. opioid bribe case," Reuters (Oct. 29, 2017) & Ex. 4 (Kapoor Dep., July 8, 2020, 15:19-16:5).

⁶ The case was originally filed against Burlakoff and Babich as well, though they each pled guilty on November 28, 2018 and January 9, 2019, respectively. (See Criminal Docket, ECF Nos. 543, 664.)

⁷ Fogel Cert., Ex. 5 (ECF No. 841 (Verdict Form) at 2-6).

⁸ Id., Ex. 6 (Crim. Trial Tr., May 2, 2019, 6:10-7:5), Ex. 7 (Memorandum and Order on Defendants' Motions for Judgment of Acquittal and for a New Trial, Nov. 26, 2019, at p. 1) & Ex. 5 (ECF No. 841 (Verdict Form) at 2-6).

⁹ (See Criminal Docket, ECF Nos. 859-64.)

convictions for the Controlled Substances Act and honest services mail and wire fraud RICO predicates.¹⁰ The convictions of the mail fraud and wire fraud RICO predicates remain.¹¹

In her Memorandum and Order, Judge Burroughs found that the Government presented strong evidence against Kapoor at trial, noting that the "weight of the evidence supported a conclusion that Kapoor agreed to conduct Insys' affairs **through bribes and fraud.**" (emphasis added.)¹² In relevant part, the Court found Kapoor's behavior to be "**reprehensible and designed to financially incentivize healthcare practitioners to prescribe Subsys without regard for the best interests of their patients.**" (emphasis added.)¹³ While Kapoor "knew the power of Subsys and that addiction was a risk," he "nonetheless tried to maximize the number of prescriptions written and the dosage prescribed."¹⁴

On March 30, 2020, Judge Burroughs entered final judgment against Kapoor, (i) sentencing him to sixty-six months' imprisonment, followed by three years of supervised release, (ii) ordering restitution in the amount of \$59,755,362.45, (iii) ordering forfeiture in the amount of \$1,914,771.20, and (iv)

¹⁰ Id., Ex. 7 (Memorandum and Order) at 82.)

¹¹ Ibid.

¹² Id., Ex. 7 (Memorandum and Order) at 62).

¹³ Id., Ex. 7 (Memorandum and Order) at 81).

¹⁴ Ibid.

imposing a \$250,000 fine and special assessment of \$100.00.¹⁵ On January 24, 2020, the Federal Government appealed Judge Burroughs' Order granting in part Kapoor's motion for judgment of acquittal and Kapoor's sentence.¹⁶ On April 6, 2020, Kapoor appealed the District Court's final judgment to the United States Court of Appeals for the First Circuit.¹⁷ Both appeals are pending.

On November 2, 2020, Kapoor requested an extension of his self-surrender date to the Bureau of Prisons from November 30, 2020 to February 2, 2021.¹⁸ The federal government opposed this request on November 16, 2020.¹⁹ On November 18, 2020, Kapoor's request was granted "in light of the ongoing pandemic."²⁰

STATEMENT OF FACTS²¹

Kapoor is the founder and former chairman of Insys, a self-described "specialty pharmaceutical company that develops and seeks to commercialize innovative pharmaceutical products that

¹⁵ Id., Ex. 8 (Criminal Docket, ECF No. 1308 (Memorandum and Order on the Government's Motion for Forfeiture and Apportionment of Restitution)).

¹⁶ (See Criminal Docket, ECF No. 1180 (Notice of Appeal).)

¹⁷ Id., ECF No. 1319 (Notice of Appeal).

¹⁸ Id., ECF No. 1405 (Defendant John Kapoor's Motion to Continue Self-Surrender Date).

¹⁹ Id., ECF No. 1411 (Government's Opposition to Defendants' Motions to Continue Surrender Date).

²⁰ (See Criminal Docket, ECF No. 1419 (Electronic Order).)

²¹ For a more comprehensive recitation of the facts, see Plaintiffs' Statement of Material Facts ("SOMF"), filed herewith, which is incorporated by reference herein.

target the unmet needs of cancer patients.”²² Since its inception, Kapoor has been the principal shareholder of Insys, and until January 2017, held executive management positions, including Executive Chairman and Chief Executive Officer.²³ Insys’s principal product and source of revenue was Subsys, a sublingual fentanyl spray approximately fifty times stronger than heroin and one hundred times more potent than morphine.²⁴ Fentanyl use can lead to severe physical and/or psychological dependence, and may result in sedation, nausea, vomiting, respiratory depression, circulatory depression, substance abuse and addiction, and/or death. Based upon these dangers and the potential for abuse, fentanyl is classified as a Schedule II narcotic. N.J.S.A. 24:21-6(d)(6); N.J.A.C. 24:21-6; 21 U.S.C.A. 812; 21 C.F.R. 1308.12(c)(9). In New Jersey alone, Insys sold approximately \$74.2 million of Subsys from 2012 through the third quarter of 2016.²⁵ At least 9,915 prescriptions of Subsys were written by healthcare

²² Fogel Cert., Ex. 9 (SEC Form S-1 Registration Statement), Ex. 4 (Kapoor Dep., July 8, 2020, 15:9-18).

²³ Id., Ex. 9 (SEC Form S-1 Registration Statement), Ex. 10 (“Billionaire John Kapoor Stepping Down as CEO, Chairman of Opioid Maker Insys,” Forbes (Jan. 10, 2017); Ex. 4 (Kapoor Dep., July 8, 2020, 15:9-18).

²⁴ Id., Ex. 11 (“DEA Issues Nationwide Alert on Fentanyl as Threat to Health and Public Safety,” Drug Enforcement Administration (March 18, 2015); Ex. 12 (Insys Form 10-k, filed with the Securities & Exchange Commission for the fiscal year ended Dec. 31, 2015); Ex. 4 (Kapoor Dep., July 8, 2020, 16:6-25).

²⁵ Id., Ex. 13 (INS-NJ-00032772).

professionals with a New Jersey address from 2012 through November 2016.²⁶

As further discussed below, beginning in 2012, Kapoor steered Insys's sales and marketing strategy for Subsys to promote the drug's prescription at higher, more addictive doses, including when those doses were not medically indicated; imposed an incentive-driven compensation structure for sales representatives that was so outside industry norms that it was flagged for encouraging off-label promotion and quid pro quo behavior; ran a speaker program kickback scheme that effectively bribed prescribers to boost the number of Subsys prescriptions they wrote, including medically unnecessary prescriptions; and orchestrated a scheme to obtain insurers' prior authorization of Subsys prescriptions through fraud and deceit, circumventing a measure designed to combat inappropriate prescribing of the highly addictive drug.

Subsys is Launched into the Market in March 2012.

In early 2012, the FDA approved Subsys for the limited purpose of treating "breakthrough pain in cancer patients ("BTC") 18 years of age and older who are already receiving and who are tolerant to opioid therapy for their underlying persistent cancer pain.

²⁶ Ibid.

Patients must remain on around-the-clock opioids when taking SUBSYS.”²⁷ In this context, “breakthrough” pain refers to “pain that comes on suddenly for short periods of time and is not alleviated by a patient’s normal pain management plan.”²⁸ According to the FDA-approved Subsys label, “[t]he initial dose of Subsys to treat episodes of breakthrough cancer pain is always 100 micrograms.”²⁹

Shortly after obtaining FDA approval, in March 2012, Subsys launched, joining several Transmucosal Immediate Release Fentanyl (“TIRF”) drugs already on the market, including Fentora, Abstral, Lazanda and Actiq.³⁰ At the time of the launch, Kapoor was Chairman of Insys.³¹ To market Subsys, Insys hired sales representatives throughout the country.³² These sales representatives were provided with “target lists,” which were lists of prescribers categorized into deciles, or rankings, based on their history of

²⁷ Id., Ex. 14 (Subsys Label).

²⁸ Id., Ex. 15 (“Transmucosal Immediate-Release Fentanyl (TIRF) Medicines,” U.S. Food & Drug Administration).

²⁹ Id., Ex. 14 (Subsys Label).

³⁰ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 79:1-8); Ex. 17 (Crim. Trial Tr., Jan. 29, 2019, 53:22-54:4); Ex. 18 (Crim. Trial Tr., Feb. 11, 2019, 219:16-220:6).

³¹ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 36:11-15); Ex. 4 (Kapoor Dep., July 8, 2020, 17:10-17).

³² Id., Ex. 17 (Crim. Trial Tr., Jan. 29, 2019, 37:2-17); Ex. 4 (Kapoor Dep., July 8, 2020, 17:18-18:1).

prescribing opiates, and the sales representatives were told to target only "high-decile" prescribers.³³

Data collected and analyzed for Kapoor showed that oncologists, the prescribers most likely to treat patients with BTCP, were not prescribing many opioids and were therefore low-decile prescribers.³⁴ An April 27, 2014 report, for example, showed that oncologists wrote only four percent of Subsys prescriptions.³⁵ According to Babich's testimony in the Fuller Litigation,³⁶ [t]he majority of [oncologists were] decile 1s and 2s, which were guys who wrote one or two scripts every . . . six months, where decile 10 guys were writing multiple scripts per day of Actiq. Those were our main targets" ³⁷

³³ Id., Ex. 17 (Crim. Trial Tr., Jan. 29, 2019, 52:19-53:21); Ex. 4 (Kapoor Dep., July 8, 2020, 20:3-21:10).

³⁴ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 46:4-11); Ex. 20 (INS-NJ-00537468 - INS-NJ-00537559 at 11); Ex. 4 (Kapoor Dep., July 8, 2020, 21:11-22).

³⁵ Id., Ex. 21 (EJF-NJ-000035272).

³⁶ This action, Deborah Fuller et al. v. John Kapoor, et al., 2:17-cv-07877-ES-SCM (D.N.J.), was originally filed in Middlesex Superior Court, MID-L-001859-17 (the "Fuller Litigation"). That wrongful death litigation was filed by the parents of New Jersey resident Sarah A. Fuller, a young woman who died from an adverse reaction to Subsys, which was prescribed to her off-label. The Fuller plaintiffs alleged a similar fraudulent scheme as Plaintiffs, including Kapoor's participation in the fraudulent marketing of Subsys, bribing of physicians, and lying to insurance companies to ensure coverage of Subsys.

³⁷ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 46:4-13); Ex. 4 (Kapoor Dep., July 8, 2020, 25:7-26:16).

Kapoor “always pushed to get more and more doctors to prescribe the drug, ranging from any specialty from podiatry to oncology and everything in between.”³⁸ Kapoor “wanted anyone and everyone who could write Subsys to prescribe.”³⁹ The majority of high-decile prescribers were pain management physicians, not oncologists, despite the fact that Subsys was indicated only for cancer-related pain.⁴⁰ Kapoor even “coach[ed]” his team to “target[]” “pill mills” – where narcotics were indiscriminately prescribed – because pill mills equated to “dollar signs.”⁴¹ For Kapoor and his team, “[i]t was not run the other way. It was run to the pill mill.”⁴²

While certain Insys employees felt positive about Subsys’s launch, Kapoor described it to colleagues as the “worst f[***]ing launch in pharmaceutical history [that] he’[d] ever seen” because he was “unhappy with the sales” of Subsys.⁴³ Based on daily data that Insys used to track each prescription written for Subsys,

³⁸ Id., Ex. 22 (Crim. Trial Tr., Mar. 6, 2019, 192:17-20); Ex. 4 (Kapoor Dep., July 8, 2020, 26:17-27:1).

³⁹ Id., Ex. 23 (Crim. Trial Tr., Mar. 7, 2019, 165:18-19); Ex. 4 (Kapoor Dep., July 8, 2020, 27:13-22).

⁴⁰ Id., Ex. 17 (Crim. Trial Tr., Jan. 29, 2019, 54:10-16); Ex. 14 (Subsys Label); Ex. 4 (Kapoor Dep., July 8, 2020, 27:23-28:7).

⁴¹ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 142:2-6); Ex. 4 (Kapoor Dep., July 8, 2020, 28:8-29:4).

⁴² Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 142:6-7); Ex. 4 (Kapoor Dep., July 8, 2020, 29:5-14).

⁴³ Id., Ex. 24 (Crim. Trial Tr., Feb. 12, 2019, 157:7-11; 158:9-12); Ex. 4 (Kapoor Dep., July 8, 2020, 30:21-31:15).

which Kapoor had analyzed regularly, Kapoor expressed concern that the majority of patients who began taking Subsys were not refilling their Subsys prescriptions after the first month.⁴⁴ Indeed, patients who began taking Subsys at a 100 mcg or 200 mcg dose were more likely to stop using the drug.⁴⁵ Kapoor “said it was the most important problem in the company at the time.”⁴⁶

With Kapoor at the Helm, Insys Changed its Strategy in the Fall of 2012.

By fall 2012, Insys began changing its leadership and its sales and marketing tactics.⁴⁷ In September and October 2012, Insys hosted both a national sales meeting and a national sales call to regroup and train its sales force on new messaging.⁴⁸ Burlakoff, who had started at the company just months earlier as a manager in the southeast region, was promoted to Vice President

⁴⁴ Id., Ex. 25 (Crim. Trial Tr., Jan. 31, 2019, 207:1-15); Ex. 26 (Crim. Trial Tr., Feb. 13, 2019, 91:5-23); Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 122:9-124:5); Ex. 28 (Crim. Trial Tr., Jan. 30, 2019, 112:18-114:8); Ex. 24 (Crim. Trial Tr., Feb. 12, 2019, 158:9-159:1); Ex. 4 (Kapoor Dep., July 8, 2020, 31:16-33:1).

⁴⁵ Id., Ex. 17 (Crim. Trial Tr., Jan. 29, 2019, 150:3-16); Ex. 24 (Crim. Trial Tr., Feb. 12, 2019, 162:21-163:18); Ex. 4 (Kapoor Dep., July 8, 2020, 32:16-33:1).

⁴⁶ Id., Ex. 24 (Crim. Trial Tr., Feb. 12, 2019, 158:9-159:1); Ex. 4 (Kapoor Dep., July 8, 2020, 31:5-15).

⁴⁷ See infra FNs 47-49; Fogel Cert., Ex. 4 (Kapoor Dep., July 8, 2020, 34:11-19).

⁴⁸ Fogel Cert., Ex. 17 (Crim. Trial Tr., Jan. 29, 2019, 57:22-58:1); Ex. 29 (Crim. Trial Tr., Feb. 4, 2019, 201:14-21); Ex. 4 (Kapoor Dep., July 8, 2020, 34:20-35:4).

of Sales.⁴⁹ At Kapoor's direction, Burlakoff commenced a new marketing initiative aimed at increasing Subsys sales, including the "effective dose strategy" described below.⁵⁰

Kapoor Drove the "Effective Dose Strategy" at Insys.

Kapoor "was behind the effective dose strategy" – the company's effort to convince prescribers that 100 mcg or 200 mcg doses were not effective for patients and "force conversations, force the titration" – getting the prescribers to quickly increase all patients' dosages of Subsys across the board.⁵¹

While the Subsys label instructed that "[t]he initial dose of Subsys to treat episodes of breakthrough cancer pain is always 100 micrograms,"⁵² the data Kapoor received regularly showed that patients who began taking Subsys at the doses of 100 or 200 mcg were not refilling their prescriptions.⁵³

In an August 29, 2012 email, Kapoor stated:

⁴⁹ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 117:3-16, 118:17-119:9); Ex. 4 (Kapoor Dep., July 8, 2020, 35:5-15).

⁵⁰ Id., Ex. 28 (Crim. Trial Tr., Jan. 30, 2019, 129:19-134:8); Ex. 25 (Crim. Trial Tr., Jan. 31, 2019, 205:6-207:25); Ex. 29 (Crim. Trial Tr., Feb. 4, 2019, 43:11-50:2); Ex. 4 (Kapoor Dep., July 8, 2020, 35:16-36:10).

⁵¹ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 59:24-61:14, 65:3-7); Ex. 28 (Crim. Trial Tr., Jan. 30, 2019, 131:5-19); Ex. 4 (Kapoor Dep., July 8, 2020, 37:18-25).

⁵² Id., Ex. 14 (Subsys label).

⁵³ Id., Ex. 24 (Crim. Trial Tr., Feb. 12, 2019, 162:21-163:18); Ex. 4 (Kapoor Dep., July 8, 2020, 36:21-37:17).

[W]e need to move patients to higher doses from 100mcg (only 4% of patients used this strength). In order to accomplish this, we agreed to do the following:

. . . .

5) We will monitor on a daily basis . . . the success of our effective dose message and new voucher program.

I am writing this memo so that we have no misunderstanding and have similar priorities.

John Kapoor.

[Emphasis added.]⁵⁴

That same day, Babich emailed all regional sales managers (“RSMs”) – blind carbon copying Kapoor – and stated:

We are seeing a number of 60 units of the 100 and 200 mcg still come through. **Our number 1 goal right now is effective dose and having reps promoting 60 units of the low strengths is not going to cut it . . .** Reps having doctors write scripts for 60 units at 100 mcg will be monitored.

[Emphasis added.]⁵⁵

Shortly after Babich’s email, on September 12, 2012, Burlakoff forwarded Kapoor an email chain wherein Burlakoff lamented that he “vehemently know[s]” that a Subsys prescription at 100mcg “is suicide [for Insys] and has to stop NOW.”⁵⁶ Burlakoff concluded that he is “driving the [effective dose] message home

⁵⁴ Id., Ex. 30 (INS-NJ-01176585); Ex. 4 (Kapoor Dep., July 8, 2020, 39:11-19).

⁵⁵ Id., Ex. 31 (EJF-NJ-000095648); Ex. 4 (Kapoor Dep., July 8, 2020, 41:15-21).

⁵⁶ Id., Ex. 32 (INS-NJ-01177466).

hard, and will continue to drive the message home even harder until [he] no longer see[s] these concerning prescription trends. (as [sic] it relates to the 100mcg dose)."⁵⁷ The next day, in a September 13, 2012 email from Burlakoff to all sales representatives in the southeastern district, carbon copying Kapoor, Babich, and others, Burlakoff outlined the new initiative:

Effective immediately, I need a reply . . . each and every single time you receive a message . . . indicating you had a prescription written for less than 400mcg . . . 100mcg or 200mcg of [Subsys] does NOT work. **We would be better off having the doctor write a prescription for one of our competitors than write for 100mcg or 200 mcg . . . I do not know how I can stress enough just how detrimental prescriptions for 200mcg and 100mcg are to the company, patient and overall state of the business.** Anyone who ignores these instructions is subject to immediate negative consequences

[Emphasis added.]⁵⁸

About four days later, around September 17, 2012, Kapoor instructed Matthew Napoletano ("Napoletano"), former Vice President of Marketing, to "put marketing materials together around effective dose," and make sure the "effective dose messages [were] rolled out."⁵⁹

⁵⁷ Ibid.

⁵⁸ Id., Ex. 33 (INS-NJ-00842142); Ex. 4 (Kapoor Dep., July 8, 2020, 43:2-44:15).

⁵⁹ Id., Ex. 29 (Crim. Trial Tr., Feb. 4, 2019, 43:11-50:2); Ex. 4 (Kapoor Dep., July 8, 2020, 46:4-13).

Shortly thereafter on September 17, 2012, Burlakoff relayed the effective dose message to Insys's entire sales force, blind copying Kapoor. The email stated that "each and every time a prescriber in your territory writes for [sic] a Subsys prescription at 100mcg or 200mcg," the sales representative must

report back within 24 hours on WHY the low dose was used and HOW the doctor plans to titrate the patient to effective dose . . . I know it is not at all easy to get a physician to initiate a new habit, and this is exactly what we are attempting to do.

[Emphasis added.]⁶⁰

The email went on to say:

We are attempting to . . . help you to maintain these newly generated Subsys patients by rapidly informing you of the fact that they wrote for a dose and number of units that is simply not effective. **We are 100 percent sure that those patients whom are prescribed 60 units of 100 micrograms do not end up filling a prescription for Subsys the following month. The goal is to generate patients who believe in the safety and efficacy behind this product, hence these patients will continuously refill their monthly prescriptions indefinitely. . . . We will inevitably fail miserably if we do not vehemently drive home the effective dose message on every sales call.**

[Emphasis added.]⁶¹

⁶⁰ Id., Ex. 34 (EJF-NJ-000299652- EJF-NJ-000299656); Ex. 35 (INS-NJ-01111286); Ex. 4 (Kapoor Dep., July 8, 2020, 46:14-48:15).

⁶¹ Id., Ex. 34 (EJF-NJ-000299652- EJF-NJ-000299656); Ex. 35 (INS-NJ-01111286); Ex. 4 (Kapoor Dep., July 8, 2020, 49:24-50:23).

In response to Kapoor's effective dose strategy, New Jersey-based sales representative, Susan Beisler ("Beisler"), with whom Kapoor had multiple correspondences,⁶² emailed Insys's former Northeast Regional Sales, Manager, Frank Serra ("Serra"), the following:

I didn't want to email Alec [Burlakoff] directly without asking you first but reporting back this information within 24 hours isn't feasible . . . To throw off my entire routing or call the office of the Pain Director of St Barnabas (who usually starts at 400 mcgs or better) because he wrote a script today for 100 mcgs and question his medical judgment seems nuts to me And knowing [New Jersey doctor] as well as I do, I think that would be a total turn off for him and I'd like him to continue writing. Additionally, analyzing his RX's since April (24+), he has only used 100 mcgs 3 or 4 times and generally starts at 400 - 600 - I'm very uncomfortable with jumping all over him for writing 100 mcgs as it's not often.⁶³

Kapoor closely monitored Insys's implementation of his Effective Dose Strategy.⁶⁴ For instance, Kapoor regularly received "Subsys Low Strength Reports" or "Daily Rep Report[s] for Low Strength," which tracked Subsys prescriptions written for 100 mcg and 200 mcg

⁶² See, e.g., Ex. 36 (EJF-NJ-000306608); Ex. 37 (EJF-NJ-000308099); Ex. 38 (EJF-NJ-000108897); Ex. 4 (Kapoor Dep., July 8, 2020, 50:24 - 52:19).

⁶³ Id., Ex. 39 (INS-NJ-00165880).

⁶⁴ See infra FNs 64, 65; see also Ex. 4 (Kapoor Dep., July 8, 2020, 52:20-53:3).

doses.⁶⁵ In addition, Kapoor participated in weekly calls with RSMs, including those managing New Jersey, to “discuss sales strategy,” and, among other things, “make sure his message of effective dose was being delivered.”⁶⁶

Kapoor Directed the Implementation of a Compensation Plan to Increase Subsys Sales.

In addition to the Effective Dose Strategy, Kapoor directed and approved the implementation of a compensation plan that incentivized sales representatives to push for higher dose prescriptions.⁶⁷ For example, in an email to Babich, dated November 13, 2012, with a subject line of “Incentive Plan,” Kapoor stated that he “would like to suggest the following criteria for [an] incentive plan.”⁶⁸ The criteria included net revenue, number of doctors in the territory writing scripts, the number of scripts, and switch plan implementation.⁶⁹ Kapoor approved the compensation

⁶⁵ Fogel Cert., Ex. 40 (EJF-NJ-000011045); Ex. 40a (EJF-NJ-000011047); Ex. 41 (EJF-NJ-000011073); Ex. 42 (EJF-NJ-000011692); Ex. 4 (Kapoor Dep., July 8, 2020, 53:4-55:11).

⁶⁶ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 61:19-62:4); Ex. 43 (Serra Cert. at ¶ 7); Ex. 4 (Kapoor Dep., July 8, 2020, 55:12-22).

⁶⁷ See *infra* FNs 67-79, Fogel Cert., Ex. 4 (Kapoor Dep., July 8, 2020, 77:10-23).

⁶⁸ Fogel Cert., Ex. 44 (EJF-NJ-000012639); Ex. 4 (Kapoor Dep., July 8, 2020, 77:24-79:6).

⁶⁹ Ibid.

structure for Insys sales representatives, and had “final signoff on any commission structure, every quarter.”⁷⁰

Under Kapoor’s compensation plan, sales representatives were paid a low base salary.⁷¹ Sales representatives were paid large bonuses based on the value of Subsys scripts that were written by their assigned prescribers.⁷² Sales representatives received “higher bonuses” for “higher micrograms.”⁷³ These bonuses made up the majority of successful sales representatives’ compensation.⁷⁴

Kapoor was informed that his compensation structure promoted non-compliant activity within Insys, including “off label promotion and quid pro quo behavior.”⁷⁵ For example, in or around 2016, an outside consulting firm concluded that the compensation structure at Insys was “way outside the norm.”⁷⁶ In response to the outside consulting firm’s findings, in June 2016, former Chief Operating Officer Daniel Brennan (“Brennan”) informed Kapoor that

⁷⁰ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 65:3-7); Ex. 4 (Kapoor Dep., July 8, 2020, 79:7-16).

⁷¹ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 55:19-22); Ex. 4 (Kapoor Dep., July 8, 2020, 79:17-25).

⁷² Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 55:23-56:10); Ex. 4 (Kapoor Dep., July 8, 2020, 81:3-20).

⁷³ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 64:9-16); Ex. 4 (Kapoor Dep., July 8, 2020, 81:13-20).

⁷⁴ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 55:23-56:1); Ex. 4 (Kapoor Dep., July 8, 2020, 81:21-82:2).

⁷⁵ Id., Ex. 45 (INS-NJ-00597203); Ex. 4 (Kapoor Dep., July 8, 2020, 82:5-16).

⁷⁶ Id., Ex. 45 (INS-NJ-00597203); Ex. 4 (Kapoor Dep., July 8, 2020, 82:17-83:4).

the compensation structure at Insys was "creating an environment of non-compliance by paying a low base salary (barely above minimum wage) and then very high ratio of incentive pay as their overall comp."⁷⁷ As Brennan explained to Kapoor, the consulting firm's interviews of Insys's employees revealed that they themselves found that Insys's "compensation structure encouraged inappropriate behavior," which Brennan assumed to mean "off label promotion and quid pro quo behavior."⁷⁸ Brennan therefore "strongly recommended" a change in payment structure "that is more in line with industry standards and creates a more compliant-behaving sales organization."⁷⁹ In response, Kapoor noted to Brennan: "To be entirely honest, I am [a] little concerned that your email directly follows on the heels of the recent termination discussions (and actions) related to your commercial team."⁸⁰

At Kapoor's Direction, Insys Used its Speaker Program to Bribe Physicians.

In addition to these new marketing strategies and compensation structure, Insys launched the Insys Speaker Program

⁷⁷ Id., Ex. 45, (INS-NJ-00597203); Ex. 4 (Kapoor Dep., July 8, 2020, 83:16-84:14).

⁷⁸ Id., Ex. 45 (INS-NJ-00597203); Ex. 4 (Kapoor Dep., July 8, 2020, 84:15-85:15).

⁷⁹ Id., Ex. 45, (INS-NJ-00597203); Ex. 4 (Kapoor Dep., July 8, 2020, 86:5-18).

⁸⁰ Id., Ex. 46 (INS-NJ-00598428); Ex. 4 (Kapoor Dep., July 8, 2020, 87:6-88:8).

("ISP") in August 2012, which was initially run by Napoletano.⁸¹ The program, which started as a pilot program primarily in the southeast region, was supposed to be a peer-to-peer program to educate physicians who could potentially prescribe Subsys to their patients.⁸² After just a few weeks, in early September 2012, Kapoor instructed Babich and Napoletano to "put on hold all speaker programs effective immediately" so they could agree on an objective for the program and its costs moving forward.⁸³ In other words, Kapoor "wanted to put a halt to the programs to determine if we [Insys and Kapoor] were making money on the programs that were done so far."⁸⁴

In September and October 2012, Kapoor, Babich, Burlakoff, and Napoletano had several contentious meetings during which they discussed the ISP and its purpose.⁸⁵ While Napoletano maintained at these meetings that the speaker program's objectives were "peer-

⁸¹ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 109:10-110:24); Ex. 26 (Crim. Trial Tr., Feb. 13, 2019, 14:24-15:6); Ex. 4 (Kapoor Dep., July 8, 2020, 90:16-91:8).

⁸² Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 114:6-115:9); Ex. 26 (Crim. Trial Tr., Feb. 13, 2019, 13:1-14:9); Ex. 4 (Kapoor Dep., July 8, 2020, 91:9-25).

⁸³ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 111:8-114:5); Ex. 26 (Crim. Trial Tr., Feb. 13, 2019, 16:8-18:12); Ex. 4 (Kapoor Dep., July 8, 2020, 92:1-19).

⁸⁴ Id., Ex. 26 (Crim. Trial Tr., Feb. 13, 2019, 17:24-18:2); Ex. 4 (Kapoor Dep., July 8, 2020, 92:1-19).

⁸⁵ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 119:20-122:25, 126:20-127:11); Ex. 4 (Kapoor Dep., July 8, 2020, 92:20-93:22).

to-peer education, to recruit physicians that potentially could use this product and have them attend the speaker program, and then have a healthcare provider or physician present the information to them," Kapoor "was not in agreement" with those objectives, and instead only "wanted to make sure every speaker wrote" Subsys prescriptions.⁸⁶

Before the speaker program hold was lifted, Burlakoff had a "detailed conversation" with Kapoor and Babich wherein "their objectives were once again reiterated" to Burlakoff; "they made sure that there was no way that [Burlakoff] could mistake their message"; and let Burlakoff know that his "job [was] on the line."⁸⁷ Burlakoff understood the clear message that Kapoor wanted conveyed to speakers: "Doc, this is a business, we're partners, **we're going to pay you in exchange for prescribing Subsys.**"⁸⁸ Burlakoff further understood that if prescribers failed to write prescriptions for Subsys, they would not be given speaker programs.⁸⁹

After this conversation with Kapoor and Babich, on September 17, 2012, Burlakoff sent the Insys sales force an email, copying

⁸⁶ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 114:6-115:9, 119:20-122:25); Ex. 4 (Kapoor Dep., July 8, 2020, 93:20-95:6).

⁸⁷ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 144:4-144:19); Ex. 4 (Kapoor Dep., July 8, 2020, 95:7-96:11).

⁸⁸ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 144:1-150:8); Ex. 4 (Kapoor Dep., July 8, 2020, 96:12-22) (emphasis added).

⁸⁹ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 144:1-150:8); Ex. 4 (Kapoor Dep., July 8, 2020, 96:23-97:7).

Kapoor, that said: "If you cannot guarantee that this program will yield positive results, the program should not take place" ⁹⁰ According to Burlakoff, the only way to guarantee a positive result from a speaker program was to "make sure that either you, the rep, your manager, director, or even myself [Burlakoff] had a conversation with the doctor that **spells it out clear as day, which is basically the more you speak, the more you're expected to prescribe.**" ⁹¹ Burlakoff also wrote in this email that "[a]ctivity does not necessarily equate to productivity. These programs have been offered to you as the number one opportunity to grow your business. Unfortunately a scheduled speaker program does not by any means solidify a return on investment." ⁹² In this context, "**return on investment means a successful bribe, an increase in Subsys prescription based on the speaker money that we [Insys] have paid the doctor, the speaker.**" ⁹³

Burlakoff repeated the mantra "if you haven't guaranteed the business, don't do the program," in "a million different ways" in his September 17 email because he "personally [did not] want any

⁹⁰ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 144:1-150:8); Ex. 4 (Kapoor Dep., July 8, 2020, 97:17-98:17).

⁹¹ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 144:1-150:8); Ex. 4 (Kapoor Dep., July 8, 2020, 99:13-25) (emphasis added).

⁹² Id., Ex. 47 (Criminal Trial Ex. 175); Ex. 4 (Kapoor Dep., July 8, 2020, 100:13-101:2).

⁹³ Id., Ex. 27 (Crim. Trial Tr., Mar 5, 2019, 144:1-150:8); Ex. 4 (Kapoor Dep. July 8, 2020, 101:14-102:1) (emphasis added).

programs to take place if the doctor is not going to prescribe as a direct result of our [Insys] paying them because that is going to come down on me, and that's going to be my [Burlakoff's] job on the line."⁹⁴ The hold on the speaker program was lifted shortly thereafter on September 24, 2012.⁹⁵

The next month, at a meeting in late-October 2012, Kapoor demanded that Insys instill "appropriate metrics in place to track whether the [speaker] program was a success."⁹⁶ There was "disagreement" and "shouting" at the meeting about how to track the speaker programs.⁹⁷ Napoletano proposed that Insys "track the attendees coming . . . to attend the presentation . . . and . . . see if the presentation had any impact and if they adopted the product in their practice."⁹⁸ Burlakoff, on the other hand, "said he doesn't care if anybody attends. It's all about the speaker and just tracking this speaker."⁹⁹ Napoletano was frustrated and stated to Kapoor and Burlakoff that "everybody in pharma knows there's statutes, everybody knows that you don't track

⁹⁴ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 144:1-150:8).

⁹⁵ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 144:10-24).

⁹⁶ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 137:3-140:17); Ex. 4 (Kapoor Dep., July 8, 2020, 102:24-103:7).

⁹⁷ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 137:3-140:17); Ex. 4 (Kapoor Dep., July 8, 2020, 92:20-93:22).

⁹⁸ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 137:11-139:6); Ex. 4 (Kapoor Dep., July 8, 2020, 103:16-104:1).

⁹⁹ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 139:9-12); Ex. 4 (Kapoor Dep., July 8, 2020, 104:2-11).

speakers.”¹⁰⁰ Nonetheless, at a subsequent meeting, Kapoor repeated that “he wanted every speaker to write,” and, over Napoletano’s objection, said “I [Kapoor] want to track every speaker and I want[] positive ROI [return on investment].”¹⁰¹

Napoletano created a document for Kapoor that tracked return on investment (“ROI”) for each ISP speaker between launch and December 6, 2012.¹⁰² This document included data about the number of programs provided to prescribers, the market share of those prescribers, the total number of programs delivered, the net revenue generated from the prescriber’s prescriptions, and the money that was paid to the doctors, or honorarium.¹⁰³ This document also reported “ROI” for each prescriber, which was “the ratio between net revenue and honorarium.”¹⁰⁴

Kapoor required that a speaker program have a “minimum” return on investment of “2 to 1.”¹⁰⁵ Kapoor “wanted to make sure that when he was spending money that he was getting his money back and

¹⁰⁰ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 140:1-4); Ex. 4 (Kapoor Dep., July 8, 2020, 104:12-20).

¹⁰¹ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 141:8-25); Ex. 4 (Kapoor Dep., July 8, 2020, 104:21-105:13).

¹⁰² Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 145:16-147:11); Ex. 4 (Kapoor Dep., July 8, 2020, 105:24-107:14).

¹⁰³ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 145:16-147:11).

¹⁰⁴ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 145:16-147:14); Ex. 4 (Kapoor Dep., July 8, 2020, 109:16-25).

¹⁰⁵ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 190:14-19); Ex. 4 (Kapoor Dep. July 8, 2020, 110:1-7).

at least doubling his investment.”¹⁰⁶ For example, “if the representative spent \$10,000 on a speaker to speak and they did not get at least two dollars back for every one, so they didn’t get \$20,000 back in net revenue, then [Insys] would take the rest of their remaining budget they were using for speakers and give it to the representative who did produce a 2 to 1 or even higher return.”¹⁰⁷ The ROI tracking document referenced above was used to flag speakers with an ROI of less than 2 to 1 and identify speakers for a temporary hold on programming because they were not writing enough Subsys prescriptions.¹⁰⁸

Kapoor was the “ultimate decision maker,” deciding “who came aboard the speaker program and then who was ‘soft deleted,’” meaning that the prescriber “won’t be given programs” if the prescriber “wasn’t writing enough scripts.”¹⁰⁹ Sales representatives increasingly focused on the “key customers” referred to at Insys as “whales.”¹¹⁰ These were prescribers who **“basically ha[d] agreed in a very clear and concise manner that**

¹⁰⁶ Id., Ex. 48 (Crim. Trial Tr., Mar. 1, 2019, 147:24-148:4); Ex. 4 (Kapoor Dep., July 8, 2020, 110:1-111:11).

¹⁰⁷ Id., Ex. 48 (Crim. Trial Tr., Mar. 1, 2019, 186:13-19); Ex. 4 (Kapoor Dep., July 8, 2020, 111:12-112:5).

¹⁰⁸ Id., Ex. 16 (Crim. Trial Tr., Feb. 1, 2019, 154:17-155:11).

¹⁰⁹ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 69:1-10, 76:4-13); Ex. 4 (Kapoor Dep., July 8, 2020, 112:6-113:8).

¹¹⁰ Id., Ex. 48 (Crim. Trial Tr., Mar. 1, 2019, 177:15-18, 180:2-10); Ex. 4 (Kapoor Dep., July 8, 2020, 113:20-114:22).

they [we]re up for the deal, which [wa]s they w[ould] be compensated based on the number of prescriptions of Subsyst they wr[ote].”¹¹¹ Funds for ISP programming were allocated predominantly for these prescribers and other high-decile prescribers.¹¹² The deal was that “the more they wr[ote] and the more they increase[d] the dose, the more they[] [were] paid to speak.”¹¹³

Kapoor and Insys executives wanted to reward top speakers with “get[ing] paid more money for doing less.”¹¹⁴ The speakers who wrote the most Subsyst scripts “as a result of their speaking” were promoted from “local” to “regional” to “national” speakers and were paid more for each program with every promotion.¹¹⁵ This allowed high-prescribing doctors to earn more in speaker fees, while having “more time at home with the family and less time [away from home,] out [at] a restaurant . . . giving up their personal time time is money.”¹¹⁶

¹¹¹ Id., Ex. 48 (Crim. Trial Tr., Mar. 1, 2019, 180:2-10 (emphasis added)); Ex. 4 (Kapoor Dep., July 8, 2020, 113:20-114:22).

¹¹² Id., Ex. 28 (Crim. Trial Tr., Jan. 30, 2019, 136:3-14); Ex. 4 (Kapoor Dep., July 8, 2020, 114:14-22).

¹¹³ Id., Ex. 48 (Crim. Trial Tr., Mar. 1, 2019, 180:2-10 (emphasis added)); Ex. 4 (Kapoor Dep., July 8, 2020, 114:23- 115:6).

¹¹⁴ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 165:18-166:7); Ex. 4 (Kapoor Dep., July 8, 2020, 115:16-116:8).

¹¹⁵ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 165:18-166:7); Ex. 4 (Kapoor Dep., July 8, 2020, 116:9-17).

¹¹⁶ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 165:18-166:7); Ex. 4 (Kapoor Dep., July 8, 2020, 116:18-117:1).

Kapoor monitored the profitability of the speaker program.¹¹⁷ Kapoor participated in a daily management meeting at 8:30 a.m. that covered, among other things, Insys's return on investment from the speaker program.¹¹⁸ Kapoor "wanted to know where the money was going and if we were seeing a return on our investment at that point."¹¹⁹ Kapoor was "so hands on" that he monitored the prescribing history of individual health care providers and questioned sales representatives when their prescribers who "wrote initially . . . haven't written in the . . . past four months."¹²⁰ Kapoor was informed when speakers wrote scripts for Insys's competitors.¹²¹ Kapoor would "always" say at the 8:30 a.m. daily management meeting, **"I thought we owned these doctors, if we're paying them to write, to do speaker programs"** and "was incensed that they would go out and write a competing product when [Insys was] paying them."¹²²

¹¹⁷ Id., Ex. 26 (Crim. Trial Tr., Feb. 13, 2019, 31:7-15); Ex. 4 (Kapoor Dep. July 8, 2020, 117:2-10).

¹¹⁸ Id., Ex. 26 (Crim. Trial Tr., Feb. 13, 2019, 17:15-23); Ex. 4 (Kapoor Dep., July 8, 2020, 117:11-118:2).

¹¹⁹ Id., Ex. 26 (Crim. Trial Tr., Feb. 13, 2019, 17:15-23); Ex. 4 (Kapoor Dep., July 8, 2020, 118:3-19).

¹²⁰ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 82:25-83:19); Ex. 4 (Kapoor Dep., July 8, 2020, 118:20-120:6).

¹²¹ Id., Ex. 26 (Crim. Trial Tr., Feb. 13, 2019, 124:23-126:7); Ex. 4 (Kapoor Dep., July 8, 2020, 120:7-15).

¹²² Id., Ex. 26 (Crim. Trial Tr., Feb. 13, 2019, 126:2-7) (emphasis added); Ex. 4 (Kapoor Dep., July 8, 2020, 120:16-121:19).

There was at least one "special meeting" where Kapoor scrutinized extensive data about speaker program performance.¹²³ Kapoor and the other meeting attendees "went through every single line by line" of a document that reported "the number of programs that [a prescriber] did, the revenue, and we analyzed, then, what we should do with those potential speakers going forward, based on their success that they were having so far."¹²⁴

Once Kapoor saw that the speaker program was successful in generating profits for Insys in 2013, he approved a speaker budget increase in 2014.¹²⁵ The goal was **"to spend more money investing in doctors in exchange for scripts.** That was discussed every single day at the company."¹²⁶

Insys's ISP events were often sparsely attended, many times only by the prescriber, the sales representative, and a friend or colleague of the prescriber.¹²⁷ Indeed, high-prescribing New

¹²³ Id., Ex. 26 (Crim. Trial Tr., Feb. 13, 2019, 35:13-20); Ex. 4 (Kapoor Dep., July 8, 2020, 121:20-122:5).

¹²⁴ Id., Ex. 26 (Crim. Trial Tr., Feb. 13, 2019, 35:13-20); Ex. 4 (Kapoor Dep., July 8, 2020, 122:6-123:9).

¹²⁵ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 69:8-10); Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 39:21-40:1, 168:3-20); Ex. 4 (Kapoor Dep., July 8, 2020, 123:10-124:2).

¹²⁶ Id., Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 228:9-12) (emphasis added); Ex. 4 (Kapoor Dep., July 8, 2020, 124:3-24).

¹²⁷ Id., Ex. 50 (Crim. Trial Tr., Mar. 14, 2019, 13:14-14:2); Ex. 17 (Crim. Trial Tr., Jan. 29, 2019, 124:4-125:8); Ex. 25 (Crim. Trial Tr., Jan. 31, 2019, 69:7-13); Ex. 51 (Crim. Trial Tr., Mar. 20, 2019, 58:17-25, 109:13-18); Ex. 18 (Crim. Trial Tr., Feb. 11, 2019, 123:23-124:4); Ex. 52 (SciMedica 77, 395,

Jersey speakers received payments of \$1,600, even though attendance sheets showed that nobody attended the programs.¹²⁸ In fact, New Jersey sales representative Beisler made light of these alleged speaker programs, noting to a nurse practitioner that wrote a lot of Subsys prescriptions: "I really appreciate all you've done for me, you are my best prescriber, . . . **I'll bring in donuts and a box of Joe and call it a programmy-day [sic] for you anytime.**"¹²⁹ To make a speaker program look legitimate, sales representatives padded sign-in sheets with names of people who were not present and forged their signatures.¹³⁰

Kapoor Was Directly Involved in Implementing the Speaker Program Bribery Scheme in New Jersey.

Kapoor was involved in the implementation of the ISP in New Jersey, as "New Jersey [was] a state in which doctors were being paid, and New Jersey was a target of this scheme."¹³¹ Kapoor personally met with at least three New Jersey prescribers, all of whom faced legal ramifications for their illicit opioid

56, 523); Ex. 4 (Kapoor Dep., July 8, 2020, 124:25-125:17).

¹²⁸ Id., Ex. 52 (SciMedica 77, 395, 56, 523); Ex. 4 (Kapoor Dep., July 8, 2020, 125:18-126:2).

¹²⁹ Id., Ex. 53 (BEISLER003073) (Emphasis added).

¹³⁰ Id., Ex. 28 (Crim. Trial Tr., Jan. 30, 2019, 155:11-156:12); Ex. 54 (Crim. Trial Tr., Feb. 7, 2019, 139:20-22, 205:19-209:12); Ex. 55 (Crim. Trial Tr., Mar. 15, 2019, 21:9-23:24); Ex. 4 (Kapoor Dep., July 8, 2020, 126:3-127:5).

¹³¹ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 14:13-16); Ex. 4 (Kapoor Dep., July 8, 2020, 127:15-128:11).

prescribing.¹³² Specifically, Kapoor met with (i) Kenneth Sun, who, in November 2019, pleaded guilty in the United States District Court for the District of New Jersey to accepting bribes and kickbacks from Insys in exchange for prescribing Subsys; (ii) Manoj Patharkar, whose New Jersey medical license was revoked by the State for his indiscriminate prescribing of painkillers; and (iii) Louis Spagnoletti, who was temporarily barred from seeing patients and forced to surrender his NJ CDS Registration in April 2018 because of his illegal and indiscriminate prescribing of opioids.¹³³ In total, the ISP made hundreds of speaker payments to numerous New Jersey prescribers.¹³⁴ These New Jersey prescribers wrote thousands of prescriptions for Subsys.¹³⁵

¹³² Id., Ex. 78 ("New Jersey/Pennsylvania Doctor [Kenneth Sun] Pleads Guilty to Accepting Bribes and Kickbacks in Exchange for Prescribing Powerful Fentanyl Drug," Department of Justice, Nov. 22, 2019); Ex. 79 (Consent Order, IMO SUSPENSION OR REVOCATION OF THE LICENSE OF MANOJ DINKAR PATHARKAR, M.D., filed Nov. 16, 2016); Ex. 80 (Consent Order, IMO SUSPENSION OR REVOCATION OF THE LICENSE OF LOUIS SPAGNOLETTI, M.D., Filed Mar. 16, 2018); Ex. 19 (Babich Dep., Jan. 27, 2020, 76:24-79:7); Ex. 4 (Kapoor Dep., July 8, 2020, 128:12-129:20).

¹³³ Ibid.

¹³⁴ Id., Ex. 56 (INS-NJ-00507784). See, in particular, the worksheets "2012," "2013," "2014," "2015," and "2016," each of which shows the thousands of dollars Insys paid to New Jersey prescriber-speakers. As the worksheets show under the "Type" column, the categories of payments included, among other things, "Honoraria," "Speaker Fee," "Speaker Payment," "Travel," and "Speaker Training Honoraria."

¹³⁵ Id., Ex. 13 (INS-NJ-00032772). See, in particular, the worksheet "TRx," which shows the number of Subsys prescriptions, by dosage and year, that each New Jersey

Kapoor was also in direct contact with New Jersey sales representative Susan Beisler about Insys's speaker program in New Jersey.¹³⁶ For example, Beisler complained to Kapoor that she could not attain the coveted status of a "top ten" sales representative because others were given more speaker money to pay their doctors to write more Subsys prescriptions.¹³⁷ Specifically, she stated, "Nobody has offered *my* doctors unlimited speaker programs to put them in the top ten . . . And that's why some reps are VERY UNFAIRLY in the top ten that shouldn't be?"¹³⁸ Beisler complained to Kapoor at least two other times that it was "very unfair" that certain sales representatives would "show up in [Insys's] top ten" when they could offer prescribers unlimited speaker programs, i.e., uncapped bribes, whereas Beisler had a limited budget for bribing prescribers.¹³⁹

prescriber wrote.

¹³⁶ Id., Ex. 36 (EJF-NJ-000306608); Ex. 37 (EJF-NJ-00308099); Ex. 38 (EJF-NJ-000108897); Ex. 4 (Kapoor Dep., July 8, 2020, 130:5-13).

¹³⁷ Id., Ex. 36 (EJF-NJ-000306608); Ex. 4 (Kapoor Dep., July 8, 2020, 130:23-133:8).

¹³⁸ Ibid.

¹³⁹ Id., Ex. 38 (EJF-NJ-000108897); Ex. 36 (EJF-NJ-000306608); Ex. 37 (EJF-NJ-00308099); Ex. 4 (Kapoor Dep., July 8, 2020, 132:13-137:16).

Kapoor Approved the Creation of the Insys Reimbursement Center ("IRC").

While the ISP was growing, Insys worked on a parallel track to create an in-house unit to address issues the company was facing in obtaining Subsys insurance approvals.¹⁴⁰ Subsys was "a very expensive medication" and "just about every Subsys prescription required a prior authorization."¹⁴¹ Insys's financial success, and by extension Kapoor's financial success, therefore depended upon approval of Subsys prior authorization requests.¹⁴² Insys originally used a third-party company called Apricot to process prior authorizations for Subsys.¹⁴³ But Apricot was only able to achieve a 30-35% success rate for Subsys prior authorization approvals.¹⁴⁴ After Insys board member Patrick Forteau suggested that bringing the prior authorization work in-house might yield better results, Michael Gurry ("Gurry"), former Vice President of Managed Markets (and co-defendant in the Criminal Trial), pitched

¹⁴⁰ Id., Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 67:22-68:11, 88:3-15).

¹⁴¹ Id., Ex. 25 (Crim. Trial Tr., Jan. 31, 2019, 80:20-22).

¹⁴² Id., Ex. 57 (Crim. Trial Tr., Feb. 22, 2019, 207:16-208:5); Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 121:17-122:8); Ex. 22 (Crim. Trial. Tr., Mar. 6, 2019, 55:19-56:23); Ex. 4 (Kapoor Dep., July 8, 2020, 140:7-15).

¹⁴³ Id., Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 74:10-19).

¹⁴⁴ Ibid.

a plan to Kapoor to pilot an in-house program that would come to be known as the Insys Reimbursement Center ("IRC").¹⁴⁵

Kapoor approved the funds for Insys to create and run the IRC.¹⁴⁶ Kapoor gave his "blessing" to set up the IRC at Insys headquarters.¹⁴⁷ In its pilot phase, the IRC functioned as an intermediary between prescribers, sales representatives, and insurers: prescribers would fax an opt-in form to the IRC; the IRC would call the insurer; if there was additional information needed, the IRC would communicate that to the sales representative who would follow up with the prescriber.¹⁴⁸ The IRC pilot program had early results of a 65 to 70% success rate.¹⁴⁹ As a result, the IRC quickly moved out of its pilot phase, and Kapoor "approved additional space to get them their separate building, which was . . . a quarter of a mile down the road" from Insys's headquarters.¹⁵⁰ The IRC was run by Gurry until May 2014, when Insys's Chief Operations Officer, Chris Homrich ("Homrich"), took

¹⁴⁵ Id., Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 67:19-70:24); Ex. 4 (Kapoor Dep., July 8, 2020, 140:16-25).

¹⁴⁶ Id., Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 75:17-23); Ex. 4 (Kapoor Dep., July 8, 2020, 141:1-8).

¹⁴⁷ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 88:6-21); Ex. 4 (Kapoor Dep., July 8, 2020, 141:9-16).

¹⁴⁸ Id., Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 73:13-74:3); Ex. 4 (Kapoor Dep., July 8, 2020, 141:25-142:18).

¹⁴⁹ Id., Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 78:7-22); Ex. 4 (Kapoor Dep., July 8, 2020, 142:19-143:2).

¹⁵⁰ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 88:10-21); Ex. 4 (Kapoor Dep., July 8, 2020, 143:3-12).

over control of the IRC.¹⁵¹ But, after a couple of months, Kapoor became "enraged" with the IRC's performance under Homrich and said, "f*ck it, I'm going to run the IRC."¹⁵²

Kapoor regularly discussed the IRC during the daily 8:30 a.m. management meeting.¹⁵³ Kapoor also requested weekly updates of the "success and failures" of the IRC and regularly received and reviewed IRC metrics.¹⁵⁴

Kapoor Constantly Pressured the IRC to Achieve Significantly Higher Subsys Approval Rates.

Kapoor continually put pressure on IRC employees to achieve rates of approval that were upwards of 90%.¹⁵⁵ Kapoor "always wanted higher."¹⁵⁶ In fact, Kapoor "wanted [the prior authorization

¹⁵¹ Id., Ex. 58 (Crim. Trial Tr., Feb. 26, 2019, 72:2-7); Ex. 48 (Crim. Trial Tr., Mar. 1, 2019, 56:2-6); Ex. 4 (Kapoor Dep., July 8, 2020, 164:6-13).

¹⁵² Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 123:18-25); Ex. 4 (Kapoor Dep., July 8, 2020, 168:3-18).

¹⁵³ Id., Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 78:4-6, 85:25-86:14, 87:16-88:2, 91:14-92:14); Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 230:5-232:6); Ex. 59 (Crim. Trial Tr., Feb. 25, 2019, 22:6-25:10); Ex. 4 (Kapoor Dep., July 8, 2020, 158:19-159:2).

¹⁵⁴ Id., Ex. 60 (EJF-NJ-000046307); Ex. 19 (Babich Dep., Jan. 27, 2019, 118:20-119:2); Ex. 4 (Kapoor Dep., July 8, 2020: 158:4-18).

¹⁵⁵ Id., Ex. 19 (Babich Dep., Jan. 27, 2019, 87:14-88:2); Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 88:3-22); Ex. 59 (Crim. Trial Tr., Feb. 25, 2019, 22:2-25:10); Ex. 4 (Kapoor Dep., July 8, 2020, 159:11-160:4).

¹⁵⁶ Id., Ex. 19 (Babich Dep., Jan. 27, 2019, 87:14-88:2); Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 88:3-22); Ex. 59 (Crim. Trial Tr., Feb. 25, 2019, 22:2-25:10); Ex. 4 (Kapoor Dep., July 8, 2020, 160:14-22).

approval rate] as close to 100 percent as possible.”¹⁵⁷ Kapoor also wanted the IRC to achieve significantly higher approval rates in the Subsys appeal process, with the goal of improving this rate from 3% to over 80%, and created an IRC working group, consisting of Xun Yu, former Vice President of Business Intelligence, Burlakoff, and Gurry, to meet this objective.¹⁵⁸

At Kapoor’s request, the IRC compiled and reported on what information each insurer required before it would approve a prior authorization.¹⁵⁹ Kapoor asked for a meeting with key IRC personnel to discuss the use of different criteria to obtain prior authorization approvals for different insurance plans.¹⁶⁰ Homrich sent Kapoor a report listing the “Facts of Approval,” which explained the factors that would likely lead to prior authorization approval for 12 different insurance plans.¹⁶¹ Kapoor then asked Homrich for a “face-to-face meeting to discuss.”¹⁶²

Kapoor Directed and Approved Numerous Fraudulent Strategies Aimed

¹⁵⁷ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 122:6-18); Ex. 4 (Kapoor Dep., July 8, 2020, 160:5-13).

¹⁵⁸ Id., Ex. 61 (EJF-NJ-000058972-73); Ex. 4 (Kapoor Dep., July 8, 2020, 161:25-162:18).

¹⁵⁹ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 120:13-121:11, 123:1-16); Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 80:2-81:15); Ex. 4 (Kapoor Dep., July 8, 2020, 162:19-163:12).

¹⁶⁰ Id., Ex. 60 (EJF-NJ-000046307); Ex. 4 (Kapoor Dep., July 8, 2020, 163:13-22).

¹⁶¹ Id., Ex. 62 (EJF-NJ-000040796); Ex. 4 (Kapoor Dep., July 8, 2020, 164:6-167:17).

¹⁶² Ibid.

at Achieving Significantly Higher Subsys Approval Rates.

Over time, the IRC developed several strategies to deceive insurers into approving prior authorizations for Subsys, which were discussed with and approved by Kapoor during the daily 8:30 a.m. management meeting.¹⁶³

One such strategy included saying that the prior authorization specialist, an IRC employee, was calling from the prescriber's office rather than from Insys.¹⁶⁴ To further this lie, Kapoor ordered that the IRC's phone numbers be blocked, so that insurers could not see that IRC employees, who were representing to be calling from a prescriber's office, were actually calling from the IRC.¹⁶⁵

Kapoor also approved other strategies, such as telling insurers that patients had certain conditions that were known to result in Subsys prior authorization approval, irrespective of whether the patients actually had those conditions.¹⁶⁶

¹⁶³ Id., Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 75:17-76:3, 85:25-86:14, 91:14-92:14); Ex. 4 (Kapoor Dep., July 8, 2020, 168:19-169:11).

¹⁶⁴ Id., Ex. 63 (Crim. Trial Tr., Feb. 8, 2019, 95:2-96:19); Ex. 4 (Kapoor Dep., July 8, 2020, 170:13-172:2).

¹⁶⁵ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 232:23-233:5); Ex. 4 (Kapoor Dep., July 8, 2020, 172:3-21).

¹⁶⁶ See infra FNs 166-174.

For example, one such strategy involved representing to insurers and PBMs that the patient had a history of cancer.¹⁶⁷ Kapoor attended a meeting where IRC employee Elizabeth Gurrieri ("Gurrieri"), former manager of the IRC, announced that a prior authorization was approved for a patient who had a "history of cancer," but did not still suffer from cancer.¹⁶⁸ After this meeting, Gurrieri told IRC employees to tell insurers "all the time" that a patient had a "history of cancer," even if it was not true.¹⁶⁹

Another strategy entailed listing tried-and-failed medications that the patient had not actually used.¹⁷⁰ Indeed, certain insurance companies would not approve a Subsys prior authorization if a patient did not first try certain medications, such as the generic fentanyl drug, Actiq.¹⁷¹ Yet another strategy involved stating falsely that the patient had dysphagia, or difficulty swallowing, to convince insurers that the patient

¹⁶⁷ Fogel Cert., Ex. 28 (Crim. Trial Tr., Jan. 30, 2019, 178:15-25); Ex. 63 (Crim. Trial Tr., Feb. 8, 2019, 9:6-10:1, 128:2-21); Ex. 4 (Kapoor Dep., July 8, 2020, 172:22-173:5).

¹⁶⁸ Id., Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 107:3-18); Ex. 4 (Kapoor Dep., July 8, 2020, 173:6-173:16).

¹⁶⁹ Id., Ex. 63 (Crim. Trial Tr., Feb. 8, 2019, 128:2-21); Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 107:3-18); Ex. 4 (Kapoor Dep., July 8, 2020, 173:17-174:1).

¹⁷⁰ Id., Ex. 59 (Crim. Trial Tr., Feb. 25, 2019, 9:6-11:24, 13:15-14:13); Ex. 4 (Kapoor Dep., July 8, 2020, 174:24-175:7).

¹⁷¹ Id., Ex. 59 (Crim. Trial Tr., Feb. 25, 2019, 9:6-11:24, 13:15-14:13); Ex. 4 (Kapoor Dep., July 8, 2020, 174:13-23).

needed the Subsys spray instead of a lozenge or lollipop TIRF competitor product.¹⁷² Actiq – the “lozenge on a stick” – has been available generically and is therefore less expensive and preferred by many insurers.¹⁷³ After Kapoor learned at a meeting that prior authorizations for patients suffering from dysphagia were frequently approved, Kapoor “was really excited and commended them on their research and feedback and basically said, ‘sh*t, everybody has difficulty swallowing, right, Alec?’”¹⁷⁴ Thereafter, false claims of dysphagia became “a common way to get approval for Subsys prescriptions.”¹⁷⁵

Another common strategy approved by Kapoor involved employing “the spiel,” which was language meant to obfuscate the diagnosis underlying the Subsys prescription from insurance companies and mislead them in the process.¹⁷⁶ The spiel was discussed with Kapoor during the 8:30 a.m. daily management calls.¹⁷⁷ When asked whether a patient had cancer or was being treated for cancer, IRC employees

¹⁷² Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 229:5-23); Ex. 59 (Crim. Trial Tr., Feb. 25, 2019, 6:16-9:5); Ex. 4 (Kapoor Dep., July 8, 2020, 179:19-180:4).

¹⁷³ Ibid.

¹⁷⁴ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 229:5-230:4); Ex. 4 (Kapoor Dep., July 8, 2020, 180:5-24).

¹⁷⁵ Id., Ex. 27 (Crim. Trial Tr., Mar. 5, 2019, 229:5-230:4); Ex. 4 (Kapoor Dep., July 8, 2020, 180:25-181:8).

¹⁷⁶ Id., Ex. 57 (Crim. Trial Tr., Feb. 22, 2019, 231:13-233:8); Ex. 4 (Kapoor Dep., July 8, 2020, 181:9-182:1).

¹⁷⁷ Id., Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 91:14-92:14); Ex. 4 (Kapoor Dep., July 8, 2020, 182:2-10).

were told to respond “yes, for breakthrough pain,” including the word “yes” and “dropp[ing]” the word, ‘cancer.’¹⁷⁸ This strategy was effective but was “misleading” to insurers.¹⁷⁹

Not only did the IRC engage in the fraud described above, but it affirmatively misrepresented that New Jersey patients suffered from BTCP, when, in fact, they did not.¹⁸⁰ For example, New Jersey patient Sarah Fuller (“Fuller”) was prescribed Subsys to treat her non-cancer, chronic pain by her primary care physician.¹⁸¹ An IRC employee, Jeanna Flores (“Flores”), called Fuller’s insurance company, EnvisionRx, to request prior authorization for Fuller.¹⁸² Flores called EnvisionRx from the IRC, but falsely represented to be calling from Fuller’s doctor’s office.¹⁸³ When EnvisionRx asked whether Fuller – who never had cancer and was prescribed Subsys to treat chronic pain – suffered from breakthrough cancer pain, Flores responded, “yeah.”¹⁸⁴

¹⁷⁸ Id., Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 91:14-92:14); Ex. 57 (Crim. Trial Tr., Feb. 22, 2019, 244:16-245:5); Ex. 4 (Kapoor Dep., July 8, 2020, 182:11-22).

¹⁷⁹ Id., Ex. 57 (Crim. Trial Tr., Feb. 22, 2019, 244:16-245:5); Ex. 4 (Kapoor Dep., July 8, 2020, 182:22-183:14).

¹⁸⁰ See infra FNs 180-187, Fogel Cert., Ex. 4 (Kapoor Dep., July 8, 2020, 183:15-25).

¹⁸¹ Fogel Cert., Ex. 64 (Certification of David Charles Fuller, ¶¶ 3, 6).

¹⁸² Id., Ex. 65 (NJAG_INSYS010798139).

¹⁸³ Ibid.

¹⁸⁴ Id., Ex. 64 (Certification of David Charles Fuller, ¶¶ 3, 6); Ex. 65 (NJAG_INSYS010798139).

The IRC made similar lies in connection with New Jersey patient J.S.'s prior authorization.¹⁸⁵ In January 2015, Insys IRC employee David Richardson telephoned OptumRX and affirmatively misrepresented that he was an employee of a New Jersey doctor.¹⁸⁶ Notably, the IRC employee mispronounced the doctor's name and incorrectly stated that the doctor's office was located in West New York, New York, when, in fact, it is located in West New York, New Jersey.¹⁸⁷ Although the patient at issue did not suffer from BTCP, when OptumRX asked Richardson whether the patient was prescribed Subsys for the management of BTCP, Richardson affirmatively and falsely responded, "Yup."¹⁸⁸

These strategies were important to IRC prior authorization specialists who were financially incentivized to obtain prior authorizations, just as sales representatives were financially incentivized to push for higher doses.¹⁸⁹

¹⁸⁵ Id., Ex. 66 (NJAG_INSYS010798138).

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Id., Ex. 63 (Crim. Trial Tr., Feb. 8, 2019, 110:24-113:21, 119:11-25); Ex. 4 (Kapoor Dep., July 8, 2020, 184:1-19, 185:13-186:14).

Kapoor Actively Managed Every Aspect of Insys.

Kapoor "was totally hands on with Insys Therapeutics."¹⁹⁰ In fact, Kapoor managed Insys with "both hands," monitoring the company down to the "specifics."¹⁹¹ In his own words, Kapoor represented that he spent "a significant amount of time on Insys."¹⁹² Every morning, as referenced above, Kapoor participated in a daily update meeting at 8:30 a.m. with Insys executives to discuss, among other things, (i) the top Subsys writers from the previous day, (ii) potential speakers for Insys's speaker program, and (iii) the IRC, including strategies to deceive insurers into approving Subsys scripts.¹⁹³ If Kapoor was unable to participate in the daily meetings in person, he participated via telephone.¹⁹⁴ Kapoor also regularly participated in weekly calls with Insys's RSMs and senior management to "discuss sales strategy, business and the handling of other regional sales matters in various regions."¹⁹⁵ During these calls, Kapoor "often inquired about

¹⁹⁰ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 44:4-6, 83:17-19); Ex. 4 (Kapoor Dep., July 8, 2020, 187:9-188:20).

¹⁹¹ Ibid.

¹⁹² Id., Ex. 67 (EJF-NJ-000118888); Ex. 4 (Kapoor Dep., July 8, 2020, 189:21-190:3).

¹⁹³ Id., (Ex. 26 (Crim. Trial Tr., Feb. 13, 2019, 110:13-18); Ex. 49 (Crim. Trial Tr., Feb. 14, 2019, 85:25-86:14, 91:14-92:14), Ex. 19 (Babich Dep., Jan. 27, 2020, 67:23-68:15, 69:22-70:7); Ex. 4 (Kapoor Dep., July 8, 2020, 190:4-192:4).

¹⁹⁴ Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 69:22-70:7); Ex. 4 (Kapoor Dep., July 8, 2020, 190:4-23).

¹⁹⁵ Id., Ex. 43 (Serra Cert., ¶ 7); Ex. 4 (Kapoor Dep., July 8,

Subsys sales activity and directed the RSMs to engage in certain sales conduct.”¹⁹⁶ In addition, Kapoor routinely received detailed data about Subsys’s market performance, prescriptions, and prescribers, as well as prescriptions written for Subsys’s competitor drugs, Actiq and Fentora.¹⁹⁷ This data included (i) daily “JK” [John Kapoor] reports tracking Subsys’s market performance, (ii) Subsys low strength reports tracking Subsys prescriptions of 100 mcg and 200 mcg doses, (iii) weekly reports tracking the scripts written by Subsys’s top prescribers, and (iv) reports of scripts written for other fentanyl drugs, Actiq and Fentora.¹⁹⁸

Important strategic decisions required Kapoor’s approval before they could be implemented to ensure they “fit into [Kapoor’s] philosophy” and to avoid “disruption in sales” of Subsys.¹⁹⁹ For example, Insys needed Kapoor’s approval before

2020, 192:5-25).

¹⁹⁶ Ibid.

¹⁹⁷ Id., Ex. 26 (Crim. Trial Tr., Feb. 13, 2019, 91:10-23, 125:22-127:5); Ex. 19 (Babich Dep., Jan. 27, 2020, 85:18-86:16); Ex. 4 (Kapoor Dep., July 8, 2020, 120:7-15, 206:11-19).

¹⁹⁸ Id., Ex. 68 (EJF-NJ-000114972 (Daily Report for “JK”)); Ex. 69 (EJF-NJ-000011045 (Subsys Low Strength Report)); Ex. 70 (INS-NJ-00893967 (Subsys Weekly Top Writer Report)); Ex. 71 (EJF-NJ-000270333 (Actiq High Dose Writers Report)); Ex. 4 (Kapoor Dep., July 8, 2020, 23:11-24:13, 53:24-55:11, 208:7-210:2, 207:21-208:6).

¹⁹⁹ Id., Ex. 72 (EJF-NJ-000163245); Ex. 4 (Kapoor Dep., July 8, 2020, 211:7-17).

"announcing to the Field" decisions about "sales compensation" and "sale bonuses."²⁰⁰ Insys also required approval from Kapoor before realigning sales territories.²⁰¹ Further, Kapoor had sole discretion for hiring Insys executives and "had final say on all hires at a certain level and above."²⁰²

In sum, Kapoor personally drove every facet of Insys's scheme to increase prescriptions of its highly addictive and potentially lethal drug Subsys - in New Jersey and elsewhere - through a campaign of aggressive sales tactics and compensation schemes, bribing physicians to write more and higher doses of Subsys, and defrauding insurance companies into approving prescriptions that would have been denied but for Kapoor's unconscionable conduct.

ARGUMENT

I. NO ISSUE OF MATERIAL FACT EXISTS AND PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

Pursuant to R. 4:46-2(c), a party is entitled to summary judgment where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

²⁰⁰ Id., Ex. 72 (EJF-NJ-000163245); Ex. 19 (Babich Dep., Jan. 27, 2020, 65:3-7); Ex. 4 (Kapoor Dep., July 8, 2020, 211:18- 212:1).

²⁰¹ Id., Ex. 72 (EJF-NJ-000163245); Ex. 4 (Kapoor Dep., July 8, 2020, 212:2-9).

²⁰² Id., Ex. 19 (Babich Dep., Jan. 27, 2020, 37:20-23); Ex. 4 (Kapoor Dep., July 8, 2020, 193:1-7).

material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." In this regard:

[Summary judgment] is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at trial.

[Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 530 (1995) (alteration in original).]

In Brill, the New Jersey Supreme Court addressed a court's role in determining when an alleged disputed issue of fact should be considered "genuine" for purposes of a summary judgment motion.

The Brill Court adopted the federal standard that

requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

[Id. at 533 (citation omitted).]

Thus, the Brill Court held:

Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a

rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment.

[Id. at 540 (citations omitted).]

In this regard, the Brill court noted that "[t]o send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'" Id. at 541 (citation omitted).

The material facts in this matter with respect to the identified violations of the CFA are not in dispute and any defenses asserted by Kapoor cannot be sustained as a matter of law. For the reasons set forth below, there are no genuine issues of material fact to preclude the entry of partial summary judgment in favor of the Plaintiffs now and without the need for further litigation.

II. ADVERSE INFERENCES SHOULD BE DRAWN FROM KAPOOR'S INVOCATION OF HIS FIFTH AMENDMENT PRIVILEGE AT HIS DEPOSITION.

In addition to the absence of issues of material fact, Plaintiffs are entitled to a plethora of adverse inferences based on Kapoor's invocation of his Fifth Amendment privilege during his July 8, 2020 deposition. At his deposition, Kapoor refused to answer any of Plaintiffs' questions, repeatedly invoking his Fifth Amendment privilege. Kapoor's invocations entitle Plaintiffs to adverse inferences against Kapoor under New Jersey law. See, e.g., Mahne v. Mahne, 66 N.J. 53, 60 (1974).

"The rule permitting adverse inferences from the failure of a party in a civil case to testify as to matters in issue within his personal knowledge is commonplace and elementary in our jurisprudence." Duratron Corp. v. Republic Stuyvesant Corp., 95 N.J. Super. 527, 532 (App. Div. 1967); see also State, Dep't of Law & Pub. Safety, Div. of Gaming Enforcement v. Merlino, 216 N.J. Super. 579, 587 (App. Div. 1987) ("It is well settled that in administrative and civil proceedings, it is permissible for the trier of fact to draw adverse inferences from a party's plea of the Fifth Amendment."). Drawing an adverse inference from a defendant's invocation of the Fifth Amendment is a "logical, traditional and valuable tool in the process of fair adjudication" of a civil matter where a defendant asserts his Fifth Amendment

privilege instead of testifying. Duratron Corp., 95 N.J. Super at 533. The Appellate Division has unequivocally declared that an adverse inference taken in a civil proceeding from a defendant's invocation of the Fifth Amendment "does not impair the privilege against self-incrimination." Ibid.

Courts regularly draw an adverse inference stemming from invocation of the privilege against self-incrimination to support a grant of summary judgment. See, e.g., SEC v. Chester Holdings, Ltd., 41 F. Supp. 2d 505, 525 (D.N.J. 1999) (granting plaintiff's motion for summary judgment and holding that it "may draw an adverse inference with respect to scienter by virtue of defendants' invocation of their Fifth Amendment rights"); Centennial Life Ins. Co. v. Nappi, 956 F. Supp. 222, 229 (N.D.N.Y. 1997) (granting summary judgment where plaintiff "set forth a myriad of evidence" and court drew an adverse inference against non-movant who asserted the Fifth Amendment privilege); Martinez v. Triple B Fabricating, 2018 N.J. Super. Unpub. LEXIS 3131, at *33 (Law Div. July 20, 2018) ("Our Supreme Court has held that when a party in a civil action asserts his or her Fifth Amendment privilege against self-incrimination, a court may draw an adverse inference on a motion for summary judgment.") (citing Mahne, 66 N.J. at 60-62); Demarquet v. Roque, 2017 N.J. Super. Unpub. LEXIS 2881, **17-18 (App. Div. 2017) (granting adverse inference from defendant's

invocation of his right against self-incrimination on plaintiff's motion for summary judgment).

Kapoor invoked his Fifth Amendment privilege almost 400 times in response to questions about all facets of the scheme. For example, with respect to his fraudulent marketing scheme and incentive compensation plan, Kapoor invoked his privilege in response to all of the following questions:

- "Isn't it fair to say that you targeted Subsys's marketing efforts [at] high volume opioid prescribers, including those in New Jersey, who did not typically treat patients with breakthrough cancer pain?"²⁰³
- "Isn't it true that you are behind the effective dose strategy?"²⁰⁴
- "You also directed and approved the implementation of an incentive compensation plan that incentivized sales representative[] to push for higher dose prescriptions of Subsys; isn't that correct?"²⁰⁵
- "Did you approve the compensation structure for Insys sales representatives and have final signoff on any commission structure at every quarter; isn't that correct?"²⁰⁶
- "Sales representatives were then paid large bonuses based on the value of Subsys prescriptions that were written by their assigned prescribers; isn't that correct?"²⁰⁷
- "Isn't it true that there were higher bonuses for higher micrograms of Subsys?"²⁰⁸
- "Isn't it correct that you continued to utilize this compensation structure even after you are informed by COO

²⁰³ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 29:15-30:10).

²⁰⁴ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 37:18-25).

²⁰⁵ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 77:10-23).

²⁰⁶ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 79:7-16).

²⁰⁷ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 81:3-12).

²⁰⁸ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 81:13-20).

Dan Brennan that it was creating an environment of noncompliance?"²⁰⁹

With regard to his speaker program/bribery scheme, Kapoor invoked his privilege in response to, among others, all of the following questions:

- "Isn't it true that the message you wanted conveyed to speakers was essentially 'doc, this is a business. We are partners. We are going to pay you in exchange for prescribing Subsys?'"²¹⁰
- "The message you wanted conveyed to speakers was that 'speakers who did not prescribe Subsys will not get speaker programs and will not get paid,' correct?"²¹¹
- "The Insys Speaker Program was a program to pay doctors through speaker payments in exchange for prescribing Subsys, correct?"²¹²

With respect to Kapoor's scheme to defraud insurers and PBMs, including those in New Jersey, among others, Kapoor also invoked his privilege in response to all of the following questions:

- "Isn't it true that the IRC acted on your encouragement and direction?"²¹³
- "Isn't it true that over time the IRC did strategies to deceive insurers into approving prior authorizations for Subsys?"²¹⁴
- "One such strategy that you improved -- that you approved included saying that the prior authorization specialists

²⁰⁹ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 84:15-85:1).

²¹⁰ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 96:12-22).

²¹¹ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 96:23-97:7).

²¹² Id., Ex. 4 (Kapoor Dep., July 8, 2020, 97:8-16).

²¹³ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 152:10-17).

²¹⁴ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 168:19-169:2).

were calling from their prescriber's office rather than from Insys, correct?"²¹⁵

- "Isn't it true that you ordered that the IRC's phone numbers be blocked so that insurers could not see that IRC employees were actually calling from the IRC?"²¹⁶
- "Another strategy that you approved involved representing that the patient had a history of cancer, correct?"²¹⁷
- "Another strategy that you approved entailed tried and failed medications that the patient had now (sic) actually used, correct?"²¹⁸
- "Another strategy that you . . . approved involved stating that the patient had dysphasia or difficulty swallowing when the patient did not have dysphasia to convince insurers or pharmacy benefit managers that the patient needed the Subsys spray instead of a Lozenge or lollipop; isn't that correct?"²¹⁹
- "Isn't it also true that you basically said to Burlakoff, 'expletive, Everybody has difficulty swallowing, right, Alec?' "²²⁰
- "The IRC affirmatively misrepresented that patients nationwide, including in New Jersey, suffered from breakthrough cancer pain when, in fact, they did not, correct?"²²¹

Plaintiffs are entitled to adverse inferences for each and every one of Kapoor's invocations of his Fifth Amendment privilege.

While an adverse inference may be drawn against a defendant on a motion for summary judgment, these inferences alone "do[] not

²¹⁵ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 170:13-23).

²¹⁶ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 172:11-21).

²¹⁷ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 172:22-173:5).

²¹⁸ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 174:24-175:7).

²¹⁹ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 178:18-179:7).

²²⁰ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 180:15-24).

²²¹ Id., Ex. 4 (Kapoor Dep., July 8, 2020, 183:15-25).

mandate a summary judgment against him.” Mahne v. Mahne, 66 N.J. 53, 60 (1974). However, summary judgment is appropriate where the adverse inferences, “weighed with the other evidence,” establish that no genuine issues of material fact exist. SEC v. Suman, 684 F. Supp. 2d 378, 386 (S.D.N.Y. 2010); see also SEC v. Weintraub, No. 11-21549, 2011 U.S. Dist. LEXIS 149999, at *19 (S.D. Fla. Dec. 30, 2011) (granting summary judgment for the SEC after drawing adverse inferences from defendant’s invocation of the Fifth Amendment, “particularly in view of compelling, independent evidence”); Cho v. Holland, No. 04-c-5227, 2006 U.S. Dist. LEXIS 76054, at *17 (N.D. Ill. Oct. 3, 2006) (affirming grant of summary judgment and concluding that an adverse inference is proper to support summary judgment when coupled with “sufficient other evidence”); SEC v. Roor, No. 99-cv-3372 (HB), 2004 U.S. Dist. LEXIS 17416, at *25 (S.D.N.Y. Aug. 30, 2004) (granting summary judgment where adverse inferences were drawn from defendant’s invocation of the Fifth Amendment privilege against self-incrimination that were buttressed by evidence showing that instead of spending investors’ money as promised, defendant spent the money on personal and family expenses).

Here, the overwhelming weight of the evidence in this case, bolstered by the multitude of adverse inferences drawn from

Kapoor's invocation of his Fifth Amendment privilege, warrants that Plaintiffs' motion for partial summary judgment be granted.

III. KAPOOR HAS INDISPUTABLY ENGAGED IN NUMEROUS ACTS AND PRACTICES IN VIOLATION OF THE CONSUMER FRAUD ACT.

By engaging in the acts and practices as detailed herein, Kapoor has violated the CFA, which, in relevant part, provides:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise. . . , or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice . . .

[N.J.S.A. 56:8-2.]

The CFA was enacted "to permit the Attorney General to combat the increasingly widespread practice of defrauding the consumer." Cox v. Sears Roebuck & Co., 138 N.J. 2, 14 (1994) (citing legislative history); see also Kugler v. Romain, 58 N.J. 522, 537 (1971) (explaining that the CFA was enacted to "empower[] the Attorney General to police consumer practices and contracts"). Among other things, the CFA prohibits misrepresentations, omissions, and unconscionable practices in "connection with the sale . . . of any merchandise." N.J.S.A. 56:8-2. The CFA defines

"merchandise" as "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1(c).

In passing the CFA, "the Legislature intended to confer on the Attorney General the broadest kind of power to act in the interest of the consumer public." Romain, 58 N.J. at 537. As a result, courts construe the CFA liberally to effectuate its remedial purpose. See, e.g., Perez v. Rent-A-Center, Inc., 186 N.J. 188, 219 (2006) ("The language of the CFA evinces a clear legislative intent that its provisions be applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud.") (quoting Lemelledo v. Benefit Mgmt. Corp., 150 N.J. 255, 264 (1997)). An expansive interpretation of the CFA is particularly important to keep pace with the ever-increasing varieties of fraudulent schemes. Lemelledo, 150 N.J. at 265-66 (noting that "the CFA could not possibly enumerate all, or even most, of the areas and practices that it covers without severely retarding its broad remedial power to root out fraud in its myriad, nefarious manifestations"); Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 576 (2011) ("Thus, to counteract newly devised stratagems undermining the integrity of the marketplace, '[t]he history of the [CFA] [has been] one of constant expansion of consumer

protection.'" (alterations in original) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 604 (1997))).

Liability for an affirmative act proscribed by the CFA does not require proof of intent. Cox, 138 N.J. at 17-18. Further, proof that a consumer was, in fact, misled or deceived is also not required. N.J.S.A. 56:8-2; Skeer v. EMK Motors, Inc., 187 N.J. Super. 465, 470 (App. Div. 1982). Rather, the mere "capacity to mislead" establishes a CFA violation. Cox, 138 N.J. at 17. Furthermore, unlike private CFA claims, proof of consumer harm or ascertainable loss is also not a prerequisite to liability in CFA enforcement actions brought by the Attorney General. Id. at 21; Meshinsky v. Nicholas Yacht Sales, Inc., 110 N.J. 464, 473 (1988). At the heart of the CFA's proscriptions is the "capacity to mislead" the average consumer. Cox, 138 N.J. at 17. Thus, the issue that must be addressed is whether the marketing or sale of the goods or services "is misleading to the average consumer, not whether it can later be explained to the more knowledgeable, inquisitive consumer." Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 69 (1985).

The CFA creates three categories of unlawful practices: (1) affirmative acts, including unconscionable commercial practices, false promises, and misrepresentations; (2) omissions, including the knowing concealment, suppression or omission of a material

fact; and (3) violations of State regulations. Cox, 138 N.J. at 17; N.J.S.A. 56:8-2. Plaintiffs have alleged that Kapoor engaged in multiple violations of the CFA, including unconscionable commercial practices (Count I), false promises and/or misrepresentations (Count II), as well as knowing omissions of material fact (Count III). Only Kapoor's unconscionable commercial practices in Count I are at issue in this motion. Plaintiffs have demonstrated those violations, and Kapoor cannot genuinely dispute them.

A. Kapoor is Liable for Unconscionable Commercial Practices in Violation of the CFA.

The New Jersey Supreme Court's standard for unconscionable commercial practices under the CFA is conduct that "lack[s] 'of good faith, honesty in fact and observance of fair dealing.'" Cox, 138 N.J. at 18 (citing Romain, 58 N.J. at 543-44). The Court further noted that an unconscionable commercial practice is "an amorphous concept obviously designed to establish a broad business ethic." Ibid. As such, "[t]he word 'unconscionable' must be interpreted liberally so as to effectuate the public purpose of the CFA." Assocs. Home Equity Svcs., Inc. v. Troup, 343 N.J. Super. 254, 278 (App. Div. 2001) (citing Romain, 58 N.J. at 543).

Whether conduct is unconscionable is "determined on a case-by-case basis." Ibid. Conduct "need not 'attain a level of rascality that would raise an eyebrow of someone inured to the

rough and tumble of the commercial world'” in order to be an unconscionable commercial practice in violation of the CFA. D’Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super 11, 31 (App. Div. 1985). Examples of unconscionable conduct include (i) a home-inspection company failing to provide a real-estate purchaser with a sufficiently critical inspection report, Herner v. HouseMaster of Am., Inc., 349 N.J. Super. 89 (App. Div. 2002); (ii) a computer retailer omitting to disclose that the computer line it sold to plaintiff was about to be discontinued, Hundred East Credit Corp. v. Eric Schuster Corp., 212 N.J. Super. 350, 353-54, 357 (App. Div. 1986); (iii) setting apartment rental rates above the maximum prescribed by local ordinance, Wozniak v. Pennella, 373 N.J. Super. 445, 456-58 (App. Div. 2004); and (iv) the sale of lifetime memberships to a purchasing club when the seller’s longest-term supplier contract was for ten years, Hyland v. Aquarian Age 2000, Inc., 148 N.J. Super. 186, 191-92 (Ch. Div. 1977).

The CFA provides for liability against not only an entity but those who control and oversee that entity’s unconscionable commercial practices. Allen v. V & A Bros., Inc., 208 N.J. 114, 136 (2011); see Hyland, 148 N.J. Super at 193 (finding that principals of a business entity may be individually liable for CFA violations); see also Milgram v. Comfort Direct, Inc., No. A-0360-07T2, 2008 N.J. Super. Unpub. LEXIS 556, at *1 (App. Div. Oct. 28,

2008) (affirming an order granting summary judgment against a corporation and its president and principal shareholder for unconscionable commercial practices).

As established below, it is indisputable that Kapoor's conduct is entirely devoid of good faith, honesty, and fair dealing, and that Plaintiffs' motion for summary judgment should be granted.

1. The Insidious Practices that Kapoor Directed at Insys are Precisely the Kinds of Acts That Qualify as Unconscionable Commercial Practices Under the CFA.

The overwhelming weight of the evidence, bolstered by the adverse inferences drawn from Kapoor's persistent invocation of his Fifth Amendment privilege, mandates that Plaintiffs' motion for summary judgment should be granted, holding Kapoor liable for the unconscionable commercial practices that he directed while at Insys.

i. There is No Question That Kapoor Directed and Implemented Numerous Schemes to Push Subsys onto New Jersey Consumers, Regardless of Medical Need.

As set forth in detail in the SOMF and herein, a mountain of evidence indisputably shows that Kapoor was responsible for numerous unconscionable commercial practices in connection with the lies and misleading statements that Kapoor directed regarding the marketing, sale, and insurance coverage of Subsys for New Jersey consumers. First, it is beyond dispute that Kapoor engaged

in fraudulent marketing practices by, among other things, pushing his highly potent fentanyl product in blatant disregard for safety and targeting inappropriate high-dosage prescribers.²²² Second, it is clear that Kapoor directed and implemented an incentive compensation structure at Insys that promoted non-compliant behavior, including "off label promotion and quid pro quo" behavior.²²³ Third, it is indisputable that Kapoor directed a scheme to bribe healthcare providers to write more Subsys prescriptions and higher doses in exchange for kickbacks.²²⁴ Fourth, there is no genuine dispute of material fact that Kapoor directed a deceptive scheme through the IRC to secure insurance coverage for Subsys through lies and misleading statements to insurers and PBMs.²²⁵

Kapoor's fraudulent marketing, incentive compensation plan, bribery scheme, and IRC fraud were critical pieces of Kapoor's strategy to maximize profits from Subsys prescriptions above all else. Kapoor's fraudulent scheme as a whole, as well as each unconscionable commercial practice on its own, was clearly intended to push profit over patient safety. Ultimately, Kapoor's

²²² Id., Ex. 73 (First Amended Complaint ("FAC") at ¶ 261(g), (h), (i), (k)); (see also SOMF at ¶¶ 8-45).

²²³ Id., Ex. 73 (FAC at ¶ 261(e), (p), (q)); (see also SOMF at ¶¶ 46-59).

²²⁴ Id., Ex. 73 (FAC at ¶ 261(a)); (see also SOMF at ¶¶ 60-120).

²²⁵ Id., Ex. 73 (FAC at ¶ 261(m), (o), (n)); (see also SOMF at ¶¶ 121-189).

conduct severely harmed countless New Jersey consumers who (i) were prescribed this powerful and potentially dangerous and addictive opioid, not because their prescribers felt that it was necessary to treat their ailments, but because their prescribers were bribed at the direction of Kapoor, and (ii) obtained insurance coverage or paid for some or all the cost of a dangerous drug based on flagrant lies.

Plaintiffs have supported these assertions through (i) significant sworn testimony from multiple witnesses from the ten-week criminal trial and the Fuller Litigation, all of whom were subject to extensive cross-examination by counsel for Kapoor and had a motive to attempt to show that Kapoor did not engage in the very unconscionable commercial practices, which form the basis of this motion, (ii) extensive documentary evidence that Plaintiffs received from Insys, Kapoor and numerous third-parties, and (iii) hundreds of adverse inferences to which Plaintiffs are entitled based on Kapoor's repeated invocation of his Fifth Amendment privilege at his July 8, 2020 deposition. Kapoor is unable to dispute that he is responsible for this conduct.

ii. There is No Doubt that Kapoor's Conduct Amounts to Unconscionable Commercial Practices Under the CFA.

Kapoor's practices, as described above, fixated on profits without any concern for the safety of New Jersey consumers. These

schemes, which violate any standard of business ethics and demonstrate a complete absence of good faith, honesty in fact and observance of fair dealing, are blatant unconscionable commercial practices in violation of the CFA. See Cox, 138 N.J. at 18. Further, Kapoor's practices are far more egregious than conduct found by New Jersey Courts to be unconscionable commercial practices under the CFA. See Herner, 349 N.J. Super. 89; Hundred East Credit Corp., 212 N.J. Super. at 353-54; Wozniak, 373 N.J. at 456-58; and Hyland, 148 N.J. Super. at 193. In light of the above evidence and governing legal standards, any rational factfinder would find that Kapoor is liable for the above-enumerated unconscionable commercial practices under the CFA. Accordingly, Plaintiffs are entitled to partial summary judgment.

CONCLUSION

As set forth above, there is no dispute that Kapoor engaged in deceptive, fraudulent, and unconscionable business practices in violation of the CFA. For all of the foregoing reasons, Plaintiffs respectfully request that this Court enter an Order granting partial summary judgment against Kapoor.

Respectfully submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: Lara J. Fogel
Lara J. Fogel
Chief, Government & Healthcare
Fraud
Deputy Attorney General
Attorney for Plaintiffs

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