

1 Elizabeth J. Cabraser (State Bar No. 083151)
ecabraser@lchb.com
2 LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP
3 275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
4 Telephone: 415.956.1000
Facsimile: 415.956.1008
5 *Plaintiffs' Lead Counsel*

6 *[Additional counsel listed on signature page]*

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8

UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

10

11 IN RE: MCKINSEY & CO., INC.
12 NATIONAL PRESCRIPTION OPIATE
CONSULTANT LITIGATION

Case No. 21-md-02996-CRB (SK)

13 This Document Relates to:

**THIRD PARTY PAYOR PLAINTIFFS'
UNOPPOSED NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

14 ALL THIRD PARTY PAYOR ACTIONS

15

DATE: TBD
TIME: TBD
PLACE: Courtroom: 6, 17th Floor

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JUDGE: The Honorable Charles R. Breyer

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, at such date and time as the Court may set in Courtroom 6 of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, the undersigned Plaintiffs' Steering Committee members representing a proposed Settlement Class of Third-Party Payors (TPPs), will and hereby do move the Court for entry of an order granting preliminary approval of the Class Action Settlement and directing notice to the Class under Federal Rule of Civil Procedure 23(c) and (e)(1); appointing Interim Settlement Class Counsel and Class Representatives under Rule 23(g)(3); and scheduling a final approval hearing under Rule 23(e)(2). The parties are prepared to present the proposed Settlement to the Court on an earlier hearing date and time at the Court's convenience, or for the Court to decide this matter on the papers if the Court is inclined to do so.

This motion is supported by the following memorandum of points and authorities, the accompanying Declaration of Paul J. Geller, and the exhibits thereto, including the Settlement Agreement attached as **Exhibit A** to the Geller Declaration.

TPP Plaintiffs have conferred with counsel for McKinsey Defendants, who do not oppose this motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs respectfully submit this Memorandum of Points and Authorities in support of their Motion for Preliminary Approval of the Settlement between Third Party Payor (TPP) Plaintiffs and Defendants,¹ and entry of the [Proposed] Order Granting Preliminary Approval of Class Settlement and Direction of Notice Under Federal Rule of Civil Procedure 23(e) (“Preliminary Approval Order” or “Notice Order”). The Preliminary Approval Order will (i) grant preliminary approval of the proposed class action settlement on the terms set forth in the Settlement Agreement and Plan of Allocation; (ii) appoint Interim Settlement Class Counsel; (iii) approve the form and manner of notice of the proposed Settlement to the Settlement Class; (iv) preliminarily approve the Plan of Allocation; (v) authorize and direct Plaintiffs to retain A.B. Data as the Notice and Claims Administrator; and (vi) schedule a hearing date for the final approval of the Settlement (“Final Approval Hearing”), and establish a schedule for various deadlines in connection with the Settlement.

I. INTRODUCTION

The TPP Plaintiffs, represented by members of the Court-appointed Plaintiffs’ Steering Committee, and McKinsey have reached a settlement on behalf of TPPs. McKinsey will pay a total of \$78 million (including Court-awarded fees and costs, plus any accrued interest) to the TPP Settlement Class, upon the Settlement’s finality. The Settlement payment will be made to the TPP Settlement Class once (no payment over years), and there is no reversion. The Class members that choose to accept the Settlement terms will receive their portion of the Settlement Amount pursuant to the Plan of Allocation.

II. BACKGROUND

A. Summary of the Opioids Litigation/Procedural History

This action against McKinsey, and the proposed settlement, should be viewed against the backdrop of the national opioid multidistrict litigation and settlements that precede it. *In re National Prescription Opiate Litigation*, MDL No. 2804, centralized in the Northern District of

¹ McKinsey & Company, Inc., McKinsey Holdings, Inc., McKinsey & Company, Inc. United States, and McKinsey & Company, Inc. Washington D.C. (collectively, “McKinsey”).

1 Ohio before Judge Dan Aaron Polster, consists of thousands of lawsuits primarily filed by cities
2 and counties (commonly referred to as “subdivisions”), and by TPPs, school districts, Native
3 American tribal governments and related tribal entities (Tribes), hospitals, and those making
4 claims on behalf of individuals born addicted to opioids and with neo-natal abstinence syndrome
5 (“NAS plaintiffs”). The MDL 2804 plaintiffs allege that opioid manufacturers, distributors, and
6 opioid-selling pharmacies acted in concert to aggressively market prescription opioids to vastly
7 increase their sales and revenues, misleading medical professionals into prescribing, and millions
8 of Americans into taking and often becoming addicted to, opioids. Plaintiffs in both MDL 2804
9 and this MDL allege that approximately 350,000 individuals in the United States died from an
10 opioid overdose between 1999 and 2016. Claims against major opioids manufacturer Purdue are
11 being resolved through bankruptcy proceedings. A supermajority of Purdue’s creditors (the
12 categories of plaintiffs described above) voted to approve a Plan of Reorganization that featured a
13 negotiated allocation of Plan proceeds among them.²

14 As with MDL 2804 plaintiffs, the plaintiffs suing McKinsey in this MDL can be
15 categorized into five groups: political subdivisions, school districts, Tribes, TPPs, and NAS
16 plaintiffs. Plaintiffs allege that McKinsey strategized and acted with Purdue and various other
17 MDL 2804 opioid defendants to create and employ such marketing and sales practices to
18 maximize opioid revenues. TPP Plaintiffs are private benefit plans, Taft-Hartley funds, and
19 commercial insurers that provide health and welfare benefits, including reimbursement for some
20 or all of the costs of prescription opioids that were on their approved formularies and opioid
21 addiction-related treatment. The TPP Plaintiffs allege that the opioid industry’s practices harmed
22 TPPs by causing them to pay for prescription opioids rather than safer, non-addictive, and lower-
23 cost prescription drugs (including over-the-counter pain relievers) that would have been used
24 otherwise, and further paid for opioid addiction-related treatment that followed.

25
26 _____
27 ² The Plan includes a release of the Sackler defendants, who would contribute most of the money
28 used to fund the Plan and pay creditors. Appeals from this third-party release provision have
reached the Supreme Court, which heard argument on December 4, 2023. Its decision, expected
before the end of its term in 2024, could require renegotiation and approval of an amended Plan.

1 Because the claims against McKinsey involve factual and legal questions common to claims
2 against other opioid defendants, the majority of early complaints against McKinsey were directly
3 filed in MDL 2804. On March 5, 2021, McKinsey filed a Motion to Transfer before the Judicial
4 Panel on Multidistrict Litigation (“JMPL”), asking for the cases against it to be consolidated and
5 transferred to the Southern District of New York—both the location of McKinsey’s lead U.S. office
6 and of Purdue’s bankruptcy proceeding. On June 7, 2021, the JPML instead centralized the actions
7 in the Northern District of California before Judge Charles R. Breyer. *In re McKinsey & Co., Inc.,*
8 *Nat’l Prescription Opiate Consultant Litig.*, 543 F. Supp. 3d 1377 (J.P.M.L. 2021).

9 After transfer, this Court appointed Lead Counsel and a Plaintiffs’ Steering Committee
10 comprised of attorneys representing all five plaintiff groups. ECF No. 211. On December 6,
11 2021, Plaintiffs filed Master Complaints on behalf of the political subdivisions, school districts,
12 NAS plaintiffs, and Tribes, as well as a Consolidated Class Action Complaint on behalf of the
13 TPPs. *See* ECF Nos. 296 (Subdivisions), 297 (School Districts), 298 (NAS plaintiffs), 299
14 (TPPs), and 300 (Tribes).

15 On December 23, 2021, McKinsey filed two Rule 12 motions: one for lack of personal
16 jurisdiction in certain states against all plaintiff groups, and a second on grounds of *res judicata*
17 and release against the subdivision and school district master complaints. Plaintiffs opposed both
18 motions, and the Court conducted an initial hearing on them on March 31, 2022, requested and
19 received additional briefing, and scheduled a subsequent hearing for October 28, 2022. On
20 October 26, 2022, the parties notified the Court that McKinsey and the Subdivision and School
21 District Plaintiffs had reached an agreement in principle to resolve those Plaintiffs’ claims, and
22 they requested that the Court not adjudicate the *res judicata* motion. ECF No. 436. On October
23 27, 2022, the Court denied McKinsey’s motion to dismiss for lack of personal jurisdiction. *In re*
24 *McKinsey & Co., Inc., Nat’l Prescription Opiate Consultant Litig.*, No. 21-md-2996-CRB, 2022
25 WL 15525768 (N.D. Cal. Oct. 27, 2022). McKinsey’s motion to dismiss the subdivision and
26 school district master complaints on *res judicata* grounds remains under submission following the
27 Court’s preliminary approval of the subdivision and school district plaintiffs’ settlements. ECF
28 Nos. 621 (School Districts), 622 (Subdivisions).

1 On October 27, 2022, this Court also adopted a joint discovery schedule, and discovery is
2 ongoing. McKinsey responded to Plaintiffs' Requests for Production and began document
3 production. Two joint discovery dispute letters were submitted to Magistrate Judge Kim, which
4 were resolved by order on March 17, 2023. ECF No. 489. Judge Kim resolved objections
5 regarding the production of documents stored in a repository for MDL No. 2804 on May 9, 2023.
6 ECF No. 543. Plaintiffs have been reviewing McKinsey's production to the state Attorneys
7 General as part of McKinsey's February 4, 2021 settlement.

8 On January 9, 2023, McKinsey filed a third Rule 12 motion seeking to dismiss the Tribes'
9 and NAS plaintiffs' Master Complaints, and the TPPs' Consolidated Class Action Complaint, for
10 failure to state a claim. ECF No. 462. Plaintiffs opposed the motion, ECF No. 481, and
11 McKinsey filed a reply, ECF No. 506. On May 19, 2023, the Court continued oral argument on
12 the Rule 12 motion as to Tribes and TPPs to enable proposed settlement negotiations with these
13 two groups to proceed. ECF No. 552.

14 On July 20, 2023, the Court granted McKinsey's motion to dismiss as to the NAS
15 plaintiffs' cases, holding that McKinsey did not owe those plaintiffs a legal duty or that the NAS
16 plaintiffs relied on McKinsey's alleged false or misleading statements. *In re McKinsey & Co.,*
17 *Inc., Nat'l Prescription Opiate Consultant Litig.*, No. 21-md-2996-CRB, 2023 WL 4670291
18 (N.D. Cal. July 20, 2023), ECF No. 573. The Court also concluded that NAS plaintiffs did not
19 adequately plead a public nuisance claim. *Id.* The NAS plaintiffs filed an Amended Master
20 Complaint on August 24, 2023, ECF No. 582, which McKinsey moved to dismiss, ECF No. 615.
21 This motion is scheduled to be fully briefed by January 19, 2024. ECF No. 639.

22 **B. Settlement Negotiations and Mediation**

23 The TPPs agreed to mediate before Professor Eric Green. The parties participated in an in-
24 person mediation in Boston, Massachusetts, with Professor Green and his colleague Fouad Kurdi.
25 This Settlement is the result of those extensive, arm's-length negotiations.

1 **III. THE PROPOSED SETTLEMENT**

2 **A. The Proposed TPP Settlement Class**

3 The Settlement is conditioned upon the approval, for settlement purposes only, of the
4 following Settlement Class definition:

5 All entities that paid and/or reimbursed for (a) opioid prescription
6 drugs manufactured, marketed, sold, or distributed by the Opioid
7 Marketing Enterprise Members (Purdue, Johnson & Johnson,
8 Janssen, Cephalon, Endo, and Mallinckrodt), for purposes other
9 than resale, and/or (b) paid or incurred costs for treatment related
10 to the misuse, addiction, and/or overdose of opioid drugs, on
11 behalf of individual beneficiaries, insureds, and/or members,
12 during the period June 1, 2009 to October 31, 2023. For clarity,
13 included in the class are: (a) private contractors of Federal Health
14 Employee Benefits plans, (b) plans for self-insured local
15 governmental entities that have not settled claims in MDL 2804,
16 (c) managed Medicaid plans, (d) plans operating under Medicare
17 Part C and/or D, and (e) Taft Hartley plans.

18 Excluded from the class are (a) all federal and state governmental
19 entities, (b) all tribal entities, (c) local governmental entities and
20 school districts, (d) Pharmacy Benefit Managers (PBMs), (e)
21 consumers, and (f) fully-insured plans. For the avoidance of
22 doubt, entities that are otherwise members of the class are not
23 excluded on the basis that they own an interest, including a
24 controlling interest, in a PBM.

25 **B. The Settlement Consideration and Plan of Allocation**

26 McKinsey has agreed to create a Settlement Fund of \$78 million. No portion of the
27 Settlement Fund will revert to McKinsey. *See* Geller Decl. Ex. A (TPP-McKinsey Settlement
28 Agreement).

29 TPP Plaintiffs' proposed plan of allocation among members of the proposed Settlement
30 Class was developed by Dr. Meredith Rosenthal, the C. Boyden Gray Professor of Health
31 Economics and Policy at the Harvard T.H. Chan School of Public Health and an Academic
32 Affiliate of Greylock McKinnon Associates ("GMA"), a consulting and litigation support firm.
33 Dr. Rosenthal's principal research interests concern the economics of the health care industry,
34 including pharmaceuticals. She has conducted research on a wide variety of health economics
35 topics, with a focus on the financing and organization of the U.S. health care system. Specific

1 topics she has studied include the effect of payment incentives on provider behavior, payment and
2 delivery system reform, and advertising of prescription drugs. Dr. Rosenthal has published more
3 than 170 peer-reviewed journal articles, essays, and book chapters. She previously submitted
4 expert testimony in *In re National Prescription Opiate Litigation*, MDL No. 2804.

5 In her accompanying Declaration, Dr. Rosenthal describes her methodology, which
6 focuses on the size of the affected TPP population, measured in the number of covered person-
7 years by state, and adjusted according to the extent to which opioid manufacturers' marketing
8 efforts targeted the states in which TPPs' enrollees resided. The plan thus ensures that TPPs more
9 significantly impacted by McKinsey's alleged misconduct receive a larger share of the settlement.
10 *See* Geller Decl. Ex. F.

11 **C. Release**

12 In exchange for the settlement relief detailed above, McKinsey will receive from the Class
13 a release of claims related to McKinsey's consulting work for opioid manufacturers' prescription
14 opioid products. Geller Decl. Ex. A § III. The release covers claims that were actually litigated
15 in this action, or could have been, whether through formal motion practice or in terms of
16 information sought and produced in discovery.

17 **D. Settlement Notice and Right to Opt Out**

18 Class members will be notified by the methods ordered by the Court, and notice to the
19 Class and the costs of administration will be funded from the Settlement Fund. *Id.* § II.4.

20 Proposed Class Counsel ask the Court to appoint A.B. Data, a nationally recognized
21 notice and settlement claims administrator with extensive experience noticing and administering
22 TPP class settlements, subject to the Court's approval. A.B. Data has on numerous occasions
23 provided direct email or mail notice to TPPs. See the accompanying Declaration of Eric J. Miller
24 for a description of A.B. Data's qualifications and experience. Geller Decl. Ex. E. As a result of
25 these previous (and ongoing) settlement notices, A.B. Data is an experienced notice and
26 settlement claims administrator.

27 A.B. Data will provide notice to Class members through a combination of direct mail,
28 email, and internet publication of the Settlement itself and of every Class member's right to opt

1 out. The proposed Class Notice will also be posted on the Settlement website, which will be
2 cross-linked from the National Opioids Settlement website. Moreover, the content of the
3 proposed Notice clearly articulates the terms of the Settlement and Class members' rights and
4 options in plain, easily understood language and provides all the data points suggested by Factor
5 3 of the Northern District of California Procedural Guidance for Class Action Settlements
6 (Preliminary Approval). *See* Geller Decl. Ex. B.

7 Class members will be provided with instructions for opting out of the Settlement. If they
8 do not choose to opt out and the Court grants final approval of the Settlement and Plan of
9 Allocation, then each Class Member that submits a valid and timely claim form will receive a
10 distribution in accordance with the Plan of Allocation. The Plan of Allocation is described in
11 further detail in the Declaration of TPP Plaintiffs' expert Dr. Meredith Rosenthal, which sets out
12 her allocation analysis. *See* Geller Decl. Ex. F.

13 **E. Attorneys' Fees and Expenses**

14 Pursuant to Rule 23(h) and this Court's Pretrial Order No. 3: Protocol for Common
15 Benefit Work and Expenses, ECF No. 215 at 2, Plaintiffs intend to apply to the Court for
16 attorneys' fees and costs for TPP Settlement Class Counsel and counsel for individually
17 represented TPPs in an amount not to exceed 25% of the Settlement Fund, which shall be
18 deducted and paid from the Fund. Geller Decl. Ex. A at § VI.2. This is at or below the Ninth
19 Circuit's benchmark of 25% for the "percent-of-recovery method" of allocation. *See Resnick v.*
20 *Frank (In re Online DVD-Rental Antitrust Litig.)*, 779 F.3d 934, 949 (9th Cir. 2015) (citing *In re*
21 *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011)). This amount also
22 includes the full common benefit assessment from Class members paid to the Fee Fund
23 established in PTO 9 (ECF No. 567).

24 **IV. ARGUMENT**

25 **A. The Proposed Settlement Meets the Legal Standards for Preliminary**
26 **Approval.**

27 Federal Rule of Civil Procedure 23(e) governs a district court's analysis of the fairness of
28 a proposed class action settlement and creates a three-stage process for approval. First, a court

1 must determine that it is likely to (i) approve the proposed settlement as fair, reasonable, and
 2 adequate, after considering the factors outlined in Rule 23(e)(2), and (ii) certify the settlement
 3 class after the final approval hearing. *See* Fed. R. Civ. P. 23(e)(1)(B); *see also id.* at 23(e)(1)
 4 advisory committee’s note to 2018 amendment (standard for directing notice is whether the Court
 5 “likely will be able both to approve the settlement proposal under Rule 23(e)(2) and . . . certify
 6 the class for purposes of judgment on the proposal”). Second, a court must direct notice to the
 7 proposed settlement class, describing the terms of the proposed settlement and the definition of
 8 the proposed class, to give them an opportunity to object or opt out. *See id.* at 23(c)(2)(B); *id.* at
 9 23(e)(1), (5). Third, after a hearing, the court may grant final approval of the proposed settlement
 10 on a finding that the settlement is fair, reasonable, and adequate, and certify the settlement class.
 11 *Id.* at 23(e)(2). Where, as here, “the parties negotiate a settlement agreement before the class has
 12 been certified, settlement approval requires a higher standard of fairness and a more probing
 13 inquiry than may be normally required under Rule 23(e).” *Roes 1-2 v. SFBSC Mgmt., LLC*, 944
 14 F.3d 1035, 1048 (9th Cir. 2019). In this District, a movant’s submission should also include the
 15 information called for under the District’s Procedural Guidance for Class Action Settlements.

16 This TPP class is virtually identical to TPP classes that numerous courts have certified for
 17 litigation or for settlement. *See, e.g., In re Restasis (Cyclosporine Ophthalmic Emulsion)*
 18 *Antitrust Litig.*, 335 F.R.D. 1 (E.D.N.Y. 2020); *In re EpiPen (Epinephrine Injection, USP) Mktg.,*
 19 *Sales Pracs. & Antitrust Litig.*, No. 17-md-2785, 2020 WL 1180550 (D. Kan. Mar. 10, 2020); *In*
 20 *re Lidoderm Antitrust Litig.*, No. 14-md-02521-WHO, 2017 WL 679367 (N.D. Cal. Feb. 21,
 21 *2017); In re Loestrin 24 FE Antitrust Litig.*, 410 F. Supp. 3d 352 (D.R.I. 2019); *In re Nexium*
 22 *(Esomeprazole) Antitrust Litig.*, 297 F.R.D. 168 (D. Mass. 2013), *aff’d*, 777 F.3d 9 (1st Cir.
 23 2015).

24 **B. The Court Will Be Able to Certify the Proposed Class for Settlement**
 25 **Purposes upon Final Approval.**

26 Certification of a settlement class is “a two-step process.” *In re Volkswagen “Clean*
 27 *Diesel” Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 15-md-02672-CRB (JSC), 2016 WL
 28 4010049, at *10 (N.D. Cal. July 26, 2016) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591,

1 613 (1997)). First, the Court must find that the proposed settlement class satisfies the
 2 requirements of Rule 23(a). *Id.* (citing Fed. R. Civ. P. 23(a)). Second, the Court must find that “a
 3 class action may be maintained under either Rule 23(b)(1), (2), or (3).” *Id.* (citing *Amchem*, 521
 4 U.S. at 613). The proposed Settlement Class here readily satisfies all certification requirements
 5 set out in Rule 23(a)(1)-(4) and 23(b)(3). *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d
 6 539, 557 (9th Cir. 2019) (en banc) (upholding district court’s preliminary approval and
 7 certification of nationwide settlement class in fuel economy settlement).

8 **1. Every Class member has Article III standing.**

9 As an initial matter, “[c]ourts considering class action settlements must verify that every
 10 class member has standing, and, as in the non-class action context, it is the plaintiffs’ burden to
 11 establish standing.” *In re Volkswagen*, No. 15-md-02672-CRB, 2022 WL 17730381, at *1 (N.D.
 12 Cal. Nov. 9, 2022) (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207-08 (2021)). But
 13 they must do so only with “the manner and degree of evidence required at the successive stages of
 14 the litigation.” *TransUnion*, 141 S. Ct. at 2208 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555,
 15 561 (1992)). Because the TPP Consolidated Class Action Complaint and the underlying TPP
 16 cases in this MDL all remain at the pleading stage, “general factual allegations of injury resulting
 17 from the defendant’s conduct may suffice.” *Lujan*, 504 U.S. at 561.

18 Here, TPP Plaintiffs alleged violations of the Racketeer Influenced and Corrupt
 19 Organizations Act, 18 U.S.C. § 1961 *et seq.*, unjust enrichment, and fraud by concealment in their
 20 TPP Consolidated Class Action Complaint, filed on December 6, 2021. TPP Plaintiffs alleged
 21 that the opioid industry’s nationwide practices harmed TPP Plaintiffs throughout the country by
 22 causing them to pay for prescription opioids rather than safer, non-addictive, and lower-cost
 23 prescription drugs (including over-the-counter pain relievers) that would have been used
 24 otherwise, and further paid for opioid addiction-related treatment that followed.

25 **2. The Settlement Class meets the Rule 23(a) requirements.**

26 **a. Rule 23(a)(1): The Class is sufficiently numerous.**

27 Rule 23(a)(1) requires a class to be “so numerous that joinder of all members is
 28 impracticable.” Generally, numerosity is satisfied when the class comprises forty or more

1 members. *Akaosugi v. Benihana Nat'l Corp.*, 282 F.R.D. 241, 253 (N.D. Cal. 2012). Here, the
2 Settlement Class includes over 40,000 TPPs across the country. “Joinder of thousands of class
3 members is ‘clearly impractical.’” *Volkswagen*, 2022 WL 17730381, at *2 (quoting *Palmer v.*
4 *Stassinis*, 233 F.R.D. 546, 549 (N.D. Cal. 2006)). With approximately 40,000 members, the TPP
5 Class easily satisfies Rule 23(a)(1).

6 Moreover, while the Ninth Circuit has squarely held that the administrative feasibility of
7 identifying class members is generally not a reason to deny certification, *Briseno v. ConAgra*
8 *Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017), the proposed Class presents none of the
9 concerns that might need to be addressed within the Rule 23 analysis. The Class members are
10 known entities that are easily identifiable and whose contact information has already been
11 collected and recently vetted by the proposed notice and claims administrator through its noticing
12 and claims processing of related, similar settlements.

13 **b. Rule 23(a)(2): The Class claims present common questions of**
14 **law and fact.**

15 Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” The
16 Supreme Court has held that “for purposes of Rule 23(a)(2), even a single common question will
17 do.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The *Dukes* standard “focuses on
18 whether a class action will generate common answers that are likely to drive resolution of the
19 lawsuit.” *Id.* at 350. TPP Plaintiffs bring claims against McKinsey for violation of RICO, unjust
20 enrichment, and fraud by concealment. Underlying each of these claims is a core set of common
21 questions about, *inter alia*: (i) McKinsey’s knowledge of and conduct regarding the alleged
22 improper marketing of opioid medications by its manufacturer clients; (ii) McKinsey’s conduct in
23 creating, proposing, and/or implementing sales and marketing strategies for opioids manufactured
24 by Purdue before and after Purdue’s first guilty plea in 2007 relating to misbranding of
25 OxyContin; and (iii) whether McKinsey’s strategies for promotion and collaboration with its
26 opioid manufacturer clients caused or contributed to the harm alleged by TPP Plaintiffs. The
27 answers to these questions will be the same across Class members and are central to each Class
28 member’s claims. Rule 23(a)(2) is met.

1 Representatives have no interests antagonistic to Settlement Class members and will continue to
2 protect the Class's interests in overseeing the Settlement administration and through any appeals.
3 *See Clemens v. Hair Club for Men, LLC*, No. 15-cv-01431-WHA, 2016 WL 1461944, at *2-3
4 (N.D. Cal. Apr. 14, 2016). The Representatives, which include named Plaintiffs in the underlying
5 actions centralized in this MDL and in the previously filed Consolidated Class Action Complaint
6 understand their duties, have agreed to consider the interests of absent Settlement Class members,
7 and have reviewed and uniformly endorsed the Settlement terms. *See* Geller Decl. ¶¶ 36–38; *see*
8 *also, e.g., Trospen v. Styker Corp.*, No. 13-cv-0607-LHK, 2014 WL 4145448, at *12 (N.D. Cal.
9 Aug. 21, 2014) (“All that is necessary is a ‘rudimentary understanding of the present action
10 and . . . a demonstrated willingness to assist counsel in the prosecution of the litigation.’” (citation
11 omitted)). The proposed Settlement Class Representatives are more than adequate.

12 Similarly, as demonstrated throughout this litigation, proposed Settlement Class Counsel
13 and many of the PSC firms have undertaken the ongoing pleading, briefing, investigative, and
14 discovery work, effort, and expense of this MDL. They have demonstrated their willingness to
15 devote whatever resources were necessary to reach a successful outcome throughout the two
16 years since filing their complaints. They, too, satisfy Rule 23(a)(4).

17 Specifically, Paul Geller is a founding partner of Robbins Geller Rudman & Dowd LLP,
18 where he has handled cases in each of the firm's practice areas for nearly 30 years. Mr. Geller
19 and his firm have held lead roles in some of the country's most impactful class actions and MDLs
20 in this District and elsewhere, including TPP class actions. For example, Mr. Geller was Lead
21 Counsel in *In re Facebook Biometric Info, Privacy Litigation*, No. 3:15-cv-03747-JD (\$650
22 million all cash settlement approved by Judge Donato), which at the time was the largest ever
23 cash-funded privacy settlement and achieved a record-breaking claim rate. Mr. Geller's firm
24 recently resolved *Evanston Police Pension Fund v. McKesson Corporation*, No. 3:18-cv-06525-
25 CRB, before this Court (\$141 million settlement approved by Judge Breyer), and *Drieu v. Zoom*
26 *Video Comms. Inc.*, No. 3:20-cv-02353 (\$150 million pending approval by Judge Donato).
27 Additionally, Mr. Geller, at the request of Ms. Cabraser as Lead Counsel, successfully presented
28

1 the class certification motion to this Court in the historic *In re Volkswagen “Clean Diesel”*
2 litigation (MDL No. 2672).

3 With specific regard to recent TPP class actions, Mr. Geller was Lead Counsel in *In re*
4 *EpiPen Marketing, Sales Practices & Antitrust Litigation* (MDL No. 2785), No. 17-md-02785, an
5 MDL in the District of Kansas (\$609 million class settlement fully approved with no objections),
6 and Robbins Geller was Lead Counsel in *In re Remicade Antitrust Litigation*, No. 2:17-cv-04326,
7 in the Eastern District of Pennsylvania, a TPP class action that recently settled for \$25 million.
8 Robbins Geller was also a member of the Executive Committee in this District in *In re Lidoderm*
9 *Antitrust Litigation*, No. 3:14-md-02521-WHO, which settled for \$104.75 million.

10 In the instant case, Mr. Geller actively participated in the settlement negotiation process,
11 the Boston mediation, and the prosecution of TPP Plaintiffs’ claims, together with Ms. Cabraser
12 as Lead Counsel. Importantly, Mr. Geller is also a member of the leadership team in *In re*
13 *National Prescription Opiate Litigation* (MDL No. 2804), where, along with Ms. Cabraser, he
14 helped negotiate and implement nine global settlements that will bring over \$50 billion in
15 abatement funds to communities throughout the country.

16 **3. The Settlement Class meets the Rule 23(b)(3) and/or 23(c)(4)**
17 **requirements.**

18 **a. Common issues of law and fact predominate.**

19 “The predominance inquiry ‘asks whether the common, aggregation-enabling, issues in
20 the case are more prevalent or important than the non-common, aggregation-defeating, individual
21 issues.’” *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted). “When
22 ‘one or more of the central issues in the action are common to the class and can be said to
23 predominate, the action may be considered proper under Rule 23(b)(3) even though other
24 important matters will have to be tried separately, such as damages or some affirmative defenses
25 peculiar to some individual class members.’” *Id.* (citation omitted). At its core, “[p]redominance
26 is a question of efficiency.” *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012).
27 Thus, “[w]hen common questions present a significant aspect of the case and they can be resolved
28

1 for all members of the class in a single adjudication, there is clear justification for handling the
2 dispute on a representative rather than on an individual basis.” *Hanlon*, 150 F.3d at 1022.

3 The Ninth Circuit favors class treatment of fraud claims stemming from a “common
4 course of conduct.” See *In re First Alliance Mortg. Co.*, 471 F.3d 977, 990 (9th Cir. 2006)
5 (citation omitted); *Hanlon*, 150 F.3d at 1022–23. Even outside of the settlement context,
6 predominance is readily satisfied for consumer claims arising from defendants’ common course
7 of conduct. See *Amchem Prods.*, 521 U.S. at 625; *Wolin v. Jaguar Land Rover N. Am., LLC*, 617
8 F.3d 1168, 1173, 1176 (9th Cir. 2010) (finding consumer claims based on uniform omissions
9 were certifiable where “susceptible to proof by generalized evidence,” even if individualized
10 issues remained); *Friedman v. 24 Hour Fitness USA, Inc.*, No. 06-cv-06282 AHM (CTx), 2009
11 WL 2711956, at *8 (C.D. Cal. Aug. 25, 2009) (finding common issues predominated where
12 alleged injury was a result “of a single fraudulent scheme”).

13 Central to each TPP Plaintiff’s claims are allegations that McKinsey perpetrated the same
14 fraud in the same manner against all Class members: namely, that it conspired with its opioid
15 manufacturer clients in a scheme to unlawfully increase sales of opioids—and to grow their share
16 of the prescription painkiller market and the market as a whole—through repeated and systematic
17 misrepresentations, concealments, and omissions of material fact about the safety and efficacy of
18 opioids for treating long-term chronic pain, together with fraudulent and deceptive marketing
19 campaigns and abusing their access to prescriber data to target high-prescribing doctors. Whether
20 McKinsey engaged in this conduct is a question that is susceptible to common proof, and the
21 answer as to one plaintiff’s case is the answer as to all. That question can be resolved using the
22 same evidence for all Class members and thus is the precise type of predominant question that
23 makes a class-wide adjudication worthwhile. See *Tyson Foods*, 577 U.S. at 453 (“When ‘one or
24 more of the central issues in the action are common to the class and can be said to predominate,
25 the action may be considered proper under Rule 23(b)(3)’” (citation omitted)). In other
26 words, if the Court were to find that McKinsey has indeed engaged in a deceptive and fraudulent
27 scheme, such a finding would apply to all of the Class members’ claims.

28

1 TPP Plaintiffs also allege a common and unifying injury. Their injuries, like every other
2 Class member’s injuries, allegedly arise from the inordinate increase in opioid sales and diversion
3 that occurred throughout the country, beginning after the 1996 launch of OxyContin.

4 Rule 23(b)(3)’s trial manageability-inflected requirements are irrelevant for settlement-
5 purposes certification because, as the Supreme Court observed in *Amchem*, a settlement means
6 “there [will] be no trial.” 521 U.S. at 620. Were the TPPs’ claims to be configured for trial, the
7 court might elect, pursuant to adversary briefing, to proceed under Rule 23(c)(4), designating one
8 or more particular claims or issues for class-wide, binding treatment, while leaving others for
9 individualized pursuit. The common questions described under the Rule 23(a)(2) section above—
10 questions relating to McKinsey’s conduct, knowledge, and duty arising from its relationships with
11 other opioids actors, not differing among Class members—would be among those proposed for
12 Rule 23(c)(4) trial certification by TPP Plaintiffs, making settlement-purposes Rule 23(c)(4)
13 certification appropriate.

14 **Class treatment is superior to other available methods for the**
15 **resolution of this case.**

16 Superiority asks “whether the objectives of the particular class action procedure will be
17 achieved in the particular case.” *Hanlon*, 150 F.3d at 1023. In other words, it “requires the court
18 to determine whether maintenance of this litigation as a class action is efficient and whether it is
19 fair.” *Wolin*, 617 F.3d at 1175-76. Under Rule 23(b)(3), “the Court evaluates whether a class
20 action is a superior method of adjudicating plaintiff’s claims by evaluating four factors: ‘(1) the
21 interest of each class member in individually controlling the prosecution or defense of separate
22 actions; (2) the extent and nature of any litigation concerning the controversy already commenced
23 by or against the class; (3) the desirability of concentrating the litigation of the claims in the
24 particular forum; and (4) the difficulties likely to be encountered in the management of a class
25 action.’” *Trosper*, 2014 WL 4145448, at *17 (quoting *Leuthold v. Destination Am., Inc.*, 224
26 F.R.D. 462, 469 (N.D. Cal. 2004)).

27 Class treatment here is far superior to the litigation of thousands of individual TPP
28 actions. “From either a judicial or litigant viewpoint, there is no advantage in individual members

1 controlling the prosecution of separate actions. There would be less litigation or settlement
 2 leverage, significantly reduced resources and no greater prospect for recovery.” *Hanlon*, 150
 3 F.3d at 1023; *see also Wolin*, 617 F.3d at 1176 (“Forcing individual vehicle owners to litigate
 4 their cases, particularly where common issues predominate for the proposed class, is an inferior
 5 method of adjudication.”).

6 Class resolution is also superior from an efficiency and resource perspective. If Class
 7 members had to bring individual lawsuits against McKinsey, each Class member would have to
 8 prove the same wrongful conduct to establish liability and thus would offer the same evidence.
 9 Given that Class members number in the thousands, there is the potential for just as many
 10 lawsuits with the possibility of inconsistent rulings and results. MDL 2804 and the parallel state
 11 court opioid actions against manufacturers, distributors, and pharmacies demonstrate exactly this
 12 possibility.

13 Thus, class-wide resolution of Class members’ claims, especially when they are against a
 14 single family of defendants, is clearly favored over other means of adjudication, and Rule
 15 23(b)(3)’s superiority requirement is met.

16 * * *

17 For the reasons set forth above, Plaintiffs respectfully submit that the Court will—after
 18 notice is issued and Class member input received—“likely be able to . . . certify the class for
 19 purposes of judgment on the proposal.” Fed. R. Civ. P. 23(e)(1)(B).

20 **4. The Court should appoint Interim Settlement Class Counsel under**
 21 **Rule 23(g)(3).**

22 The Court is required to appoint class counsel to represent the Settlement Class. *See* Fed.
 23 R. Civ. P. 23(g). At the outset of the MDL, as part of a competitive application process, the Court
 24 chose Lead Counsel and each member of the PSC due to their qualifications, experience, and
 25 commitment to the successful prosecution of this litigation. *See* ECF No. 211. The criteria that
 26 the Court considered in appointing Lead Counsel and the PSC align with the considerations set
 27 forth in Rule 23(g). *See, e.g., Clemens*, 2016 WL 1461944, at *2. As noted above, Lead Counsel
 28 and several of the PSC firms have undertaken an enormous amount of work, effort, and expense

1 in this MDL on behalf of the TPP Settlement Class. *See* Geller Decl. § V. Plaintiffs therefore
2 submit that Robbins Geller Rudman & Dowd LLP should be appointed as Interim Settlement
3 Class Counsel under Rule 23(g)(3) to conduct the necessary steps in the Settlement approval
4 process.

5 **5. The Court should preliminarily approve the settlement under Rule**
6 **23(e) as fair, reasonable, and adequate.**

7 Rule 23(e)(2) identifies several criteria for the Court to use in deciding whether to grant
8 preliminary approval of a proposed class settlement and direct notice to the proposed class. The
9 Settlement proposed here readily satisfies the criteria for preliminary approval.

10 **a. Rule 23(e)(2)(A): Class Counsel and the Class Representatives**
11 **will continue to zealously represent the Class.**

12 Class Counsel and the Settlement Class Representatives fought hard to protect the
13 interests of the Class, as evidenced by the significant compensation available to the Class through
14 the proposed Settlement. Class Counsel prosecuted this action and the fair resolution of it with
15 vigor and dedication since filing their clients' complaints. *See* Fed. R. Civ. P. 23(e)(2)(A). Class
16 Counsel undertook significant efforts to uncover the facts to continuously prosecute and refine the
17 Class claims. Class Counsel also engaged in robust Rule 12 motion practice—researching,
18 drafting, and filing three thorough opposition briefs, totaling well over 100 pages, to Defendants'
19 motions to dismiss.

20 The Settlement Class Representatives each worked with counsel to review and evaluate
21 the terms of the proposed Settlement Agreement and have endorsed its terms. Each
22 Representative has also expressed their continued willingness to protect the Class until the
23 Settlement is approved and its administration completed. *See* Geller Decl. § IV.

24 **b. Rule 23(e)(2)(B): The Settlement is the product of good faith,**
25 **informed, and arm's-length negotiations.**

26 The Parties undertook serious, informed, and arm's-length negotiations over several
27 months—including in-person negotiation sessions and multiple remote sessions via video and
28

1 telephone. *Id.* ¶ 23. These detailed discussions culminated in the proposed Settlement now
2 before the Court. *See* Fed. R. Civ. P. 23(e)(2)(B).

3 Where extensive information has been exchanged, “[a] court may assume that the parties
4 have a good understanding of the strengths and weaknesses of their respective cases and hence
5 that the settlement’s value is based upon such adequate information.” William B. Rubenstein, et
6 al., 4 *Newberg on Class Actions* § 13:49 (5th ed. 2012) (“*Newberg*”); *cf. In re Anthem, Inc. Data*
7 *Breach Litig.*, 327 F.R.D. 299, 320 (N.D. Cal. 2018) (concluding that the “extent of discovery”
8 and factual investigation undertaken by the parties gave them “a good sense of the strength and
9 weaknesses of their respective cases in order to ‘make an informed decision about settlement’”
10 (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000))).

11 Here, too, the volume of documents and information supports the Parties’ ability to make
12 a well-supported settlement decision. Notably, discovery supporting a settlement does not need
13 to have been formally produced and can include documents and information learned in related
14 proceedings. *See Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1239–40, 1241 (9th Cir.
15 1998) (noting that formal discovery is not required for settlement approval and that, “[i]n
16 particular, the district court and plaintiffs may rely on discovery developed in prior or related
17 proceedings”); *Wahl v. Yahoo! Inc.*, No. 17-cv-02745-BLF, 2018 WL 6002323, at *4 (N.D. Cal.
18 Nov. 15, 2018) (granting final approval of class settlement although “little formal discovery” was
19 conducted, noting relevant inquiry was whether parties had “sufficient information to evaluate the
20 case’s strengths and weaknesses”). Here, Defendants have produced or made available hundreds
21 of thousands of documents relevant to McKinsey’s alleged involvement in developing opioid
22 marketing schemes, including documents previously produced to the state Attorneys General in
23 connection with that settlement, all of which informed Plaintiffs’ understanding of their claims’
24 strengths and weaknesses. Geller Decl. ¶ 22.

25 “Collusion may not always be evident on the face of a settlement, and courts therefore
26 must be particularly vigilant not only for explicit collusion, but also for more subtle signs that
27 class counsel have allowed pursuit of their own self-interests and that of certain class members to
28 infect the negotiations.” *In re Bluetooth Headset*, 654 F.3d at 947. Such signs include “when

1 counsel receive a disproportionate distribution of the settlement,” *id.* (citing *Hanlon*, 150 F.3d at
 2 1021); the inclusion of “clear sailing” provisions whereby fees are funded separately from the
 3 class funds, *id.*; and when the un-awarded fees revert to defendants, *id.* None of these flags are
 4 present. Plaintiffs plan to request not more than 25% for attorney’s fees and for litigation and
 5 administrative costs, which is at or less than the standard Ninth Circuit benchmark for counsel
 6 fees and costs. Also, there is no clear sailing provision, and no portion of the Fund will revert to
 7 McKinsey even if this Court makes no award of fees.

8 Additionally, the Parties formally negotiated the Settlement over months, under the
 9 oversight of Eric Green, a sophisticated and objective mediator with decades of proven
 10 experience with complicated litigation and class actions, including experience with the mediation
 11 and resolution of TPP claims through class settlements. Geller Decl. ¶ 23. In approving a class
 12 action settlement, the Ninth Circuit puts “a good deal of stock in the product of an arm’s-length,
 13 non-collusive, negotiated resolution.” *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 965 (9th
 14 Cir. 2009). And “[t]he assistance of an experienced mediator in the settlement process confirms
 15 that the settlement is non-collusive.” *G. F. v. Contra Costa County*, No. 13-cv-03667-MEJ, 2015
 16 WL 4606078, at *13 (N.D. Cal. July 30, 2015); *see also Noroma v. Home Point Fin. Corp.*, No.
 17 17-cv-07205, 2019 WL 1589980, at *7 (N.D. Cal. Apr. 12, 2019) (settlements resulting from
 18 formal mediations with experienced mediator weigh in “favor of granting preliminary settlement
 19 approval”).

20 c. **Rule 23(e)(2)(C): The Settlement provides substantial**
 21 **compensation in exchange for the compromise of strong claims.**

22 The Settlement provides substantial relief for the Class, especially considering (i) the
 23 costs, risks, and delay of trial and appeal; (ii) the effectiveness of the proposed distribution plan;
 24 and (iii) the fair terms of the requested award of attorney’s fees. *See* Fed. R. Civ. P. 23(e)(2)(C).

25 Plaintiffs believe their underlying claims are meritorious. Plaintiffs allege that
 26 McKinsey’s deceptive marketing strategies were aimed at increasing opioids sales and revenues
 27 for its clients, the natural and foreseeable consequence of which was increased costs to TPPs for
 28 the prescription opioids themselves (rather than safer, non-addictive, and lower-cost prescription

1 drugs such as over-the-counter pain relievers), as well as for additional costs to address the
2 resulting opioid addiction-related treatment that followed. ECF No. 299 (TPP Consolidated Class
3 Action Compl.) ¶¶ 532–37. The Rule 12(b)(6) briefing on behalf of NAS, Tribal, and TPP
4 Plaintiffs previews the strength of arguments that Plaintiffs would make if faced with a similar
5 challenge. *See* ECF No. 481. While there is no trial opinion adjudicating the strength of TPP
6 Plaintiffs’ RICO and common law claims, they have survived a dispositive challenge in other
7 opioid cases. *See, e.g., In re Nat’l Prescription Opiate Litig. (Cleveland Bakers)*, 440 F. Supp. 3d
8 773, 802 (N.D. Ohio 2020).

9 **6. The extent of discovery taken across opioids cases and the stage of the**
10 **proceedings favor preliminary approval.**

11 While discovery against McKinsey is ongoing, the legal and factual issues surrounding the
12 litigation have been thoroughly investigated. Years of discovery, starting with MDL 2804 and
13 related actions, inform Plaintiffs’ claims against McKinsey. This covers millions of pages of
14 documents, terabytes of data, hundreds of depositions, expert reports, and testimony presented at
15 several trials. Indeed, Plaintiffs and Class members have sued McKinsey’s own clients—
16 including Purdue, Endo, Johnson & Johnson, and Mallinckrodt—for the same course of false
17 messaging and aggressive promotional tactics that Plaintiffs and Class members allege McKinsey
18 advised and facilitated. This Court lifted its stay of discovery in October 2022, ECF No. 440;
19 since then, McKinsey has produced hundreds of thousands of documents, which Plaintiffs have
20 diligently reviewed. Plaintiffs have also reviewed McKinsey’s state Attorneys General
21 production. Geller Decl. ¶ 22. While additional discovery would benefit all parties if Plaintiffs’
22 and Class members’ cases were to proceed to trial, the degree of current and prior discovery
23 informing Plaintiffs’ and Class Counsel’s understanding and valuation “suggests that the parties
24 arrived at a compromise with a full understanding of the legal and factual issues surrounding the
25 case.” *Carlotti v. ASUS Computer Int’l*, No. 18-cv-03369-DMR, 2019 WL 6134910, at *6 (N.D.
26 Cal. Nov. 19, 2019).

1 7. **The Settlement mitigates the risks, expenses, and delays that the Class**
2 **would bear with continued litigation.**

3 “The risks and certainty of recovery in continued litigation are factors for the Court to
4 balance in determining whether the Settlement is fair.” *Nobles v. MBNA Corp.*, No. 06-cv-3723-
5 CRB, 2009 WL 1854965, at *2 (N.D. Cal. June 29, 2009); *see also Kim v. Space Pencil, Inc.*, No.
6 11-cv-03796 LB, 2012 WL 5948951, at *5 (N.D. Cal. Nov. 28, 2012) (“The substantial and
7 immediate relief provided to the Class under the Settlement weighs heavily in favor of its
8 approval compared to the inherent risk of continued litigation, trial, and appeal, as well as the
9 financial wherewithal of the defendant.”).

10 Under Rule 23(e), the strength of Plaintiffs’ claims must be “balanced by the risk,
11 expense, and complexity of their case, as well as the likely duration of further litigation.” *In re*
12 *Volkswagen*, 2016 WL 6248426, at *11 (N.D. Cal. Oct. 25, 2016) (citing *In re Mego Fin. Corp.*
13 *Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000), *as amended* (June 19, 2000)).

14 First, this litigation poses real risks. Plaintiffs’ claims have not withstood a Rule 12(b)(6)
15 motion, a motion for class certification and likely appeal thereof, summary judgment, or *Daubert*
16 motions. As demonstrated by the Court’s July 20, 2023 Order Granting Defendants’ Motion to
17 Dismiss in the NAS plaintiffs’ cases, there is no guarantee that TPP Plaintiffs would be able to pass
18 through even the first dispositive hurdle posed by Rule 12. *See McKinsey, supra*, 2023 WL
19 4670291 (ECF No. 573) (dismissing negligence for failure to plead duty, fraud for failure to plead
20 reliance, public nuisance for lack of standing as private actors, and other claims dependent on the
21 underlying dismissed torts).

22 Almost all class actions involve a high level of risk, expense, and complexity, which is
23 one reason that judicial policy so strongly favors resolving class actions through settlement. *See*
24 *In re Volkswagen*, 229 F. Supp. 3d 1052, 1065 (N.D. Cal. 2017) (“Settlement is favored in cases
25 that are complex, expensive, and lengthy to try.” (citing *Rodriguez*, 563 F.3d at 966)). If
26 Plaintiffs’ claims were certified for litigation here, then significant discovery would need to be
27 undertaken and expert analysis conducted, not only to prove McKinsey’s liability but to quantify
28

1 the degree of harm for each Class member. The costs of doing so would be extraordinarily high,
2 with no guarantee of success.

3 Second, similar cases against opioid manufacturers, distributors, and dispensers have been
4 pending in MDL 2804 for at least six years. The time it has taken bellwethers to proceed through
5 discovery and then through trial or to another resolution has averaged approximately two to three
6 years, and, even then, trial wins have been and are subject to ongoing appeals. Should Settlement
7 Class Counsel prosecute Class members' claims, it would similarly take two to three years and
8 then likely be followed by a lengthy appeals process. Given the risks and complexity, expense,
9 and delay posed by further litigation, this Settlement represents a fair and adequate resolution for
10 the Class.

11 **8. The Proposed Plan of Allocation, including the method of processing**
12 **Class member claims, is effective and based on objective factors.**

13 The proposed Plan of Allocation by Dr. Rosenthal is based on neutral, objective criteria
14 and will ensure a fair distribution of the Settlement Fund among Class members. *See* Geller Decl.
15 Ex. F. Dr. Rosenthal is a preeminent TPP testifying expert, who is thoroughly familiar with the
16 operation of the healthcare industry and the TPPs' role and costs in the delivery of healthcare to
17 their beneficiaries. Moreover, Class Counsel expect a comparably low opt-out and high
18 participation rate compared to other class action settlements.

19 The Notice and Claims Administrator is highly qualified. A.B. Data has demonstrated
20 success in administering numerous national TPP settlements. *See* Geller Decl. Ex. E (Miller
21 Decl.) ¶ 3. Class members' enthusiasm and support for similar national TPP settlements are
22 encouraging. Given the low expected opt outs here and the high participation rate in similar
23 national settlements, there is virtually zero risk of money remaining after distribution. Even so,
24 there will be no reversions of the Settlement Fund to McKinsey; all Settlement Fund money, net
25 fees and costs, shall be distributed to the Class.

26 **9. The terms relating to attorneys' fees are reasonable.**

27 Plaintiffs plan to seek attorneys' fees and costs, together, of up to 25% of the Settlement
28 Fund. Geller Decl. ¶ 43; Fed. R. Civ. P. 23(e)(2)(C)(iii). This request is at or below the range

1 regularly approved in common fund settlements in this Circuit. *See, e.g., Vizcaino v. Microsoft*
2 *Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (observing Ninth Circuit case law that between 20
3 and 30 percent of the settlement common fund in attorneys' fees is within the "usual range");
4 *Hernandez v. Dutton Ranch Corp.*, No. 19-cv-00817-EMC, 2021 WL 5053476, at *6 (N.D. Cal.
5 Sept. 10, 2021) (collecting cases and finding that "[d]istrict courts within this circuit, including
6 this Court, routinely award attorneys' fees that are one-third of the total settlement fund . . . [s]uch
7 awards are routinely upheld by the Ninth Circuit").

8 Settlement Class Counsel will file their fee application, which will provide the supporting
9 basis for their request, at least 40 days in advance of the Objection Deadline, and the fee
10 application will be available on the Settlement website after it is filed. This application will
11 include common benefit time incurred by the PSC members and others operating under this
12 Court's common benefit orders, as recommended by Plaintiffs' Lead Counsel. Any attorneys'
13 fees and expenses awarded by the Court will be paid from the Settlement Fund following the
14 Effective Date of the Settlement. Based on a preliminary review, the total common benefit
15 combined hours in this case through October 31, 2023 are approximately 39,300, for a total
16 combined lodestar of approximately \$24 million during that period. The total combined litigation
17 expenses in this case through October 31, 2023 are approximately \$ 471,100. Based on the above
18 numbers, a fee and expense award up to 25% of the Settlement Fund plus costs, after subtracting
19 the expenses portion, would represent a negative multiplier of 0.8 of the submitted common
20 benefit lodestar. *See* Geller Decl. § VI. Settlement Class Counsel will continue to incur time in
21 seeking settlement approval and on implementation efforts should the Settlement be approved.

22 As the Court is aware, settlements for other categories of Plaintiffs are ongoing or have
23 reached finality, and all settlements are subject to PTO No. 9's common benefit assessment.
24 Counsel other than TPP class counsel have done work redounding to the common benefit that is
25 included on the lodestar above, and a noticed report and recommendation regarding the equitable
26 allocation of the resulting fund will be submitted for comment, consideration, and approval.
27 Plaintiffs' Lead Counsel will provide additional information in the fee application, to be filed and
28 posted on the Settlement website prior to the opt-out/objection deadline, so that Class members

1 will have the opportunity to comment on or object to the requested fees prior to the final approval
2 hearing.³

3 Attorneys' fees, costs, and expenses, in whatever amount set by the Court, are to be paid
4 only after the Court grants Final Approval. The Court's ultimate decision on whether to award
5 fees and expenses does not impact or terminate the underlying Settlement Agreement. As with
6 attorneys' fees in all other McKinsey settlements, TPP attorneys' fees will be subject to PTO No.
7 9 (ECF No. 567), and Lead Counsel will recommend a proposed equitable allocation of fees and
8 reimbursement of costs among Class Counsel, PSC members, and other counsel performing
9 authorized work for the common benefit of plaintiffs in connection with the McKinsey MDL.

10 **10. The Settlement treats Class members equitably in relation to each**
11 **other.**

12 No Class member receives preferential treatment under the Settlement. Any and every
13 Class member is entitled to a *pro rata* portion of the Settlement Fund based on the Plan of
14 Allocation. As Dr. Rosenthal explains in her Declaration, "a fixed settlement to compensate
15 TPPs for overcharges related to opioid marketing should be allocated in a way that reflects the
16 relative burden borne by individual TPPs. This relative burden could theoretically be measured
17 by statistically estimating the incremental amount of a TPP's actual spending on opioids and the
18 health care sequelae of opioid addiction (e.g., medications for opioid use disorder, emergency
19 department visits for overdose, etc.) that is attributable to the alleged misconduct." Geller Decl.
20 Ex. F ¶ 11. Rather than simply allocating settlement funds based on spending, the focus should
21 be on the impact of McKinsey's and its co-conspirators' conduct. Thus, Dr. Rosenthal opines,
22 "[a]locating the Settlement based on actual spending alone (i.e., by summing opioid-related paid
23 claims) would also run the risk of awarding a higher share of the Settlement to TPPs with higher
24 opioid use unrelated to marketing." *Id.*

25
26
27 ³ Finally, there are no agreements between the Parties other than the Settlement. *See* Fed. R. Civ.
28 P. 23(e)(3) ("[T]he parties seeking approval must file a statement identifying any agreement made
in connection with the proposal.").

1 Drawing on published work, Dr. Rosenthal developed a model that relieves TPPs of the
2 onerous burden of gathering spending and reimbursement data for a 14-year period:

3 An alternative approach to allocation would be to focus on the size
4 of the affected population, measured in the number of covered
5 beneficiaries, and account for differential exposure to the
6 challenged conduct. Enrollment data, particularly in aggregate,
7 will be more readily available from reports and regulatory filings,
8 and easier to access and analyze. My allocation approach for the
9 McKinsey TPP Settlement is predicated on the idea that the impact
10 of opioid manufacturers' marketing on TPPs is a function of the
11 size of their covered populations over time and their exposure to
12 the challenged marketing. Following recent work exploring the
13 impact of opioid marketing on downstream outcomes, I measure
14 exposure as a function of the extent to which the prescribers who
15 cared for the TPPs' covered population were targeted by the opioid
16 manufacturers' marketing efforts.

17 *Id.* ¶ 12.

18 **11. The Northern District of California Procedural Guidance for Class**
19 **Action Settlements supports Settlement approval.**

20 **a. Guidance 1: Differences, range, and plan of allocation**

21 Guidance Factors 1(a) and 1(b): 1(a): The only difference between the class definitions in
22 the TPP Consolidated Class Action Complaint and those in this motion is a clearer description
23 here of the entities that qualify for class membership. Such clarification is necessary to ensure
24 proper identification of and notice to Class members. 1(b): There are no differences between the
25 TPPs' claims to be released and the claims in the TPP Consolidated Class Action Complaint.

26 Guidance Factor 1(c): This litigation poses many unknowns that make it difficult to
27 quantify what Class members could receive on their claims at trial. Of the opioid-related cases
28 across the country that have gone to trial thus far, all involve plaintiff government subdivisions.
Some of those plaintiffs have won and some have lost, but only one yielded a monetary verdict.
See In re Nat'l Prescription Opiate Litig. (Lake & Trumbull Counties, Ohio), No. 17-md-2804,
ECF No. 4611 (N.D. Ohio Aug. 17, 2022) (awarding injunctive relief and \$650.6 million to be
paid over 15 years to two Ohio counties for nuisance claim against three pharmacy defendants).
That order is currently on appeal to the Sixth Circuit, which in turn has *sua sponte* certified a
question of law to the Supreme Court of Ohio, and does not provide an adequate touchstone for

1 what any particular TPP Class member could receive in their individual cases against one
2 defendant family.

3 While it is possible that Class members could win large trial awards if they proceeded
4 with their claims (that they would then have to defend on appeal), Plaintiffs submit that this
5 Settlement represents an excellent value in recovery for the Class. *See Nat'l Rural Telecomms.*
6 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (“[I]t is well-settled law that a
7 proposed settlement may be acceptable even though it amounts to only a fraction of the potential
8 recovery that might be available to the class members at trial.”).

9 Guidance Factor 1(d): The only cases affected by the proposed Settlement are the other
10 TPP cases on file, all of which plead similar claims.

11 Guidance Factor 1(e): As detailed by Dr. Rosenthal, the Plan of Allocation applies a
12 neutral, mathematical algorithm that, first, is derived from objective data points aimed at
13 assessing a proportional degree of harm and, second, is reflective of Class members’ relative
14 bargaining power and of the strength of their claims. *See Geller Decl. Ex. F.*

15 Guidance Factor 1(f): Class Counsel expect a low opt-out rate compared to ordinary class
16 action settlements, which range from one to ten percent. *See In re Myford Touch Consumer*
17 *Litig.*, No.13-cv-1372 (EMC), 2018 WL 10539266, at *2 (N.D. Cal. June 14, 2018).

18 Guidance Factor 1(g): Given the expected low opt-outs here and the high participation
19 rate in similar national settlements, there is little to no risk of money remaining after initial
20 distributions.

21 **b. Guidance 2: The Proposed Settlement Administrator**

22 Plaintiffs propose that A.B. Data be appointed as the Notice and Claims Administrator,
23 based on its previous experience administering national TPP settlements. A.B. Data has
24 successfully noticed and made initial payments for some of the largest TPP settlements in history,
25 including *In re Restasis Antitrust Litigation* (MDL No. 2819), *In re EpiPen Marketing, Sales*
26 *Practices & Antitrust Litigation* (MDL No. 2785), and *In re Suboxone Antitrust Litigation* (MDL
27 No. 2445). In the past two years, Lead Counsel has worked with A.B. Data on administration in
28 the following cases:

- 1 • *Cleary v. American Airlines, Inc.*, No. 4:21-cv-00184-O (N.D. Tex.);
- 2 • *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*, No. 18-
- 3 md-02819 (E.D.N.Y.);
- 4 • *The Hospital Authority of Metropolitan Government of Nashville and Davidson*
- 5 *County v Momenta Pharmaceuticals, Inc.*, No. 15-cv-01100 (M.D. Tenn.); and
- 6 • *Lincoln Adventures, LLC v. Those Certain Underwriters at Lloyd's*, No. 2:08-cv-
- 7 00235-CCC-ESK (D.N.J.)

8 The administrative costs for these services will be paid out of the Settlement Fund.

9 Geller Decl. Ex. A § IV. These costs are anticipated to be approximately \$200,000 to \$300,000
10 for both notice and payment processing and distribution. These amounts are significantly less
11 than can be expected from new, untested notice and claims administrators who would have to
12 duplicate much of the groundwork that A.B. Data has already laid.

13 The accompanying Declaration of Eric J. Miller sets forth A.B. Data's procedures for
14 securely handling class member data (including technical, administrative, and physical controls;
15 retention; destruction; audits; and crisis response), as well as confirmation of A.B. Data's
16 acceptance of responsibility for and maintenance of insurance in case of errors. Mr. Miller's
17 declaration also lists the numerous cases where A.B. Data provided notice and claim
18 administration services in TPP class settlements. *See* Geller Decl. Ex. E.

19 c. **Guidance 3: The Proposed Notice to the Settlement Class Is**
20 **Adequate**

21 The Proposed Notice program provides for Class Notice to be distributed by: (i) direct
22 mail notice to verified and up-to-date contacts for Class members, (ii) direct email notice to the
23 appropriate individuals on behalf of each Class member, where direct mail addresses are
24 unavailable, and (iii) internet publication. Additionally, the proposed notice program provides for
25 the creation and maintenance of a dedicated Settlement website, where Class members can review
26 the Settlement Agreement; detailed notice materials, including the Notice itself, which provides
27 clear and concise information concerning all relevant aspects of the litigation; key deadlines; the
28

1 preliminary approval order when and if it is granted; and the briefs and declarations in support of
2 preliminary approval, final approval, and the fee award, once they are filed with the Court.

3 The proposed Notice includes contact information for Class Counsel; instructions on how
4 to access the case docket via PACER or in-person at any of the court's locations; and a note to
5 advise Class members to check the Settlement website or the Court's PACER site to confirm that
6 any dates have not changed. *See* Geller Decl. Exs. B (Long-Form Notice), C (Postcard Notice).
7 The Notice also includes the date and time of the final approval hearing, as well as other relevant
8 dates (including opt-out and objection deadlines), clearly stating that dates may change without
9 further notice to the class. *Id.* Class Counsel will ensure that the dates on the Settlement website
10 are kept up-to-date.

11 The content and method of dissemination of the Proposed Notice comports with the
12 requirements of due process, and the combination of these multiple forms of direct notice are
13 designed to provide the most comprehensive notice to the Class.

14 **d. Guidance 4 & 5: Exclusions and Objections**

15 Pursuant to Sections 4 and 5 of the Guidance and Rule 23(e)(5), the proposed Class
16 Notice clearly discusses the Class members' rights. In particular, it includes information on
17 Settlement Class members' rights to: (1) request exclusion and the manner for submitting such a
18 request; (2) comment on or object to the Settlement, or any aspect thereof, and the manner for
19 filing and serving a comment or objection; and (3) participate in the Settlement. *See* Geller Decl.
20 Ex. B. The Proposed Notice also provides contact information for Class Counsel, the postal
21 address for the Court, and includes the URL for a Settlement website where Class members can
22 seek additional information or pose questions to the Notice and Claims Administrator. *Id.*

23 **e. Guidance 6: The Intended Attorneys' Fees and Expenses**
24 **Request**

25 Plaintiffs will separately seek an award of attorneys' fees and reimbursement of litigation
26 costs and expenses. This payment, too, will come from McKinsey through the Settlement Fund.
27 Geller Decl. Ex. A § VI. The request for an award of attorneys' fees and costs, combined, will
28 not exceed 25% of the Settlement Fund. Geller Decl. ¶ 43. This amount includes and satisfies

1 the PTO 9 common benefit obligation of TPP Class members. The amount awarded will be held
2 and ultimately allocated in a manner to be set by the Court.

3 **f. Guidance 7: Proposed Service Awards**

4 Class Counsel will not seek Service Awards for the named TPP Plaintiffs.

5 **g. Guidance 8: Cy Pres Awardees**

6 Cy pres awards may be made in this Settlement and will consist only of de minimis
7 residual amounts based on the interest earned while uncashed checks remain and the amounts of
8 any uncashed checks.

9 No portion of the Settlement Fund shall revert to McKinsey. Because there is no cap on
10 distribution per Class member, all Settlement Funds shall be paid pursuant to the Plan of
11 Allocation and on a *pro rata* share to Class members.

12 **h. Guidance 9: Proposed Timeline**

13 In connection with preliminary approval of the Settlement, the Court must also set dates
14 for certain events. The Parties suggest a schedule based on the following intervals:

Event	Proposed Date
Deadline for Notice Administrator to complete email and/or U.S. mail notice (the "Notice Date").	No later than 20 days following entry of the Preliminary Approval Order.
Deadline to submit opening briefs and supporting materials in support of Final Approval of Settlement and motion for attorneys' fees and expenses	No later than 30 days following entry of the Preliminary Approval Order
Deadline for objectors to deliver written objections by hand or postmarked/sent by First Class Mail, and for Class members to submit a Request for Exclusion, if desired.	Postmarked or submitted not later than 50 days from Notice Date
Reply Memoranda in Support of Final Approval and Fee/Expense Application filed	No later than 7 days prior to the Final Approval Hearing
Final Approval Hearing	Day and time to be chosen at the Court's discretion

24 Given the above schedule, the Final Approval Hearing will likely take place in early April
25 2024.

26 **i. Guidance 10: Class Action Fairness Act Notice**

27 Pursuant to Section 10 of the Guidance, Defendants shall be responsible at their own cost,
28 separate from the Settlement Fund, for providing notice under the Class Action Fairness Act of

1 2005, 28 U.S.C. § 1711 *et seq.*, to state Attorneys General and the U.S. Attorney General. This
 2 notice shall be provided within 10 days of the filing of the instant motion with the Court.

3 **j. Guidance 11: Comparisons**

4 Pursuant to Section 11 of the Guidance, Class Counsel submit that this class Settlement is
 5 *sui generis* in opioids litigation but is similar in its notice and claim administration to other TPP
 6 cases, such as the numerous TPP antitrust cases. For examples, see the Miller Declaration (Geller
 7 Decl. Ex. E).

8 Administrative costs will be minimized because A.B. Data already has significant
 9 experience setting up systems for distribution of settlement proceeds to TPP Plaintiffs.

10 **C. The Form and Manner of Notice Are Proper.**

11 **1. The Settlement provides the best Notice practicable.**

12 Under Rule 23(e)(1)(B), “[t]he court must direct notice in a reasonable manner to all class
 13 members who would be bound by the [settlement] proposal.” Likewise, in directing notice “to a
 14 class proposed to be certified for purposes of settlement under Rule 23(b)(3) – the court must
 15 direct to class members the best notice that is practicable under the circumstances, including
 16 individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P.
 17 23(c)(2)(B).

18 The proposed Class Notice, Geller Decl. Ex. B, readily meets these requirements, and the
 19 Notice program constitutes the best practicable notice under the circumstances of this case. The
 20 proposed Class Notice will be posted on the Settlement website, which will be cross-linked from
 21 the National Opioids settlements website. The proposed Class Notice will also be mailed or
 22 emailed directly to Class members. Class members are sophisticated entities, many of which
 23 have been part of settlement distribution processes in other litigations.

24 **2. The Notice provides a clear explanation to Class members of their**
 25 **opportunity to weigh the benefits, and opt out, of the Settlement.**

26 Moreover, the Notice uses “plain English” to inform sophisticated Class members of,
 27 among other things, the nature of the class Claims, the essential terms of the Settlement, the date,
 28 time and place of the Final Approval Hearing, how to object or opt out of the Settlement, and the

1 binding effect of the Settlement on Class members. The Notice also contains information
 2 regarding Counsel’s request for fees and expenses, along with the URL of the Settlement website
 3 where the preliminary approval motion, the fee and cost motion, and other important case
 4 documents will be posted. Thus, the Notice satisfies the specific requirements of Rule
 5 23(c)(2)(B), which, in relevant part, provide that the Notice shall apprise class members that “the
 6 court will exclude from the class any member who requests exclusion[, and] the time and manner
 7 for requesting exclusion.”

8 **D. Appointment of Escrow Agent and Order Continuing McKinsey’s**
 9 **Outstanding Motions.**

10 Under the Agreement: (1) Defendants shall pay by wire transfer a portion of the
 11 Settlement Amount sufficient to cover the Notice and Administrative Costs, but in no event
 12 greater than \$1,000,000.00, into an escrow account at Citibank, the Escrow Agent, within 14
 13 calendar days of the later of (a) Preliminary Approval of the Settlement Agreement, or (b)
 14 Defendants’ receipt of the information and instructions required to effectuate the wire transfer;
 15 and (2) Defendants shall pay by wire transfer the remainder of the Settlement Amount into the
 16 Escrow Account within 14 calendar days of Final Approval of the Settlement Agreement.
 17 Plaintiffs and Defendants jointly request that the Court continue to maintain its continuance of
 18 oral argument and decision on McKinsey’s Rule 12(b)(6) motion to dismiss and motion to
 19 dismiss on *res judicata* grounds until such time as the Court has considered and ruled on whether
 20 this Agreement and Settlement should be communicated to the Class and ultimately approved.

21 **V. CONCLUSION**

22 For the foregoing reasons, Plaintiffs respectfully request that preliminary approval of the
 23 TPP Plaintiffs’ class action settlement be granted in accordance with the terms set forth herein.

24
 25 Date: December 29, 2023

Respectfully submitted,

26 By: /s/ Elizabeth J. Cabraser

27 Elizabeth J. Cabraser
 Eric B. Fastiff
 28 **LIEFF, CABRASER, HEIMANN &
 BERNSTEIN, LLP**

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275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
ecabraser@lchb.com

*Plaintiffs' Lead Counsel, Plaintiffs' Steering
Committee Chair, and Counsel for District Council
37 Benefits Fund Trust*

By: /s/ Paul J. Geller
Paul J. Geller
Mark J. Dearman
ROBBINS GELLER RUDMAN & DOWD LLP
225 NE Mizner Boulevard, Suite 720
Boca Raton, FL 33432
Telephone: 561.750.3000
pgeller@rgrdlaw.com
mdearman@rgrdlaw.com

Aelish M. Baig
ROBBINS GELLER RUDMAN & DOWD LLP
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
aelishb@rgrdlaw.com

*Plaintiffs' Steering Committee Member, Proposed
Settlement Class Counsel, and Counsel for BCTGM
Atlantic Health & Welfare Fund*