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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

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

15 This Document Relates to:

16 ALL THIRD PARTY PAYOR ACTIONS

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

CLASS ACTION

**THIRD PARTY PAYOR PLAINTIFFS'
REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT,
ATTORNEYS' FEES AND EXPENSES,
AND CLASS REPRESENTATIVE
SERVICE AWARDS**

Date: July 26, 2024

Time: 10:00 A.M

Courtroom: 6, 17th Floor

Judge: The Honorable Charles R. Breyer

MEMORANDUM OF POINTS AND AUTHORITIES

Third-party payor (“TPP”) Plaintiffs respectfully submit this Reply Memorandum in Support of TPP Plaintiffs’ Motion for Final Approval of Class Action Settlement, Attorneys’ Fees and Expenses, and Class Representative Service Awards (ECF No. 706).

I. POSITIVE RESPONSE FROM TPP CLASS MEMBERS

June 1, 2024 was the deadline for TPP Class members to request exclusion from or object to the Settlement. From the approximately 42,000 Class members who received notice, no objections have been received, and only seven TPPs (less than 0.017%) chose to opt out of the settlement. *See* Supp. Geller Decl. in Support of Reply Mem. (“Geller Decl.”), Ex. 1 (Supplemental Declaration of Eric J. Miller) ¶ 6. This low exclusion rate and the lack of any objections are persuasive evidence that TPP Class members favor the proposed settlement; take no issue with the fairness and adequacy of the proposed settlement; and approve of Interim Settlement Class Counsel’s requests for reasonable attorneys’ fees, expenses, and Class Representative service awards. *See, e.g., In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 15-md-02672-CRB (JSC), 2019 WL 2077847, at *3 (N.D. Cal. May 10, 2019) (Breyer, J.) (“The small number of objections and opt outs supports that the settlement and plan of allocation are fair, reasonable, and adequate.” (citation omitted)); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. 07-cv-05634-CRB, 2018 WL 6267840, at *4 (N.D. Cal. Sept. 24, 2018) (Breyer, J.) (noting that low objection and opt-out rates may “alone” suggest “that the settlements are fair”). On June 25, 2024, McKinsey confirmed that it will go forward with the settlement, upon final approval by the Court, under the terms and conditions of the Settlement Agreement and the Final Approval Order.

II. TPP CLASS NOTICE RESULTS

A.B. Data timely completed the Court-approved notice program on April 15, 2024. Since that date, notice has continued through the McKinsey-TPP Settlement website, <https://www.mckinseytppsettlement.com>, which recorded 3,238 visitor sessions from its launch through June 20, 2024. Geller Decl. ¶ 4.

1 A.B. Data is also operating a toll-free telephone number (1-877-933-3322) available to
 2 Class Members, seven days a week and 24 hours a day. As of June 20, 2024, this toll-free
 3 number received 39 calls. *Id.* A.B. Data maintains a case email address, which received 46 email
 4 inquiries from Class members. *Id.*

5 **III. THE UPFRONT PAYMENT OPTION**

6 As part of the settlement administration, all TPP Class Members were given the right to
 7 receive an Upfront Payment. TPP Class Members could exercise their right to the Upfront
 8 Payment Option by providing written notice to A.B. Data within five days of the expiration of the
 9 June 1, 2024 objection/opt-out deadline.¹ If at least 90% of TPP claimants on a claims-approved
 10 basis (of the TPP claimants that submitted approved claims in the Mallinckrodt bankruptcy)
 11 elected the Upfront Payment Option by June 6, 2024, 70% of the Settlement Fund net of Court-
 12 approved expenses (the “Upfront Funds”), would be set aside for Upfront Payments. As of
 13 today’s date, A.B. Data received 105 requests from TPP claimants to elect the Upfront Payment
 14 Option. *Id.* ¶ 7.

15 To receive an Upfront Payment, a TPP Class Member agreed (a) to participate in the TPP
 16 Class and to be bound by the Settlement, and (b) that 7.5% of its recovery will be set aside into an
 17 escrow account pursuant to this Court’s Common Benefit Order, PTO-9 (ECF No. 567). Upfront
 18 Funds will, within five business days of the settlement’s Effective Date, be distributed on a *pro*
 19 *rata* and preliminary basis consistent with the allocation of the funds in the Mallinckrodt
 20 proceeding and the terms of the Court’s Final Approval Order. The ultimate recovery for a TPP
 21 Class Member that elects the Upfront Payment Option will be “trued-up” in accordance with the
 22 TPP Claims Methodology set forth in Sections C and D of the Court-approved Claim Form (ECF
 23 No. 699-3) and will account for the amount of any Upfront Payment.

24 The Upfront Payment Option does not alter the allocation of the settlement proceeds
 25 among TPP Class members, which allocation is being made in accordance with the methodology
 26 developed by Professor Meredith Rosenthal and is designed to address the particular impacts of
 27

28 ¹ Any TPP Class Member that elected the Upfront Payment Option must also complete and submit
 a Class Claim Form by the December 15, 2024 claim filing deadline.

1 opioids marketing. *See* ECF No. 699-4 (Second Expert Report of Professor Meredith Rosenthal).
2 Rather, the Upfront Payment Option affords all TPP Class Members the opportunity to expedite a
3 portion of their allocation if they provide the requisite expedited claims information.

4 **IV. CLASS REPRESENTATIVE SERVICE AWARDS**

5 Interim Settlement Class Counsel requested that each of the Settlement Class
6 Representatives be granted an award of \$10,000 in recognition of their service and their activities
7 as named plaintiffs on behalf of TPPs in this MDL. There has been no objection to such awards.

8 **V. ATTORNEYS' FEES AND EXPENSES**

9 **A. Settlement Class Counsel's Attorneys' Fee and Expense Request**

10 Interim Settlement Class Counsel has requested that the Court award notice and
11 administration costs, expert costs, service awards, and 20% of the Settlement Fund for attorneys'
12 fees and expenses, subject to and in accordance with the Upfront Fund provisions posted on the
13 TPP Settlement website, and subject to the Common Benefit Order, PTO No. 9.

14 **B. Attorneys' Fees as to the Upfront Funds**

15 Attorneys' fees as to the Upfront Funds will be handled as follows: (a) 7.5% of all Upfront
16 Funds shall be set aside into an escrow account pursuant to the Court's Common Benefit Order
17 (ECF No. 567); (b) if a TPP Class Member is represented by private counsel pursuant to a pre-
18 existing fee contract, and if that private counsel is authorized to, and does on behalf of its client,
19 properly exercise its right to the Upfront Payment Option, and receives settlement monies on
20 behalf of the TPP Class Member, then the terms of that fee contract shall govern any payments
21 due to that private counsel; the contractual fee payment and the 7.5% common benefit assessment
22 represent the TPP Class Member's share of Court-approved fees and costs; and, (c) if a TPP Class
23 Member that is not represented by a pre-existing fee agreement properly exercises its right to the
24 Upfront Payment Option, then the Settlement Administrator shall deduct from the Upfront claim
25 amount, prior to payment, that TPP Class Member's 12.5% share of Court-approved Settlement
26 Class Counsel's fees and expenses, in addition to the 7.5% common benefit set-aside.

1 **VI. UPDATED HOURS, LODESTAR, AND LITIGATION COSTS**

2 When Interim Settlement Class Counsel last reported attorneys' fees and costs through
 3 March 31, 2024, they had dedicated approximately 35,775 hours to this MDL (not just to the TPP
 4 case), resulting in an aggregate lodestar of \$22.46 million as of March 31, 2024. *See* ECF No.
 5 706-1. As of May 30, 2024, Interim Settlement Class Counsel have spent over 287 additional
 6 hours on duties such as: (i) responding to and, when necessary, investigating inquiries from Class
 7 members; (ii) discussing various Settlement logistics with other TPP counsel; (iii) overseeing the
 8 work of the Notice Administrator; and (iv) preparing papers for the July 26, 2024 Final Approval
 9 Hearing. Geller Decl. ¶ 16. This additional work increases the lodestar by approximately
 10 \$290,255, to \$22.75 million, with the negative lodestar multiplier not exceeding 0.67. *Id.*

11 Up to and past the December 15, 2024 claim deadline, Interim Settlement Class Counsel
 12 will continue to work additional hours and incur additional costs to oversee and help administer
 13 the Settlement after final approval, for which additional compensation will not be sought. Those
 14 hours will further reduce the lodestar multiplier. *Id.* ¶ 21.

15 **VII. CONCLUSION**

16 For the reasons stated above and in their related filings (ECF Nos. 645, 699, and 706),
 17 TPP Plaintiffs ask the Court to approve this proposed class action settlement, including the
 18 requested attorneys' fees and expenses, costs, and settlement class representative service awards.

19
 20 Dated: June 26, 2024

Respectfully submitted,

21 By: /s/ Paul J. Geller

22 Paul J. Geller

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