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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SANTA CRUZ COUNTY, CALIFORNIA; POPE COUNTY, ILLINOIS; and THE VILLAGE OF EDDYVILLE, ILLINOIS, Individually and on Behalf of a Class of Persons Similarly Situated

In re MCKINSEY & CO., INC. NATIONAL PRESCRIPTION OPIATE CONSULTANT LITIGATION

This Document Relates To:

ALL SUBDIVISION ACTIONS.

Case No. 3:21-md-02996-CRB

SUBDIVISION PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND AWARD OF ATTORNEYS' FEES AND COSTS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

DATE: February 2, 2024
TIME: 10:00 a.m.
DEPT: Courtroom 6, 17th Floor
JUDGE: Honorable Charles R. Breyer

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NOTICE OF MOTION AND MOTION

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD

PLEASE TAKE NOTICE that, on February 2, 2024, at 10:00 a.m., in Courtroom 6 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiffs City of Santa Cruz, California; Pope County, Illinois; and The Village of Eddyville, Illinois will and hereby do move the Court for an order granting final approval of the Class Action Settlement and the motion for attorneys' fees and costs and appointing Settlement Class Counsel and Class Representatives under Rule 23(g)(1) of the Federal Rules of Civil Procedure. This Motion is supported by the following memorandum of points and authorities; the Declaration of Aelish M. Baig, Interim Settlement Class Counsel ("Baig Decl."); the Declaration of Professor William B. Rubenstein ("Rubenstein Decl."); and the Declaration of Cameron R. Azari, Esq. Regarding Commencement of Settlement Notice Plan ("Azari Decl.").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Settlement before the Court resolves claims for a proposed political subdivision class against McKinsey[1] for its alleged part in the opioid crisis. As detailed in the Amended Master Class Action Complaint (Subdivision) ("CAC") (ECF 597), Plaintiffs alleged McKinsey, a business consultant, "played a central role in the unfolding, propagation, and exploitation of the opioid crisis by advising multiple opioid manufacturers and other industry participants how to sell as many opioids as conceivably possible." CAC, ¶2. As a result of the crisis, Class members across the country have suffered harm and must now work to abate the epidemic – a costly endeavor. CAC, ¶¶1, 537-546. The proposed Settlement provides a guaranteed, non-reversionary fund of $207 million for Class members to abate the opioids crisis.

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[1] "McKinsey" or "Defendants" refers here to Defendants McKinsey & Company, Inc., McKinsey Holdings, Inc., McKinsey & Company, Inc. United States, and McKinsey & Company, Inc. Washington D.C.

The proposed Settlement is an outstanding result for the Class. It provides significant monetary value to the Class for the impact McKinsey's allegedly fraudulent marketing and consulting work may have had in creating the opioid epidemic. It adds to the $641.5 million secured by Attorneys General ("AGs") against McKinsey in 2021 and provides political subdivisions the financial return they could have negotiated had they been included in the AG settlement.

For their work in securing this result, proposed Settlement Class Counsel and Lead Counsel seek $31.05 million in fees and costs. Half of this award (7.5% of the Fund) will be tendered to the Common Benefit Fund pursuant to PTO No. 9. ECF 567. The requested fees and costs together are 15% of the guaranteed $207 million non-reversionary settlement fund. This is well below the Ninth Circuit's 25% benchmark and consistent with the national MDL 2804 settlements. *See, e.g.*, *In re Google LLC St. View Elec. Commc'ns Litig.*, 611 F. Supp. 3d 872, 887 (N.D. Cal. 2020), *aff'd sub nom. In re Google Inc. St. View Elec. Commc'ns Litig.*, 21 F.4th 1102 (9th Cir. 2021). Consistent with all national opioids settlements to date, it reserves the net proceeds of the Fund to be used by the Class for opioids abatement. The reasonableness of the requested fees is further confirmed by a lodestar cross-check that yields a routine multiplier of just 0.75 on Class Counsel's lodestar after costs are deducted.

Plaintiffs respectfully request the Court certify the Settlement Class, grant final approval to the Settlement, and approve an aggregate award of $31.05 million in attorneys' fees and costs. This award is to be allocated by Lead Counsel and Class Counsel among participating Political Subdivision Committee ("PSC") firms for their common benefit work devoted to obtaining this excellent result and to eligible Plaintiffs' counsel for their contingency fees.

II. BACKGROUND

In the interest of efficiency, Plaintiffs will not reiterate the entire litigation history here and instead incorporate by reference the summary in their preliminary approval motion. *See* ECF 598 at 3-6. A few points, however, do bear repeating.

A. The Settlement Provides the Cash Compensation Class Members Would Have Negotiated Had They Participated in the State AG Settlements

McKinsey has agreed to create a Settlement Fund of $207 million. This monetary recovery to government subdivisions is in addition to the approximately $641.5 million McKinsey has already paid under the AG settlements. Each Class member with a population above 10,000 or that filed a lawsuit against McKinsey raising the issues alleged in the Master Complaint shall be eligible for a *pro rata* share of the Net Settlement Fund based on a proposed plan of allocation. That plan, in turn, tracks the allocation agreements reached between the states and their subdivisions as to the portion of each state's share under the 2021 National Settlements. In those states without negotiated agreements, the plan will follow the default allocation provided for in the national settlements, *i.e.*, the "default" direct-to-subdivision allocation of 15% will be used, with the remaining net settlement funds going to an abatement fund.

The Settlement is accordingly designed to provide the direct payments that subdivisions negotiated in the earlier national settlements but were missing from the McKinsey-AG settlements. Plaintiffs' intention with this plan of allocation is to put Class Members in, as nearly as possible, the position they would have been had they had the opportunity to actively negotiate the AG Settlements (as they did with every other national opioids settlement), while recognizing the risk of an adverse ruling on the threshold *res judicata* and duty issues, discussed below.

The plan of allocation applies state-by-state percentages reflected in Memoranda of Understanding ("MOUs") the Class Members previously negotiated with their state AGs and one another to implement the national opioids settlements, including the 2021 National Settlements. *See, e.g.*, National Opioids Settlement, Janssen Settlement Agreement, https://nationalopioidsettlement.com/wp-content/uploads/2023/01/Janssen-agreement-03302022-FINAL2-Exhibit-G-as-of-1.9.23.pdf. Those MOUs are publicly posted on the National Opioids Settlement website. *See* National Opioids Settlement, State Participation Status, https://nationalopioidsettlement.com/state-participation-status. As set forth in the 2021 National Settlements:

> The allocation of the Settlement Fund allows for different approaches to be taken in different states, such as through a State-Subdivision Agreement. Given the uniqueness of States and their Subdivisions, Settling States and Participating Subdivisions are encouraged to enter into State-Subdivision Agreements in order to direct the allocation of their portion of the Settlement Fund.

Janssen Agreement at 30; *see also* Distributor Agreement at 28.[2] The states agreed among themselves as to interstate allocations; most states also came to agreements with their subdivisions in the MDL settlements, which included a percentage of the abatement fund for each participating subdivision in the state. For example, Appendix 1 of the California agreement sets forth abatement percentages for each participating subdivision in California. *See, e.g.*, the "California State-Subdivision Agreement Regarding Distribution and Use of Settlement Funds – Distributor Settlement."[3] The McKinsey settlement uses the same allocation models as were previously negotiated in the National Settlements. By way of example, if local government X received 0.069% of the 2021 National Janssen Settlement abatement funds directed to subdivisions, local government X would receive 0.069% of the McKinsey settlement abatement funds to local governments in that same state.[4] *See* Rubenstein Decl., §§II-III.

Given the low expected opt outs here and the high participation rate in similar national settlements, there is virtually zero risk of money remaining after distribution. Even so, there will be no reversions of the Net Settlement Fund to McKinsey; all Settlement Fund money, net of fees and costs, shall be distributed to the Class for opioid abatement consistent with that negotiated in the National Settlements. Agreement, ¶V(6).

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[2] The 2021 National Settlements are located on the nationalopioidsettlement.com website, as are each of the State-subdivision agreements.

[3] https://nationalopioidsettlement.com/wp-content/uploads/2021/10/final-proposed-ca-state-subdivision-agreement-distributors-settlement.pdf.

[4] To the extent the litigating entities in McKinsey are not precisely the same as those in the National Settlements, the appropriate adjustment will be made in keeping with the model negotiated between subdivisions and the AG for that state. https://nationalopioidsettlement.com/wp-content/uploads/2023/01/Janssen-agreement-03302022-FINAL2-Exhibit-G-as-of-1.9.23.pdf.

B. The Subdivision Litigation Was Complex and Risky

The Settlement benefits are particularly impressive given the inherent uncertainties of continued litigation and the inevitable delay that would accompany it. Settlement, by its very nature, does not require full recovery of actual damages; a compromise of potential recovery in exchange for certain and timely provision of the benefits under the Settlement is an unquestionably reasonable outcome. *See Nobles v. MBNA Corp.*, No. 06-cv-3723-CRB, 2009 WL 1854965, at *2 (N.D. Cal. June 29, 2009) ("The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the Settlement is fair.") (citation omitted); *Kim v. Space Pencil, Inc.*, No. 11-cv-03796-LB, 2012 WL 5948951, at *5 (N.D. Cal. Nov. 28, 2012) ("The substantial and immediate relief provided to the Class under the Settlement weighs heavily in favor of its approval compared to the inherent risk of continued litigation, trial, and appeal, as well as the financial wherewithal of the defendant.").

Plaintiffs believe their case on the merits is a strong one. First, on the threshold *res judicata* issue, Plaintiffs believe they should ultimately prevail. Plaintiffs have shown their claims are distinct from the *parens patriae* claims settled by the AGs; the political subdivisions are "pursu[ing] damages and remedies for harm to themselves for local undertakings in response to the opioid epidemic," not harm to residents under *parens patriae*. ECF 345 at 15. They have further shown McKinsey has failed to carry its burden to demonstrate that, under the laws of each state in which a Subdivision Plaintiff has asserted claims, AGs' authority adequately extends to the ability for the state to resolve subdivision claims ***and*** was properly executed in these circumstances. *Id.* at 20-35. Indeed, the Subdivision Plaintiffs provided evidence that, in at least 11 states, AGs ***lack*** the authority to represent subdivisions in claims such as these; and, in an additional 11 states, the law is unclear at best as to whether an AG holds that authority. *Id.* at 38-58. However, as set forth below, this threshold issue, absent from all other opioids litigation (because the McKinsey settlement with the AGs uniquely excluded subdivisions from the negotiations), injected into this McKinsey litigation complex and unsettled questions regarding the legal and political relationships and divisions of power between states and subdivisions. The

1 parties propose these issues be resolved rather than adjudicated, and the Settlement is designed to
2 supply a direct payment to the subdivisions to do so.
3 Plaintiffs further believe their underlying claims are meritorious. Plaintiffs allege
4 McKinsey's actions created, assisted, or permitted the creation of a public nuisance, including
5 conditions harmful to public health, in violation of state public nuisance laws. *See* CAC §V. The
6 Rule 12(b)(6) briefing on behalf of Tribal and TPP Plaintiffs previews the strength of arguments
7 Plaintiffs would make if faced with a similar challenge. *See* ECF 481. Of course, opioid-related
8 claims sounding in nuisance have already seen high-profile trial wins, including before this Court.
9 *See City & Cnty. of S.F. v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936 (N.D. Cal. 2022) (Breyer, J.);
10 *see also In re Nat'l Prescription Opiate Litig. (Lake & Trumbull Counties, Ohio)*, 622 F. Supp. 3d
11 584 (N.D. Ohio 2022) *and* Short Form Order, *New York State Opioids Litig. Part 48 –*
12 *Suffolk Cnty.*, Hon. Jerry Garguilo (N.Y. Sup. Ct. Apr. 16, 2020) (denying summary judgment and
13 permitting public nuisance claims to proceed). While there is as yet no trial opinion adjudicating
14 the strength of the Subdivision Plaintiffs' RICO and common law claims, they too have survived
15 multiple dispositive challenges in other opioid cases. *See*, *e.g.*, Opinion and Order Regarding
16 Defendant'' Summary Judgment Motions on RICO and OCPA, *In re Nat'l Prescription Opiate*
17 *Litig.*, No. 1:17-md-02804-DAP, 2019 WL 4279233 (N.D. Ohio Sept. 10, 2019); Opinion and
18 Order Denying Manufacturer Defendants' Motion for Summary Judgment on Plaintiffs' Public
19 Nuisance Claims, *In re Nat'l Prescription Opiate Litig.*, 406 F. Supp. 3d 672 (N.D. Ohio 2019);
20 Short Form Order, *New York State Opioids Litig. Part 48 – Suffolk Cnty.*, Hon. Jerry Garguilo
21 (N.Y. Sup. Ct. June 17, 2020); *but see City & Cnty. of S.F. v. Purdue Pharma, L.P.*, 491 F. Supp.
22 3d 610, 659 (N.D. Cal. 2020) (Breyer, J.) (dismissing San Francisco's RICO claim for failure to
23 plead proximate causation).
24 However, and as discussed further below, in addition to the risks of maintaining a class
25 action through trial and the time required to complete discovery and take the case to trial, this case
26 presented unique litigation risks. Public nuisance is a developing field of litigation, and
27 government entity cases have met with varying degrees of success. Civil RICO claims are
28

notoriously difficult to prove, and McKinsey Defendants raise threshold issues Plaintiffs would have to defeat nationally before the substantive litigation could proceed.

Of course, the true risk – the one that drives Plaintiffs, Class Counsel, the PSC, and Class Members throughout this country to pursue such complicated litigation – is that the opioid epidemic is ongoing. People die every day of opioid overdoses. Abatement is needed now.

C. The Notice Plan Is Already a Demonstrated Success

Following preliminary approval, the Parties worked and are working with respected class notice providers and settlement administrators to roll out the Court-approved Notice Program with great success. Epiq reports the Notice Program is on track to directly reach virtually all Class Members. *See generally* Azari Decl. On October 25, 2023, Epiq established a Settlement Website (www.McKinseySubdivisionClassAction.com) to allow Class Members to obtain additional information about the Settlement; sponsored search listings linking directly to the Settlement Website on Google, Yahoo!, and Bing; and established a toll-free telephone number (1-888-575-4125), which is available to Class Members. *Id.*, ¶¶20, 22-23. That same day, Epiq sent 36,393 Email Notices to 23,080 unique identified Class Members for whom a valid email address was available (13,313 Class Members had more than one valid email address, all of which were sent an Email Notice) and 21,342 Postcard Notices to all identified Class Members for whom a physical address was available and for whom no valid email address had been identified. *Id.*, ¶¶14-15.

Epiq also has placed Banner Notices in the *CN Now* and *Leadership Matters* eNewsletters. *Id.*, ¶16. *CN Now* is published by the National Association of Counties ("NACo"), and Banner Notices are being placed in the following issues of the eNewsletters: November 2, 2023, November 9, 2023, November 16, 2023, and November 30, 2023. *Id. Leadership Matters* is published by the International City/County Management Association ("ICMA"), and Banner Notices are being placed in the following issues of the eNewsletters: October 31, 2023, November 7, 2023, November 14, 2023, and November 28, 2023. *Id.*

Further, Interim Settlement Class Counsel have begun to receive and respond to emails and phone calls from Class Members or their individual counsel requesting further information on the settlement. Baig Decl., ¶25.

Because Class Members need not submit claims forms to participate in the settlement, their claims cannot be tracked. Nevertheless, since the settlement was preliminarily approved on October 5, 2023, no Class Member has filed an objection, nor has any Class Member elected to opt out of the settlement. Azari Decl., ¶25. Together, these are encouraging signs of the Class' engagement.

III. ARGUMENT

A. The Settlement Class Should Be Certified, and Class Representatives and Settlement Class Counsel Should Be Appointed

As the Court concluded in granting preliminary approval and directing notice to the Class, "the Class and its representatives likely meet all relevant requirements of Rules 23(a)-(c)." ECF 622, ¶8. This remains true, and the Settlement Class should be certified.

1. Every Class Member Has Article III Standing

"Courts considering class action settlements must verify that every class member has standing, and, as in the non-class action context, it is the plaintiffs' burden to establish standing." *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 15-md-02672-CRB, 2022 WL 17730381, at *1 (N.D. Cal. Nov. 9, 2022) (Breyer, J.) (citing *TransUnion LLC v. Ramirez*, 594 U.S. ___, 141 S. Ct. 2190, 2207-08 (2021)). However, they must do so only "'with the manner and degree of evidence required at the successive stages of the litigation.'" *TransUnion*, 141 S. Ct. at 2208 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . . ." *Lujan*, 504 U.S. at 561. Here, where the parties settled prior to class certification or summary judgment, Plaintiffs' allegations that McKinsey's conduct directly contributed to the opioid epidemic and impacted every city and county in the United States – and thus every Class member – are sufficient to establish standing.

2. The Class Meets the Rule 23(a)(1)-(4) Requirements

a. Rule 23(a)(1): The Class Is Sufficiently Numerous

Rule 23(a)(1) is satisfied where, as here: "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Generally, numerosity is met when the class comprises 40 or more members. *See Akaosugi v. Benihana Nat'l Corp.*, 282 F.R.D. 241, 253 (N.D. Cal. 2012). Here, it is undisputed that the Class includes over 25,000 cities and counties in the United States – known entities easily identifiable through records of the U.S. Census Bureau. The size of the Settlement Class and its geographic dispersal across the United States render joinder impracticable. *See, e.g.*, *Palmer v. Stassinos*, 233 F.R.D. 546, 549 (N.D. Cal. 2006) ("Joinder of 1,000 or more co-plaintiffs is clearly impractical.").

b. Rule 23(a)(2): The Class' Claims Present Common Questions of Law and Fact

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Supreme Court has held that "for purposes of Rule 23(a)(2), '"[e]ven a single [common] question"' will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011).[5] The *Dukes* standard focuses on whether a class action will "'"generate common ***answers*** apt to drive the resolution of the litigation."'" *Id.* at 350 (emphasis in original). In other words, commonality "does not turn on the number of common questions, but on their relevance to the factual and legal issues at the core of the purported class' claims." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014).

Courts routinely find commonality where, as here, the class claims arise from a defendant's uniform course of conduct. *See, e.g.*, *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 17-md-02777-EMC, 2019 WL 536661, at *6 (N.D. Cal. Feb. 11, 2019) (commonality satisfied where claims arose from the defendants' "'common course of conduct'" in perpetrating alleged vehicle emissions cheating scheme); *Cohen v. Trump*, 303 F.R.D. 376, 382

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[5] Unless otherwise noted, all emphasis is added and citations are omitted.

(S.D. Cal. 2014) (finding "common questions as to 'Trump's scheme and common course of conduct, which ensnared Plaintiff[] and the other Class members alike'").

The Settlement Class claims against McKinsey all arise from a nucleus of common fact questions relating to: (i) McKinsey's knowledge of and conduct regarding the alleged improper marketing of opioid medications by its manufacturer clients; (ii) McKinsey's conduct in creating, proposing, and/or implementing sales and marketing strategies for opioids manufactured by Purdue before and after Purdue's first guilty plea in 2007 relating to misbranding of OxyContin; and (iii) whether McKinsey's strategies for promotion and collaboration with its opioid manufacturer clients caused or contributed to the devastating result of opioid addiction and death in communities across the country. The answers to these questions will be the same across Class Members and are central to each Class Member's claims.

c. Rule 23(a)(3): Settlement Class Representatives' Claims Are Typical of Other Class Members' Claims

Rule 23(a)(3) requires that class representatives' claims or defenses be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). As with commonality, "[t]he requirement is permissive, such that 'representative claims are "typical" if they are reasonably coextensive with those of absent class members; they need not be substantially identical.'" *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (quoting *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014)). Here, Class Members' claims arise from the same course of conduct by McKinsey (*e.g.*, fraudulent and aggressive marketing) and are based on the same legal theories (*e.g.*, RICO and public nuisance). Thus, typicality is satisfied. *See Mullins v. Premier Nutrition Corp.*, No. 13-cv-01271-RS, 2016 WL 1535057, at *4 (N.D. Cal. Apr. 15, 2016) ("Putative class members' claims are usually typical if their claims 'arise[] from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'").

d. Rule 23(a)(4): Settlement Class Representatives and Class Counsel Have Protected and Will Protect the Interests of the Class

Rule 23(a)(4)'s adequacy requirement is met where: "'(1) . . . the named plaintiffs and their counsel have [no] conflicts of interest with other class members and (2) . . . the named plaintiffs and their counsel [have] prosecute[d] the action vigorously on behalf of the class.'" *Evon v. Law Offs. of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). Both prongs are readily satisfied here.

The Settlement Class Representatives have no interests antagonistic to Class members but rather are entirely aligned with the Class. Settlement Class Representatives, who are Named Plaintiffs in the underlying actions centralized in this MDL and in the Amended Master Complaint, understand their duties, have agreed to consider the interests of absent Class Members, have reviewed and uniformly endorsed the Settlement terms, and have protected and will continue to protect the Class' interests in overseeing the Settlement administration and through any appeals. *See* Baig Decl.,¶29; *see also, e.g.*, *Trosper v. Stryker Corp.*, No. 13-cv-0607-LHK, 2014 WL 4145448, at *12 (N.D. Cal. Aug. 21, 2014) ("All that is necessary is a 'rudimentary understanding of the present action and . . . a demonstrated willingness to assist counsel in the prosecution of the litigation.'"). They are more than adequate as representatives. *See also Clemens v. Hair Club for Men, LLC*, No. 15-cv-01431-WHA, 2016 WL 1461944, at *3 (N.D. Cal. Apr. 14, 2016).

Further, as demonstrated throughout this litigation, Interim Settlement Class Counsel and many of the PSC firms have undertaken enormous work in the prosecution of this and other opioid-related litigation, including the ongoing pleading, briefing, and investigative and discovery work, as well as the expense of this MDL. They have demonstrated their willingness to devote whatever resources were necessary to reach a successful outcome throughout the more than two years since filing their complaints here (nearly six years in MDL 2804). They, too, satisfy Rule 23(a)(4).

1 **3. The Class Meets the Rule 23(b)(3) and 23(c)(4) Requirements**

2 **a. Common Issues of Law and Fact Predominate**

3 "The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the
4 case are more prevalent or important than the non-common, aggregation-defeating, individual
5 issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). Further:

6 When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under
7 Rule 23(b)(3) even though other important matters will have to be tried separately,
8 such as damages or some affirmative defenses peculiar to some individual class members."

9 *Id.* At its core, "[p]redominance is a question of efficiency." *Butler v. Sears, Roebuck & Co.*, 702
10 F.3d 359, 362 (7th Cir. 2012). Thus, "'[w]hen common questions present a significant aspect of
11 the case and they can be resolved for all members of the class in a single adjudication, there is
12 clear justification for handling the dispute on a representative rather than on an individual basis.'"
13 *Hanlon*, 150 F.3d at 1022.

14 The Ninth Circuit favors class treatment of fraud claims stemming from a "'common
15 course of conduct.'" *In re First All. Mortg. Co.*, 471 F.3d 977, 990 (9th Cir. 2006). Even outside
16 the settlement context, predominance is readily satisfied for consumer claims arising from
17 defendants' common course of conduct. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625
18 (1997); *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173, 1176 (9th Cir. 2010)
19 (consumer claims based on uniform omissions certifiable where "susceptible to proof by
20 generalized evidence" even if individualized issues remain); *Friedman v. 24 Hour Fitness
21 USA, Inc.*, No. 06-cv-6282-AHM, 2009 WL 2711956, at *8 (C.D. Cal. Aug. 25, 2009) (common
22 issues predominate in RICO actions where alleged injury is a result "of a single fraudulent
23 scheme").

24 Central to Plaintiffs' allegations is that McKinsey perpetrated the same fraud in the same
25 manner against all Class Members, namely, that it conspired with its opioid manufacturer clients
26 in a scheme to unlawfully increase sales of opioids – and to grow its share of the prescription
27 painkiller market and the market as a whole – through repeated and systematic misrepresentations,
28 concealments, and omissions of material fact about the safety and efficacy of opioids for treating

long-term chronic pain, together with fraudulent and deceptive marketing campaigns, *see* CAC, ¶566, and abusing their access to prescriber data to target high prescribing doctors, *id.*, ¶636. Whether McKinsey engaged in this conduct is a question susceptible to common proof, and the answer as to one Plaintiff's case is the answer as to all. That central question can be resolved using the same evidence for all Class Members and thus is the precise type of predominant question that makes Class-wide adjudication proper. *See Tyson Foods*, 577 U.S. at 453.

Plaintiffs also allege common kinds of injuries. Their injuries, like every Class Member's injuries, arise from the inordinate increase in opioid sales and diversion that occurred in every community throughout the country following the 1996 launch of OxyContin. *See* CAC, ¶48.

b. Class Treatment Is Superior to Other Available Methods for Resolution of This Case

Superiority asks "whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. In other words, it "requires the court to determine whether maintenance of this litigation as a class action is efficient and whether it is fair." *Wolin*, 617 F.3d at 1175-76. In undertaking a Rule 23(b)(3) superiority analysis, courts evaluate four factors:

> "(1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action."

Trosper, 2014 WL 4145448, at *17.

Here, class treatment is far superior to the litigation of 25,000 individual actions by political subdivisions. "From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." *Hanlon*, 150 F.3d at 1023; *see also Wolin*, 617 F.3d at 1176 ("Forcing individual vehicle owners to litigate their cases, particularly where common issues predominate for the proposed class, is an inferior method of adjudication.").

Class resolution is also superior from an efficiency and resource perspective. If Class Members had to bring individual lawsuits against McKinsey, each Class Member would have to prove the same wrongful conduct to establish liability and thus would offer the same evidence. Given that Class Members number in the tens of thousands, there is the potential for as many lawsuits with the possibility of inconsistent rulings and results. *In re National Opiate Litigation* and the parallel state court opioid actions against manufacturers, distributors, and pharmacies demonstrate exactly this possibility. Moreover, Rule 23(b)(3)'s trial manageability requirements are irrelevant for settlement class certification because, as the Supreme Court observed in *Amchem*, 521 U.S. at 620, a settlement means there will be no trial.

Thus, Class-wide resolution of Class Members' claims, especially where, as here, they are against a single defendant family, is clearly favored over other means of adjudication, and Rule 23(b)(3)'s superiority requirement is met.

4. The Court Should Appoint Settlement Class Counsel Under Rule 23(g)(1)

As detailed in the preliminary approval motion (ECF 598), incorporated here by reference, Lead Counsel Elizabeth J. Cabraser and the PSC members have undertaken a significant amount of work, effort, and expense in litigating this case (and cases against defendants in MDL 2804). *See generally* Baig Decl. Following these efforts, the Court previously appointed the PSC members as Interim Settlement Class Counsel: Aelish M. Baig of Robbins Geller Rudman & Dowd LLP; Emily Roark of Bryant Law Center, PSC; Jayne Conroy of Simmons Hanly Conroy, LLC; Joseph F. Rice of Motley Rice, LLC; and Matthew Browne of Browne Pelican, PLLC. ECF 622, ¶11. In the intervening period, Interim Settlement Class Counsel and Lead Counsel have continued to demonstrate the skill and experience necessary to oversee and effectuate this Settlement through their efforts in the approval process and in overseeing the Notice Program rollout. Named Plaintiffs thus request that the Court appoint the PSC members as Settlement Class Counsel under Rule 23(g)(1) in connection with Final Approval of the Settlement.

B. The Settlement Is Fair, Reasonable, and Adequate Under Rule 23(e)(2)

A "district court's task in reviewing a settlement is to make sure it is 'not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.'" *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 895 F.3d 597, 617 (9th Cir. 2018). The Court "may approve the [S]ettlement 'only on finding that it is fair, reasonable, and adequate.'" *Volkswagen*, 2022 WL 17730381, at *5 (quoting Fed. R. Civ. P. 23(e)(2)). Rule 23(e)(2) identifies several criteria for the Court to consider in deciding whether to grant final approval of a proposed class settlement: whether the class has been adequately represented, the proposal was negotiated at arm's length, the relief for the class is adequate, and class members are treated equitably relative to each other. *See* Fed. R. Civ. P. 23(e)(2)(A)-(D). Where, as here, "the parties negotiate a settlement agreement before the class has been certified, 'settlement approval "requires a higher standard of fairness" and "a more probing inquiry than may normally be required under Rule 23(e)."'" *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1048 (9th Cir. 2019); *see also In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 783 (9th Cir. 2022) (affirming same). "However, the Court's role is not to determine 'whether the settlement is perfect in [its] estimation' – but to determine if it is 'fundamentally fair.'" *Volkswagen*, 2022 WL 17730381, at *5 (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012)).

As detailed above, Class Members stand to recover amounts under the proposed Settlement that are close to what Class Members would have received had they been permitted to participate in the AG settlement. The national allocation formula treats Class Members equitably relative to one another. *See* Rubenstein Decl., ¶¶34-41. This strong result, and all of the factors set forth in Rule 23(e)(2) and by the Ninth Circuit, support final approval. Indeed, in granting preliminary approval, the Court has already observed that the proposed Settlement "appears to be fair, reasonable, and adequate" such that the Court would "likely" be able to approve it. ECF 622, ¶¶1, 8. These same conclusions support final approval here.

1. Rule 23(e)(2)(A): Settlement Class Counsel and the Settlement Class Representatives Will Continue to Zealously Represent the Class

Settlement Class Counsel and Settlement Class Representatives fought hard to protect the interests of the Class. These efforts find no better evidence than the significant results achieved through the proposed Settlement. The opioid epidemic impacts every American political subdivision; consistent with the previous national settlements, Class Members shall be required to use the net settlement funds for approved uses designed to abate the opioid epidemic as set forth in Exhibit E ("List of Opioid Remediation Uses") of the prior MDL 2804 settlements. No one settlement could ever provide sufficient funds to completely abate the epidemic, but this Settlement provides Class Members with funds they would have been entitled to receive had they been permitted to participate in the AGs' negotiations and settlement with McKinsey, and it adds significantly to a growing body of settlements nationally that will and must be used toward that end.

As this outcome reflects, Settlement Class Counsel prosecuted this Action and its fair resolution with vigor and dedication. Settlement Class Counsel undertook significant efforts to investigate, prosecute, and resolve this Action over the course of more than two years in this MDL – in addition to their six-year (and ongoing) prosecution of actions against different defendants in MDL 2804. Settlement Class Counsel engaged in robust Rule 12 motion practice – researching, drafting, and filing three thorough opposition briefs, totaling well over 100 pages, to Defendants' motions to dismiss, a process that fleshed out the strengths and vulnerabilities of Plaintiffs' claims. Class Counsel were therefore well positioned to negotiate a fair and reasonable Settlement.

Settlement Class Representatives are also actively engaged. Each worked with counsel to review and evaluate the terms of the proposed Settlement Agreement and have endorsed its terms. Each Representative has also expressed its continued willingness to protect the Class until the Settlement is approved and its administration completed. *See* Baig Decl., ¶29. The Class was and remains well represented.

2. Rule 23(e)(2)(B): The Settlement Is the Product of Good Faith, Informed, Arm's-Length Negotiations

The proposed Settlement arose out of intensive, thorough, serious, informed, and non-collusive negotiations. Indeed, Counsel for the parties negotiated resolution of this litigation over several months with the assistance of an experienced mediator – including in-person negotiation sessions and multiple remote sessions via video and telephone. Baig Decl., ¶14. Voluntary mediation before an experienced mediator resulting in a successful settlement is "highly indicative of fairness." *Lembeck v. Arvest Cent. Mortg. Co.*, No. 3:20-cv-03277-VC, 2021 WL 5494940, at *4 (N.D. Cal. Aug. 26, 2021); *see also G.F. v. Contra Costa Cnty.*, No. 13-cv-03667-MEJ, 2015 WL 4606078, at *13 (N.D. Cal. July 30, 2015) ("'The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.'").

That these negotiations were serious and informed by the parties' "good understanding of the strengths and weaknesses of their respective cases" is evidenced by the significant discovery exchanged here and in other related cases. 4 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* §13:49 (6th ed. 2022); *see also, e.g.*, *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 320 (N.D. Cal. 2018) (concluding the "extent of discovery" and factual investigation undertaken by the parties gave them "a good sense of the strength and weaknesses of their respective cases in order to 'make an informed decision about settlement'") (quoting *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000)). Notwithstanding that the parties were in the relatively early stages of formal discovery in this MDL when they reached a settlement-in-principle, Plaintiffs' counsel relied on discovery from related litigation in valuing the case – an accepted practice in the Ninth Circuit. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239-40 (9th Cir. 1998) (noting formal discovery is not required for settlement approval and, "[i]n particular, the district court and plaintiffs may rely on discovery developed in prior or related proceedings"); *Wahl v. Yahoo! Inc.*, No. 17-cv-02745-BLF, 2018 WL 6002323, at *4 (N.D. Cal. Nov. 15, 2018) (granting final approval of class settlement where "little formal discovery" was conducted and noting that the parties had "sufficient information to evaluate the case's strengths and weaknesses").

Years of discovery, starting with MDL 2804 and related actions, informed Plaintiffs' claims against McKinsey. This covers millions of pages of documents, terabytes of data, hundreds of depositions, expert reports, and testimony presented at several trials. Indeed, Plaintiffs and Class Members have sued McKinsey's own clients – Purdue, Endo, J&J, Mallinckrodt – for the same course of false messaging and aggressive promotional tactics that Plaintiffs and Class members allege McKinsey advised and facilitated. Defendants themselves produced or made available here hundreds of thousands of documents relevant to their involvement in developing opioid marketing schemes, including those previously produced to the AGs in connection with that settlement. Baig Decl., ¶13. Plaintiffs' counsel have reviewed those documents, in addition to other document productions obtained pursuant to discovery requests. *See* ECF 440; Baig Decl., ¶13. The degree of current and prior discovery informing Plaintiffs' and Settlement Class Counsel's understanding and valuation "'suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case.'" *Carlotti v. ASUS Comput. Int'l*, No. 18-cv-03369-DMR, 2019 WL 6134910, at *6 (N.D. Cal. Nov. 19, 2019).

Finally, it bears mention that Interim Settlement Class Counsel, based on their own significant experience in litigating RICO and nuisance cases arising from the opioid epidemic, like this one, are confident in the proposed result and the process used to reach it. This too supports approval. *See, e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 2019 WL 2077847, at *1 (N.D. Cal. May 10, 2019) (granting final approval where "Lead Counsel ha[d] . . . a successful track record of representing [plaintiffs] in cases of this kind . . . [and] attest[ed] that both sides engaged in a series of intensive, arm's-length negotiations," and there was "no reason to doubt the veracity of Lead Counsel's representations").

3. Rule 23(e)(2)(C): The Settlement Provides Substantial Compensation in Exchange for the Compromise of Strong Claims

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

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a. The Settlement Mitigates the Risks, Expenses, and Delays the Class Would Bear with Continued Litigation

As explained in §II *supra*, Plaintiffs continue to believe their case is strong on the merits. However, under Rule 23(e), the strength of Plaintiffs' claims must be "balanced by the risk, expense, and complexity of their case, as well as the likely duration of further litigation." *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 2016 WL 6248426, at *11 (N.D. Cal. Oct. 25, 2016) (citing *Mego*, 213 F.3d at 458).

This is a complex case, both factually and legally, and was risky from the outset. Because there are so many state-based claims asserted across a significant number of states, the legal analyses presented unique risks for each Plaintiff. For example, Plaintiffs allege McKinsey's actions created, assisted, or permitted the creation of a public nuisance, including conditions harmful to public health, in violation of state public nuisance laws. *See* CAC §V. Public nuisance claims are still novel in this application within many jurisdictions and have not been universally successful in recent test cases. *Compare City & Cnty. of S.F.*, 620 F. Supp. 3d at 938-39, *with City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 412-13 (S.D.W. Va. 2022). Of the opioid-related cases across the country that have gone to trial thus far, some plaintiffs have won and some have lost; only one yielded a monetary verdict. *See Opiate Litig. (Lake & Trumbull Counties)*, ECF 4611 (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 and does not provide an adequate touchstone for what any particular class member could receive in an individual case against one category of defendants.

Here, Defendants raised substantial and potentially meritorious defenses, including a motion to dismiss on *res judicata* grounds; while Plaintiffs believe they are likely to prevail, the motion is not baseless. This defense is generally untested and required a detailed, state-by-state analysis of the authority afforded to political subdivisions. The case also presented intricate legal questions regarding the extent of liability that can be assigned to consultants, which depended on a factual analysis of the nature of the advice and the extent to which McKinsey not only provided advice but also took affirmative steps to implement that advice on behalf of its clients. As

demonstrated by the Court's Order Granting Defendant's Motion to Dismiss in the NAS track cases, there is no guarantee the Subdivision Plaintiffs would be able to pass through even the first dispositive hurdle. *See* ECF 573 (dismissing NAS Plaintiffs' claims of negligence for failure to plead duty, fraud for failure to plead reliance, public nuisance for lack of standing as private actors, and other claims dependent on the underlying dismissed torts).

Almost all class actions involve a high level of risk, expense, and complexity, which is one reason judicial policy so strongly favors resolving class actions through settlement. *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 229 F. Supp. 3d 1052, 1065 (N.D. Cal. 2017) ("Settlement is favored in cases that are complex, expensive, and lengthy to try."). No putative class action on behalf of government subdivisions bringing nuisance claims has yet been certified for litigation purposes. If Plaintiffs' claims were certified for litigation here, significant discovery would need to be undertaken and expert analysis conducted not only to prove McKinsey's liability but to quantify the degree of harm and abatement needs of every Class Member (and potentially of every community in the United States if a nationwide class were certified). The costs of doing so would be extraordinarily high with no guarantee of success.

Additionally, similar cases against opioid manufacturers, distributors, and retailers have been pending in MDL 2804 for more than five years. The time it has taken bellwethers to proceed through discovery and then through trial or to another resolution has averaged approximately two to three years; even then, trial wins have been and are subject to ongoing appeals. Should Settlement Class Counsel prosecute Class Members' claims, it would similarly take two to three years and then would likely be followed by a lengthy appeals process.

The Settlement here is an excellent recovery for the Settlement Class in light of the challenging and unpredictable path of likely protracted litigation that Plaintiffs and the certified class would have faced absent the Settlement. Given the risks, complexity, expense, and delay posed by further litigation, this Settlement represents a fair and adequate resolution for the Class.

b. The Proposed Plan of Allocation, Including the Method of Processing Class Members' Claims, Is Fair and Effective

The proposed plan of allocation is based on neutral, objective criteria that have been applied successfully in seven prior opioid-related settlements (*see* §II.A. *infra*); it is the product of extensive, informed negotiations between sophisticated Class Members and state AGs – all governmental entities; and it will ensure a fair distribution of the Net Settlement Fund among Class Members. Accordingly, Settlement Class Counsel expect a comparably low opt-out and high participation rate compared to other class action settlements – an expectation thus far proving to hold true. Because no claim form or supporting documentation is required to process Class Members' claims, administration and distribution of monies will be streamlined. Notice has been proceeding effectively, and BrownGreer has proven success in processing subdivision payment distributions. Class Members shall be paid by check or electronic payment, at their election, in a process substantially similar to that employed in the previous national settlements. Finally, 100% of Class Members eligible for a distribution based on this pre-negotiated criteria that do not opt out of the Settlement will receive their *pro rata* distributions. This is in contrast to settlements requiring a claim form to be submitted, where average claims rates range between 1% and 10%. *See In re Myford Touch Consumer Litig.*, No. 13-cv-03072-EMC, 2018 WL 10539266, at *2 (N.D. Cal. June 14, 2018) (collecting cases).

c. The Attorneys' Fees and Costs Request Is Reasonable

Interim Settlement Class Counsel's reasonable fees and costs request of 15% of the fund is detailed below. In this context it is worth reiterating that "the terms of [the] proposed award of attorney's fees, including timing of payment," are fair and reasonable, particularly in light of the substantial recovery of a non-reversionary fund of $207 million that stands to provide significant compensation for many Class Members. Fed. R. Civ. P. 23(e)(2)(C)(iii). Counsel's request is below the range regularly approved in common fund settlements in this Circuit. *See, e.g.*, *Hernandez v. Dutton Ranch Corp.*, No. 19-cv-00817-EMC, 2021 WL 5053476, at *6 (N.D. Cal. Sept. 10, 2021) (Collecting cases and finding that "[d]istrict courts within this circuit, including this Court, routinely award attorneys' fees that are one-third of the total settlement fund. Such

awards are routinely upheld by the Ninth Circuit."). The Court's ultimate decision on fees and expenses does not affect the case for Settlement approval.

4. The Settlement Treats Class Members Equitably in Relation to One Another Under Rule 23(e)(2)(D)

As explained in detail by Professor William Rubenstein, the Settlement treats Class Members equitably relative to one another. Rubenstein Decl., ¶2. First, the default allocation formula is based on objective public health data and placed in context by public health and medical experts, which shows the extent of the harms of the opioid epidemic in any given area. *Id.*, ¶36. Second, many of the Class Members here participated as stakeholders in developing the default allocation formula in MDL 2804, in collaboration with experts and the leadership of that MDL. *Id.*, ¶37. As Professor Rubenstein explains, class member participation in generating an allocation formula is rare because most class actions involve large classes of anonymous members with small stakes. *Id.* Determining an allocation formula ***before*** money is on the table and ***before*** the opt-out opportunity promotes class member involvement. Third, the allocation formula has already been reviewed and found to be fair by a Special Master and a federal court in the context of MDL 2804. *Id.*, ¶38. Fourth, despite the negotiation settlement class not receiving approval from the Sixth Circuit for other reasons, States and subdivisions still chose to use the national allocation formula as a default in the 2021 National Opioid Settlements. *Id.*, ¶39. Thus, Class Members and stakeholders have found this allocation formula to be fair and equitable for the purpose of distributing opioid remediation funds. Finally, Professor Rubenstein notes the allocation formula is equitable even to those small government entities that will not receive monetary recovery under it because those entities tend not to expend significant resources remediating the opioid epidemic and will receive a benefit from distributions to their overarching subdivisions (*e.g.*, a small city or subdivision benefits from a distribution to the county within which it is situated). *Id.*, ¶16.

As explained in the preliminary approval motion and incorporated here, Class Members are entitled to a *pro rata* share of the Net Settlement Fund based on formulas and eligibility criteria that Class Members themselves have already had the opportunity to negotiate with their state AGs

in prior opioid-related settlements.[6] It is thus ***equitable*** treatment because the Class members are sophisticated government entities that have had the opportunity to test and exercise their bargaining power. The J&J MOUs that subdivisions and AGs negotiated in each state reflect the relative strength of AG power to litigate and release subdivision claims in their own states, as well the substantive state law on subdivisions' claims. They are therefore an apt proxy for the allocation percentages subdivisions would have received here had they been active participants in the AG negotiations with McKinsey.

5. The Settlement Satisfies the Ninth Circuit's Approval Factors

The Ninth Circuit has identified a number of additional, overlapping factors the Court must consider when evaluating the fairness, reasonableness, and adequacy of a class action settlement. Those factors include: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). Many of these approval factors overlap with the Rule 23(e)(2)(B)-(C) factors and are addressed above. The remainder, addressed below, also support final approval.

a. Class Members Are Governmental Entities

This class settlement is unique in that it complements a settlement Attorneys General have negotiated directly with the same Defendants and in that Class Members themselves are sophisticated governmental entities with direct experience in evaluating other recent opioid-related settlements. Thus far, Settlement Class Counsel have been contacted by two AG offices regarding

[6] It is also based on prolonged and intensive research, analysis, and discussion by and among members of the Court-appointed MDL 2804 PEC and Settlement Committee – which overlaps in part with the leadership appointed in this MDL, government subdivisions, and public health and health economics experts.

state-specific logistics for implementing the Settlement, and they are working together amicably to ensure the settlement payments align with recently enacted legislation. Baig Decl., ¶26.

b. The Class' Initial Response Is Positive

While the opt-out deadline has not yet passed, the reaction of the Class Members thus far suggests the initial response is positive and supports final approval. Here, the Class size exceeds 25,000 Class Members, and thus far, no Class Member has yet opted out of the Settlement, nor has any Class Member filed an objection. *Id.*, ¶27; Azari Decl., ¶25. "A low number of opt-outs and objections in comparison to class size is typically a factor that supports settlement approval." *In re LinkedIn User Priv. Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015). *See also, e.g.*, *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming final approval of class action settlement where "only 45 of the approximately 90,000 notified class members objected to the settlement"); *In re Lyft Inc. Sec. Litig.*, No. 19-cv-02690-HSG, 2023 WL 5068504, at *9 (N.D. Cal. Aug. 7, 2023) (final approval granted of class action settlement with over 68,000 claims received, 29 requests for exclusion, and 3 objections); *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 19-md-02913-WHO, 2023 WL 6205473, at *7 (N.D. Cal. Sept. 19, 2023) (ordering final approval of class action settlement in case where "[o]ut of [approximately 6.4 million] Settlement Class Members, there were 2,620 timely opt-outs and eight timely objections to the Settlement," as well as over 400 objections submitted directly by claimants).

The 2021 National Settlements saw average participation rates between litigating and non-litigating subdivisions at above 98%, and the five "new" settlements are hitting similar levels. *See* https://nationalopioidsettlement.com/state-participation-status. Class Members' support and enthusiasm for these parallel national opioids settlements are also encouraging here.

Settlement Class Counsel will provide a full accounting of the information outlined in the District's Procedural Guidance once the Notice Program has been fully completed. As it stands, the encouraging response from the Class supports final approval; Class Counsel have every reason to believe it will stay that way.

6. There Is No Evidence of Collusion

Finally, when reviewing a pre-certification settlement, the Court must also "'look[] for and scrutinize[] any subtle signs that class counsel have allowed pursuit of their own self-interests . . . to infect the negotiations.'" *In re Google Referrer Header Priv. Litig.*, No. 5:10-cv-04809-EJD, 2023 WL 6812545, at *4 (N.D. Cal. Oct. 16, 2023) (quoting *Roes, 1-2*, 944 F.3d at 1043). The Ninth Circuit prescribes the following indicia of collusion for which the Court must scrutinize this pre-certification settlement: (1) "'when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded'"; (2) "'clear sailing' arrangement[s]"; and (3) "when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund." *Bluetooth*, 654 F.3d at 947.

None of these flags is present here. Plaintiffs request 15% of the settlement fund for attorneys' fees and litigation and administrative costs – far less than the standard Ninth Circuit benchmark. Half of this award (7.5% of the Fund) will be tendered to the Common Benefit Fund pursuant to PTO No. 9. ECF 567.

Consistent with all national opioid settlements to date, the Settlement reserves the net of the Fund to be used by the Class for opioids abatement. Moreover, McKinsey has not taken the position that it will not contest any attorneys' fees application that Plaintiffs will make; thus it reserves the ability to make such an objection. No portion of the Fund will revert to McKinsey.

Further, as discussed above, the mediator's experienced and adept assistance in the settlement process also "'confirms that the settlement is non-collusive.'" *Lembeck*, 2021 WL 5494940, at *4.

The Settlement is fair, reasonable, adequate, and merits final approval.

C. The Court Should Award Attorneys' Fees and Costs

"[L]awyer[s] who recover[] a common fund . . . [are] entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The Court must determine whether the requested fee amount is "'fundamentally fair, adequate, and reasonable.'" *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. P. 23(e)). Here,

Class Counsel's request of 15% of the Gross Settlement Fund is below the range regularly approved in common fund settlements in this Circuit. *See, e.g.*, *Bernstein v. Virgin Am., Inc.*, No. 15-cv-02277-JST, 2023 WL 7284158, at *2 (N.D. Cal. Nov. 3, 2023) (finding attorneys' fee award of 33% of settlement "to be reasonable under the circumstances"); *Google*, 611 F. Supp. 3d at 887; *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (observing the "usual range" in the Ninth Circuit of attorneys' percentage award as between 20% and 30% of the settlement common fund); *Hernandez*, 2021 WL 5053476, at *6. Half of this award (7.5% of the Fund) will be tendered to the Common Benefit Fund pursuant to PTO No. 9. ECF 567. Class Counsel is seeking a contingency award for attorneys' fees under Rule 23(h) of a percentage equivalent to the Fund. The recommended allocation of this and other deposits into the Common Benefit Fund from other settlements will be made by Lead Counsel at a future time to equitably reimburse and compensate all PSC members and others performing duly authorized common benefit work.

The determination of an appropriate fee award to Class Counsel involves analysis of a number of factors, including: (1) the results achieved; (2) the complexity of the case and skill required; (3) the risks of litigation; (4) the benefits to the class beyond the immediate generation of a cash fund; (5) the market rate of customary fees for similar cases; (6) the contingent nature of the representation and financial burden carried by counsel; and (7) a lodestar cross-check. *See, e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 2017 WL 1047834, at *1 (N.D. Cal. Mar. 17, 2017) (citing *Vizcaino*, 290 F.3d at 1048-52). Each of these factors supports Class Counsel's request in this case.

1. Class Counsel Obtained Substantial Cash Compensation for the Class

The result achieved for the Class is the most important factor in evaluating the reasonableness of a requested fee. *See, e.g.*, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.* ("*NCAA*"), No. 4:14-md-2541-CW, 2017 WL 6040065, at *3 (N.D. Cal. Dec. 6, 2017) ("'The most important factor is the results achieved for the class.'").

As described in detail above, the proposed Settlement provides $207 million to the Class. These funds will be allocated to government subdivisions and consistent with the National Settlements used to remediate the opioid epidemic in Class Members' communities. Plaintiffs submit this Settlement represents an excellent value in recovery for the Class. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("[I]t is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial.").

2. The Settlement Resulted from Class Counsel's Zealous Representation in Complex and Risky Litigation

The Settlement is particularly noteworthy given the combined litigation risks. Plaintiffs are asserting public nuisance claims, novel in this application within many jurisdictions, and Defendants raised substantial and potentially meritorious defenses. Indeed, prosecuting this matter was risky from the outset. Plaintiffs allege McKinsey's actions created, assisted, or permitted the creation of a public nuisance, including conditions harmful to public health, in violation of state public nuisance laws. *See* CAC §V. McKinsey's *res judicata* threshold defense – that a previously-reached settlement between McKinsey and Attorneys General bars any political subdivisions from independent claims – was generally untested, presenting additional risk to Plaintiffs, and required a detailed, state-by-state analysis of the power afforded to political subdivisions within each jurisdiction. The case also presented complex legal questions regarding the extent of liability that can be assigned to consultants, which depended on a factual analysis of the nature of the advice and the extent to which McKinsey not only provided advice but also took affirmative steps to implement that advice on behalf of its clients.

The recovery achieved must be measured against the fact that any recovery by Plaintiffs and Settlement Class Members through continued litigation could only have been achieved if: (i) Plaintiffs were able to certify a class; (ii) Plaintiffs were able to defeat Defendants' Motion to Dismiss on threshold *res judicata* issues; (iii) Plaintiffs were able to defeat Defendants at summary judgment; (iv) Plaintiffs were able to establish liability and damages at trial; and (v) the final judgment were affirmed on appeal. The Settlement here is a fair and reasonable recovery for the

Settlement Class in light of Defendants' defenses, and the challenging and unpredictable path of likely protracted litigation that Plaintiffs and the certified class would have faced absent the Settlement.

As this outcome reflects, Settlement Class Counsel prosecuted this Action and its fair resolution with vigor and dedication since filing their clients' complaints. Settlement Class Counsel undertook significant efforts to investigate, prosecute, and resolve this Action over the course of more than two years in this MDL. Class Counsel have a strong reputation in the area of complex and, in particular, class action litigation. Class Counsel have successfully litigated and settled similar cases across the country, including MDL 2804, and in this case have been challenged by highly experienced and skilled counsel who deployed very substantial resources on Defendants' behalf.

3. Class Counsel's Requested Fee Percentage Is Below Benchmark

When a settlement establishes a common fund or calculable monetary benefit for a class, it is both appropriate and preferred to award attorneys' fees based on a percentage of the monetary benefit achieved. Class Counsel's request of 15% of the Settlement Fund in fees, including payment of costs they reasonably incurred in prosecuting this case, is well below the Ninth Circuit's typical 25% benchmark and at the low end of the usual range of awards routinely approved. In this Circuit: fee "'award[s] exceed[] the [25%] benchmark'" in "'most common fund cases,'" and awards of 30% or more are common. *See NCAA*, 2017 WL 6040065, at *2; *see also In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07-cv-5944-JST, 2016 WL 4126533, at *5 (N.D. Cal. Aug. 3, 2016) (awarding 30% of $576,750,000 fund); *Hernandez*, 2021 WL 5053476, at *6.

When a settlement establishes a common fund or calculable monetary benefit for a class, it is both appropriate and preferred to award attorneys' fees based on a percentage of the monetary benefit achieved. While some courts apply a lodestar analysis to "cross-check" the reasonableness of a requested award, it is not required in this Circuit for common funds. *See, e.g.*, *Vizcaino*, 290

F.3d at 1050 ("[W]hile the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award.").

4. Class Counsel Carried Considerable Financial Burden and Risk in Prosecuting This Complex Litigation

In determining the appropriateness of a fee award, the next step is to consider whether, and to what degree, "class counsel ran the risk of not being paid at all." *Steiner v. Am. Broad. Co., Inc.*, 248 F. App'x 780, 782 n.2 (9th Cir. 2007). Here, Class Counsel worked entirely on contingency, advancing both their time and money. *See generally* Baig Decl.

If McKinsey had won this case, Class Counsel would not have been compensated at all. While that risk exists in all contingency litigation, it was more acute here than in other cases. *Vizcaino*, one of the leading Ninth Circuit cases on awarding attorneys' fees in common fund class action settlements, illustrates this point well. In *Vizcaino*, the Ninth Circuit approved the district court's characterization of the case as "extremely risky." *Vizcaino*, 290 F.3d at 1048. The district court arrived at that conclusion because:

> [T]here were no controlling precedents concerning their claims, only analogies involving various areas of law. In addition, Class Counsel's risk was even greater, and their work made more difficult, because Microsoft is one of the nation's largest and most formidable companies and it, and several law firms, defended the case vigorously for several years.

Vizcaino v. Microsoft Corp., 142 F. Supp. 2d 1299, 1303 (W.D. Wash. 2001). This case presented a similar situation. McKinsey's threshold *res judicata* challenges to the case presented complex and difficult questions of law regarding the legal and political relationships and divisions of power between states and subdivisions. The underlying claim, public nuisance, is a relatively newly revived and quickly developing field of litigation that has yet to be fully litigated in numerous states. There are also challenging questions of law regarding the legal liability that may be assigned to consultants providing advice to third-party clients.

Further, Class Counsel devoted thousands of hours and advanced whatever expenses were necessary to investigate and see this case through to a successful outcome, all with no guarantee of reimbursement. Baig Decl., ¶32. In so doing, Class Counsel declined opportunities to work on other cases in order to devote time, resources, and energy to handle this case.

5. A Lodestar Cross-Check Confirms the Requested Fees Are Reasonable

In common fund cases, "the primary basis of the fee award remains the percentage method." *Vizcaino*, 290 F.3d at 1050; *see also Craft v. Cnty. of San Bernardino*, 624 F. Supp. 2d 1113, 1122 (C.D. Cal. 2008) ("A lodestar cross-check is not required in this circuit, and in some cases is not a useful reference point."). Nevertheless, courts sometimes find calculation of the lodestar "helpful." *See, e.g.*, *Vizcaino*, 290 F.3d at 1050 ("[W]hile the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award."). In so doing, "[t]he lodestar crosscheck need not entail either 'mathematical precision [or] bean counting.'" *Rieckborn v. Velti PLC*, No. 13-cv-03889-WHO, 2015 WL 468329, at *21 (N.D. Cal. Feb. 3, 2015). In this Circuit, lodestar cross-checks resulting in multipliers in the 1.0-4.0 range are "presumptively acceptable." *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014).

Here, based on MDL Lead Counsel's preliminary review, the total combined common benefit hours in this case through October 31, 2023 are over 31,600 hours, for a total combined lodestar of approximately $20.7 million. The blended average billing rate for the work described above is approximately $640 per hour. Baig Decl., ¶36. This is in line with average rates in this District and reasonable here given the skill, experience, and reputation of Class Counsel and the PSC, all of whom were appointed through a competitive leadership application process. ECF 211. The litigation expenses in this case through October 31, 2023 total approximately $496,000. Based on the above numbers, a contingency fee award equal to 7.5% of the Settlement Fund would represent a 0.75 multiplier on Class Counsel's approximate lodestar, which is below the "presumptively acceptable range." *Dyer*, 303 F.R.D. at 334; *see also Vizcaino*, 290 F.3d at 1051 & n.6 (approving 3.65 multiplier and citing appendix of cases showing "a range of 0.6-19.6, with most . . . from 1.0-4.0 and a bare majority . . . in the 1.5-3.0 range"). In addition, Settlement Class Counsel will continue to incur time in seeking settlement approval and on implementation efforts should the Settlement be approved, reducing the cross-check even further.

6. Class Counsel's Expenses Are Reasonable and Appropriate

"Class counsel are entitled to reimbursement of reasonable out-of-pocket expenses." *Wakefield v. Wells Fargo & Co.*, No. 3:13-cv-05053-LB, 2015 WL 3430240, at *6 (N.D. Cal. May 28, 2015); *see also Staton*, 327 F.3d at 974; Fed. R. Civ. P. 23(h). This includes expenses that are reasonable, necessary, directly related to the litigation, and normally charged to a fee-paying client. *See, e.g.*, *Willner v. Manpower Inc.*, No. 11-cv-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22, 2015). Here, Class Counsel do not request an award specifically for expenses but seek a combined award for both fees and expenses totaling 15% of the Gross Settlement Fund.

The total combined litigation expenses in this case through October 31, 2023 total approximately $496,000. Baig Decl., ¶41. Such expenses were necessarily incurred in this Action and are routinely charged to clients billed by the hour. The majority of expenses went to document management services required to host the documents produced in discovery, independent experts who were necessary to prosecute the case and effectuate a substantial settlement, and the costs of mediation. *Id.*

Consequently, the sum of $31.05 million as a combined fee and expense award are reasonable, and the Court should approve the requested amount.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request final approval of the Class Action Settlement be granted, Interim Settlement Class Counsel be appointed as Settlement Class Counsel

1 and Named Plaintiffs be appointed as Class Representatives, and the Court award fees and costs
2 as set forth herein.
3 DATED: November 15, 2023

Respectfully submitted,

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ATTESTATION PURSUANT TO LOCAL RULE 5-1

I, Aelish M. Baig, am the ECF user whose identification and password are being used to file the SUBDIVISION PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND AWARD OF ATTORNEYS' FEES AND COSTS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF. Pursuant to Local Rule 5-1(i)(3), I hereby attest that Elizabeth J. Cabraser has concurred in this filing.

DATED: November 15, 2023

s/ Aelish M. Baig
AELISH M. BAIG