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10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA

12	SANTA CRUZ COUNTY, CALIFORNIA;	)	Case No. 3:21-md-02996-CRB
	POPE COUNTY, ILLINOIS; and THE	)	
13	VILLAGE OF EDDYVILLE, ILLINOIS,	)	REPLY MEMORANDUM IN FURTHER
	Individually and on Behalf of a Class of	)	SUPPORT OF SUBDIVISION PLAINTIFFS'
14	Persons Similarly Situated	)	MOTION FOR FINAL APPROVAL OF
		)	CLASS ACTION SETTLEMENT AND
15	In re MCKINSEY & CO., INC. NATIONAL	)	AWARD OF ATTORNEYS' FEES AND
	PRESCRIPTION OPIATE CONSULTANT	)	COSTS
16	LITIGATION	)	
	_____	)	DATE: February 2, 2024
17		)	TIME: 10:00 a.m.
	This Document Relates To:	)	CTRM: 6
18		)	JUDGE: Honorable Charles R. Breyer
	ALL SUBDIVISION ACTIONS.	)	
19	_____	)	

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1 **I. INTRODUCTION**

2 On November 15, 2023, Subdivision Plaintiffs filed a Motion for Final Approval of Class  
3 Action Settlement and Award of Attorneys' Fees and Costs (ECF 628) ("Final Approval Motion")  
4 in support of the McKinsey Subdivision Settlement. No objections to the settlement itself, or to  
5 the fees and costs request, have been filed. Less than 1% of the Class members opted out. This  
6 positive response from the Class reflects the fairness and adequacy of the McKinsey Subdivision  
7 Settlement. The members of the Subdivision Class are well versed in opioids litigation. They are  
8 experienced in the settlement participation decision-making process, having previously  
9 participated in the Negotiation Class exercise described by Professor Rubenstein in his  
10 November 8, 2023 Declaration, ECF 628-2 at 17, and in the previous settlements with the  
11 Distributors, Manufacturers, and Pharmacies. They are claimants in the ongoing Purdue, Endo,  
12 and Mallinckrodt bankruptcies.

13 The lack of objections by this sophisticated class to the terms of this settlement reflects the  
14 significant value it delivers to the Class: (a) a \$207 million non-reversionary settlement, which  
15 will be paid without the risk of appeal or delay upon final approval by this Court; and (b) an 85%  
16 opioids abatement/15% fees and costs allocation that follows what has become the opioids  
17 settlement model: 85% of the fund earmarked for opioid remediation efforts consistent with  
18 preexisting national opioid settlement agreements. The minimal opt-out forms submitted by the  
19 January 5, 2024 opt-out deadline reflect the strong response from the Class.

20 Both the results and the work performed to achieve those results support Settlement Class  
21 Counsel's request of 15% of the settlement fund for fees and costs, well below the 25% benchmark  
22 contemplated by Ninth Circuit authority. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043,  
23 1047 (9th Cir. 2002) (observing the Ninth Circuit's "usual range" of fee awards as between 20%  
24 and 30% of the common fund). The requested fee award is reasonable in light of the Class response  
25 to the settlement, *i.e.*, minimal opt outs and the lack of **any** objection.

1 **II. ARGUMENT**

2 **A. The Class Notice Met All Due Process Requirements**

3 The comprehensive notice program, which included email, U.S. mail, media, and website  
 4 notice, was preliminarily approved by the Court, implemented here, and satisfies the applicable  
 5 standard: “the best notice that is practicable under the circumstances, including individual notice  
 6 to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). To  
 7 date, the Claims Administrator has sent out approximately 60,439 Notices/Postcard Notices to an  
 8 estimated 33,246 Class members,<sup>1</sup> including 36,393 Notices by email and 24,046 Postcard Notices  
 9 by U.S. mail. *See* Supplemental Declaration of Cameron R. Azari, Esq. (“Supp. Azari Decl.”),  
 10 submitted herewith.<sup>2</sup> Additionally, the Claims Administrator placed Banner Notices in the  
 11 *CN Now* and *Leadership Matters* eNewsletters, which are published by the National Association  
 12 of Counties and the International City/County Management Association, respectively; and posted  
 13 and made generally available all pertinent information on the website dedicated to the settlement  
 14 ([www.McKinseySubdivisionClassAction.com](http://www.McKinseySubdivisionClassAction.com)). *See* Supp. Azari Decl., ¶¶21, 29. Thus, the Court  
 15 should conclude that Settlement Class Counsel meets Rule 23(c)(2)(B) requirements and due  
 16 process demands. *See, e.g., Destefano v. Zynga, Inc.*, 2016 WL 537946, at \*7 (N.D. Cal. Feb. 11,  
 17 2016) (finding individual notice mailed to class members combined with summary publication  
 18 constituted “the best form of notice available under the circumstances”).

19 **B. The Reaction of the Class Strongly Supports Settlement Approval**

20 “In reviewing [a] proposed settlement, the Court need not address whether the settlement  
 21 is ideal or the best outcome, but only whether the settlement is fair, free of collusion, and consistent  
 22 with plaintiff’s fiduciary obligations to the class.” *In re JUUL Labs, Inc., Mktg., Sales Pracs., &*  
 23 *Prods. Liab. Litig.*, 2023 WL 6205473, at \*4 (N.D. Cal. Sept. 19, 2023). In the Final Approval

24 \_\_\_\_\_  
 25 <sup>1</sup> *See* Declaration of Roma Petkauskas, Esq. Regarding Participation Rates (“Petkauskas  
 Decl.”), ¶4, submitted herewith.

26 <sup>2</sup> This is a sum of the email and U.S. mail notice figures identified in the accompanying Supp.  
 27 Azari Decl., ¶¶14, 17. On separate dates, Epiq sent 21,342 notices, 2,701 notices, and 3 notices  
 28 by U.S. mail. *Id.*, ¶17. Epiq separately sent 36,393 notices by email. *Id.*, ¶14. The total of these  
 mailings is 60,439 notices.

1 Motion, Subdivision Plaintiffs described how the relevant factors, including “the reaction of class  
2 members to the proposed settlement,” weighed strongly in favor of approval of the McKinsey  
3 Subdivision Settlement. ECF 628 at 7-19; *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575  
4 (9th Cir. 2004); ECF 622, ¶1 (granting preliminary approval to the Class). Now that the deadline  
5 for opt-out requests and objections has passed, Subdivision Plaintiffs can more fully assess the  
6 reaction of the Class. As set forth below, the response from Class members was overwhelmingly  
7 positive and supports approval of the McKinsey Subdivision Settlement.

### 8 **1. Opt Outs**

9 Out of more than 33,000 Class members, only 79 have opted out. By contrast,  
10 approximately 99.76% of the Class members (97.90% of the Class by population) have elected to  
11 remain in the Class and participate in the settlement. Petkauskas Decl., ¶¶4-5. *See In re MacBook*  
12 *Keyboard Litig.*, 2023 WL 3688452, at \*9 (N.D. Cal. May 25, 2023) (finding the “low number of  
13 . . . opt-outs relative to the size of the class weighs in favor of approving the Settlement” where  
14 1,733 exclusion requests were received out of 718,651 eligible class members); *Quiruz v. Specialty*  
15 *Commodities, Inc.*, 2020 WL 6562334, at \*7 (N.D. Cal. Nov. 9, 2020) (approving settlement with  
16 0.09% opt-out rate and noting: “[o]pt-out percentages of nearly 5% have been deemed so  
17 ‘overwhelmingly positive’ as to support approval”).

### 18 **2. Objections**

19 No Class member has objected to any aspect of the McKinsey Subdivision Settlement.  
20 This “unanimous, positive reaction to the Proposed Settlement is compelling evidence that the  
21 Proposed Settlement is fair, just, reasonable, and adequate.” *Nat’l Rural Telecomms. Coop. v.*  
22 *DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004). Simply stated, this absence of objections  
23 “‘raises a strong presumption that the terms of [the] proposed class settlement action are favorable  
24 to the class members.’” *John Harbour v. Cal. Health & Wellness Plan*, 2024 WL 171192, at \*6  
25 (N.D. Cal. Jan. 16, 2024) (quoting *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D.  
26 Cal. 2008)); *accord AdTrader, Inc. v. Google LLC*, 2022 WL 16579324, at \*5 (N.D. Cal. Nov. 1,

1 2022) (“A court may appropriately infer that a class action settlement is fair, adequate, and  
 2 reasonable when few class members object to it.”).<sup>3</sup>

3 Similarly, the lack of objections to the proposed Plan of Allocation, which seeks to track  
 4 numerous prior national opioid settlements and the agreements reached between the states and  
 5 their subdivisions in connection therewith (*see* Rubinstein Decl.), provides firm support for its  
 6 approval. *See In re Heritage Bond Litig.*, 2005 WL 1594403, at \*11 (C.D. Cal. June 10, 2005)  
 7 (“The fact that there has been no objection to this plan of allocation favors approval of the  
 8 Settlement.”).<sup>4</sup>

9 The Court’s certification of the Settlement Class is appropriate, as detailed in previous  
 10 submissions. With over 33,000 members, the Class is sufficiently numerous; the Class’ claims  
 11 present common questions of law and fact as the case arises from a defendant’s uniform course of  
 12 conduct and the nationwide public nuisance stemming therefrom, *see In re Chrysler-Dodge-Jeep*  
 13 *Ecodiesel Mktg., Sales Pracs., & Prods. Liab. Litig.*, 2019 WL 536661, at \*6 (N.D. Cal. Feb. 11,  
 14 2019); the Class Representatives’ claims were typical of those of the Class; and their interests were  
 15 aligned. *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017); *see* Fed. R.  
 16 Civ. P. 23(e)(2)(A)-(D); ECF 628 at 15-25.

17 Further, the Class stands to recover amounts under the proposed settlement close to what  
 18 government entities would have received had they been permitted to participate in the AG  
 19 settlement. The national allocation formula, based on previous agreements negotiated between  
 20 Attorneys General and Subdivisions in their respective states, and posted on  
 21

22 <sup>3</sup> Unless otherwise noted, all emphasis is added and citations are omitted.

23 <sup>4</sup> *See also In re Regulus Therapeutics Inc. Sec. Litig.*, 2020 WL 6381898, at \*6 (S.D. Cal.  
 24 Oct. 29, 2020) (“Many potential class members are sophisticated institutional investors; the lack  
 25 of objections from such institutions indicates that the settlement is fair and reasonable.” Here,  
 26 many of the class members are sophisticated municipalities well versed in opioid litigation);  
 27 *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (approving district court’s finding  
 28 that the class reacted favorably where there were “only fifty-four submitted objections” out of  
 376,301 class members); *Churchill*, 361 F.3d at 577 (affirming approval of class action settlement  
 where 45 out of 90,000 class members objected to the settlement); *Knisley v. Network Assocs., Inc.*,  
 312 F.3d 1123, 1125 (9th Cir. 2002) (dismissing objection after approval of settlement to which  
 six class members out of roughly 150,000, or 0.004%, objected).

1 nationalopioidsettlement.com, treats Class members equitably relative to one another. We thus  
 2 respectfully request that the Court approve the McKinsey Subdivision Settlement as fair, adequate,  
 3 and reasonable and certify the Settlement Class. *In re Volkswagen “Clean Diesel” Mktg., Sales*  
 4 *Pracs., & Prod. Liab. Litig.*, 2022 WL 17730381, at \*5 (N.D. Cal. Nov. 9, 2022) (“the Court’s  
 5 role is not to determine ‘whether the settlement is perfect in [its] estimation’ – but to determine if  
 6 it is ‘fundamentally fair’”) (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012)).

7 **C. The Reaction of the Class Strongly Supports the Fees and Costs**  
 8 **Request**

9 The Class Notice apprised Class members of the 15% fees and costs request, consistent  
 10 with earlier opioids public nuisance settlements. There have been no objections. Here, as set forth  
 11 in the Final Approval Motion,<sup>5</sup> Settlement Class Counsel filed high-risk litigation against a behind-  
 12 the-scenes consultant in opioid marketing and achieved \$207 million for Subdivision Plaintiffs  
 13 from a Defendant who had already entered into a sizable settlement (approximately  
 14 \$641.5 million) with State Attorneys General. As set forth in the moving papers, Settlement Class  
 15 Counsel drew upon years of discovery in related opioid litigation, as well as hundreds of thousands  
 16 of documents produced by McKinsey here to inform settlement. Given the results achieved, the  
 17 considerable litigation risks, the skill and quality of work performed, and the contingent nature of  
 18 the representation,<sup>6</sup> the Ninth Circuit authority supports the 15% fee and cost award requested  
 19 here, which is well below the 25% benchmark. *In re Nat’l Collegiate Athletic Ass’n Athletic*  
 20 *Grant-in-Aid Cap Antitrust Litig.*, 768 Fed. App’x 651, 653 (9th Cir. 2019) (the Ninth Circuit  
 21 permits “awards of attorneys’ fees ranging from 20 to 30 percent of settlement funds, with 25  
 22 percent as the benchmark award”).

23 \_\_\_\_\_  
 24 <sup>5</sup> Settlement Class Counsel files herewith an amended Schedule A (List of Litigating Entities)  
 25 to the Settlement Agreement, which adds two additional actions recently filed and/or transferred  
 to this MDL. See accompanying Supplemental Declaration of Aelish M. Baig, Ex. 1.

26 <sup>6</sup> The Ninth Circuit has subsequently reaffirmed the relevance of “delays in payment inherent in  
 27 contingency-fee cases,” which allows for enhancements to historical hourly rates (which were used  
 here) or current rates for all hours. *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016); see  
 28 also *Stetson v. W. Publ’g Corp.*, 714 Fed.App’x 681, 683 (9th Cir. 2017) (“[t]he district court erred  
 by failing to update the lodestar calculation to compensate for the delayed payment”).



1 The absence of objections weighs strongly in favor of both approval and granting of the  
2 requested attorneys' fees and costs. *See Zynga*, 2016 WL 537946, at \*18 (“[T]he lack of objection  
3 by any Class Members also supports the 25 percent fee award.”); *In re Nuvelo, Inc. Sec. Litig.*,  
4 2011 WL 2650592, at \*3 (N.D. Cal. July 6, 2011) (finding only one objection to fee request to be  
5 “a strong, positive response from the class”); *Omnivision*, 559 F. Supp. 2d at 1048 (“None of the  
6 objectors raised any concern about the amount of the fee. This factor . . . also supports the  
7 requested award of 28% of the Settlement Fund.”). Accordingly, we respectfully request the  
8 Court’s approval of the fees and costs request.

9 **III. THERE IS OVERWHELMING PARTICIPATION IN THE**  
10 **SETTLEMENT**

11 To be timely, any subdivision class members wishing to opt out of the McKinsey  
12 Subdivision Settlement were required to submit their opt-out forms electronically by January 5,  
13 2024. *See* Supp. Azari Decl., ¶32. As of January 19, 2024, the Claims Administrator received 81  
14 opt outs. As of January 26, 2024, two subdivisions reversed course and withdrew their opt outs,  
15 for a total of 79 complete opt outs. Thus, as of the date of this filing, 99.76% of total Class  
16 members, or 97.90% of Class members by population, are participating. *Id.*; Petkauskas Decl.,  
17 ¶¶4-5. Others are considering rescinding their opt-out requests.

18 This settlement is more streamlined than the prior national opioid settlements. It will be  
19 distributed in a single payment pursuant to final approval rather than paid out over years. It takes  
20 advantage of the State/subdivision allocations negotiated in connection with these prior  
21 settlements. Additionally, the 99.76% McKinsey Class member participation rate is higher than  
22 that required for settlement approval by the Ninth Circuit, *see Chun-Hoon v. McKee Foods Corp.*,  
23 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (noting zero objections and 16 opt outs representing  
24 4.86% of the class “strongly supports settlement”), and compares favorably with the prior national  
25 opioids settlements. For example, the Distributors and Janssen settlements became effective upon  
26 reaching 90% participation levels. *See* February 25, 2022 Press Release, [https://nationalopioidsettlement.com/wp-content/uploads/2022/02/Opioids\\_release\\_20220225.pdf](https://nationalopioidsettlement.com/wp-content/uploads/2022/02/Opioids_release_20220225.pdf).  
27  
28



1 **IV. CONCLUSION**

2 Counsel obtained an outstanding result for the Class, and the Class agrees. For the reasons  
3 set forth above and in their previously filed briefs and declarations, Class Representatives and  
4 Settlement Class Counsel respectfully request that the Court approve the [Proposed] Order  
5 Granting Final Approval of Class Action Settlement and Award of Attorneys' Fees and Costs.

6 DATED: January 26, 2024

Respectfully submitted,

7 ROBBINS GELLER RUDMAN  
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**Filing Authorized Pursuant to PTO 2:**

DATED: January 26, 2024

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*Plaintiffs' Lead Counsel*

**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 REPLY MEMORANDUM IN FURTHER SUPPORT OF SUBDIVISION PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND AWARD OF

1 ATTORNEYS' FEES AND COSTS. Pursuant to Local Rule 5-1(i)(3), I hereby attest that  
2 Elizabeth J. Cabraser has concurred in this filing.

3 DATED: January 26, 2024

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s/ Aelish M. Baig  
AELISH M. BAIG