

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER

IN RE: MCKINSEY & CO. INC. )  
NATIONAL PRESCRIPTION OPIATE ) No. 21-MD-2996 CRB  
CONSULTANT LITIGATION )  
 ) San Francisco, California  
 ) Thursday  
 ) September 2, 2021  
 ) 9:00 a.m.

**TRANSCRIPT OF ZOOM VIDEO CONFERENCE PROCEEDINGS**

**APPEARANCES:**

**For Plaintiffs:** LIEFF CABRASER HEIMANN & BERNSTEIN LLP  
Embarcadero Center West  
275 Battery Street  
29th Floor  
San Francisco, California 94111  
**BY: ELIZABETH J. CABRASER, ESQ.**  
**KELLY K. McNABB, ESQ.**

ROBBINS GELLER RUDMAN & DOWD LLP  
Post Montgomery Center  
One Montgomery Street  
Suite 1800  
San Francisco, California 94104  
**BY: AELISH M. BAIG, ESQ.**

MARTZELL BICKFORD and CENTOLA  
338 Lafayette Street  
New Orleans, Louisiana 70130  
**BY: SCOTT R. BICKFORD, ESQ.**

**(APPEARANCES CONTINUED ON FOLLOWING PAGE)**

**Reported By: Debra L. Pas, CSR 11916, CRR, RMR, RPR**  
*Official Reporter - US District Court*  
*Computerized Transcription By Eclipse*

*Debra L. Pas, CSR, RPR, RMR, CRR*  
*Official Reporter - U.S. District Court - San Francisco*  
*(415) 431-1477*

**APPEARANCES: (CONTINUED)****For Plaintiffs:**

THE DUGAN LAW FIRM APLC  
 269 South Third Street  
 Philadelphia, Pennsylvania 19106

**BY: TERRIANNE BENEDETTO, ESQ.**

BRYANT LAW CENTER  
 601 Washington Street  
 Paducah, Kentucky 42003

**BY: EMILY W. ROARK, ESQ.**

MEHRI & SKALET PLLC  
 1300 19th Street, N.W.  
 Suite 400  
 Washington, DC 20036

**BY: CYRUS MEHRI, ESQ.**

SONOSKY CHAMBERS SACHSE ENDRESON &  
 PERRY LLP

725 East Fireweed Lane  
 Suite 420

Anchorage, Alaska 99503

**BY: WHITNEY A. LEONARD, ESQ.**

**For Plaintiffs Michigan, Indiana and Kentucky Local Governments:**

GRABHORN LAW OFFICE PLLC  
 2525 Nelson Miller Parkway.  
 Suite 107  
 Louisville, Kentucky 40223

**BY: MICHAEL D. GRABHORN, ESQ.**

**For the McKinsey Defendants:**

CLARENCE DYER & COHEN LLP  
 899 Ellis Street  
 San Francisco, California 94109

**BY: JOSH A. COHEN, ESQ.**

**(APPEARANCES CONTINUED ON FOLLOWING PAGE)**

**APPEARANCES: (CONTINUED)**

**For the McKinsey Defendants:**

STROOCK & STROOCK & LAVAN LLP  
180 Maiden Lane  
New York, New York 10038

**BY: DAVID M. CHEIFETZ, ESQ.**

MORRISON FOERSTER LLP  
425 Market Street  
San Francisco, California 94101

**BY: MARK DAVID MCPHERSON, ESQ.**

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Thursday - September 2, 2021

9:00 a.m.

P R O C E E D I N G S

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**THE CLERK:** Calling Civil Action C21-MD-02996, In Re McKinsey and Company, Inc. National Prescription Opiate Consultant Litigation.

Counsel, please state your appearances for the record.

**MS. CABRASER:** Good morning, Your Honor. Elizabeth Cabraser, Lief Cabraser Heimann and Bernstein, plaintiffs' lead counsel for the Plaintiffs' Steering Committee.

**MS. McNABB:** Good morning, Your Honor. Kelly McNabb from Lief Cabraser Heimann and Bernstein for the plaintiffs. Thank you.

**MS. BAIG:** Good morning, Your Honor. Aelish Baig with Robbins Geller Rudman and Dowd for the plaintiffs.

**MR. BICKFORD:** Good morning, Your Honor. Scott Bickford from Martzell Bickford and Centola in New Orleans for the plaintiffs.

**MS. BENEDETTO:** Good morning, Your Honor. TerriAnne Benedetto of the Dugan Law Firm for the plaintiffs.

**MS. ROARK:** Good morning, Your Honor. Emily Roark with Bryant Law Center from Paducah, Kentucky for the plaintiffs, with the Plaintiffs' Steering Committee.

**MR. MEHRI:** Good morning, Your Honor. This is Cyrus Mehri of Mehri and Skalet in Washington, D.C. on behalf of the

1 plaintiffs.

2 **MR. GRABHORN:** Good morning, Your Honor. Michael  
3 Grabhorn on behalf of the Michigan, Indiana and Kentucky local  
4 governments.

5 **MS. LEONARD:** Good morning, Your Honor. Whitney  
6 Leonard with the Sonosky Chambers Law Firm in Anchorage, Alaska  
7 for the plaintiffs.

8 **MR. COHEN:** Good morning, Your Honor. Josh Cohen,  
9 Clarence Dyer and Cohen, for the McKinsey defendants.

10 **THE COURT:** Good morning.

11 **MR. CHEIFETZ:** Good morning, Your Honor. David  
12 Cheifetz with Strook and Strook and Lavan also for the McKinsey  
13 defendants.

14 **MR. MCPHERSON:** Good morning, Your Honor. Mark David  
15 McPherson from Morrison and Foerster also for the McKinsey  
16 defendants.

17 **THE COURT:** Good morning. Seems like a fair number.  
18 Mr. Bickford, how is New Orleans?

19 **MR. BICKFORD:** It's -- we're getting power back  
20 slowly. Should have it all back by the weekend. The city  
21 wasn't too badly damaged compared to the suburbs outside  
22 New Orleans, but I think we'll be back up and running Wednesday  
23 or Thursday of next week, so...

24 **THE COURT:** Well, good. I have a number of  
25 colleagues in New Orleans that I am in frequent contact with.

1 Obviously, the disaster of Katrina, it was hard to see that  
2 New Orleans would bounce back because New Orleans are the  
3 people and the culture.

4 And Judge Fallon said, well, a very interesting thing  
5 happened is that a lot of people left, and then the people who  
6 came back were the people who really wanted to come back. And  
7 I was so pleased to see that that was the case.

8 I mean, it's such a remarkable area. So enriches our  
9 entire -- well, I would say world and certainly country.

10 **MR. BICKFORD:** Well, I appreciate your thoughts. You  
11 come from a very similar sister city that has it's own culture  
12 and deep background. But this time we didn't flood, so I think  
13 that -- that really --

14 **THE COURT:** Money well spent. Money well spent.  
15 Glad to see that.

16 **MR. BICKFORD:** Thank you, Judge.

17 **THE COURT:** Great.

18 Well, first, let me start out by thanking the parties.  
19 Obviously, they -- the Plaintiffs' Steering Committee, and I  
20 would assume the plaintiffs' lead counsel and counsel for  
21 McKinsey, did a lot of work and came to an organization that I  
22 think makes complete sense as far as I can see. I don't know  
23 if anybody has some concerns about it in terms of its  
24 organization.

25 I want to talk a little bit about dates. But is there

1 anybody who wants to voice some concern about how it's  
2 organized? That is, what is going to take place first and  
3 second and third and simultaneously? Now is the time to speak,  
4 because I will enter it as an order.

5 (No response.)

6 **THE COURT:** Okay. Well, that's fine. That's great.  
7 Maybe it's one of the few times that the -- that everybody is  
8 pleased. I don't know. Maybe that's not the right word, but  
9 anyway, let me -- let me throw out one tweak, which I call a  
10 tweak, which is this.

11 The date for the Motion to Dismiss based upon the A.G.  
12 settlements, and I think the personal jurisdiction motion, in  
13 the proposal was January 14th, 2022. I think that that ought  
14 to be advanced to December 10th of this year, because I didn't  
15 see that there was really a good reason to kick it over a  
16 month.

17 That's essentially my view, based upon the fact that I'm  
18 very concerned that this litigation not be viewed as a  
19 marathon, like the New York City Marathon, but be viewed sort  
20 of like the San Francisco Bay to Breakers. That is, that there  
21 is an issue. It may be the -- a hill, but the sooner we get to  
22 the hill, which in my view at this point is the question of the  
23 A.G. settlements, the happier I'll be and I think the  
24 clearer -- hopefully, the clearer the path of litigation will  
25 be.

1           So I don't see any reason to wait to January to do it and  
2       ruin a lot of Christmas vacations for a lot of people. And I  
3       was going to set the date at December 10th.

4           Now, I am mindful that the time periods, the intervals  
5       between the filing of the motion, the opposition and the  
6       replies have probably been carefully negotiated, and the  
7       parties are satisfied with those times. And I'm going to keep  
8       to those times, but I'm going to actually add a further twist  
9       to it.

10          The days between the motion and the opposition were 45  
11       days. The days between the opposition and the reply was 30  
12       days. What I'm going to do is increase the number of days in  
13       one sense between the motion and the opposition. I was going  
14       to set the opposition for January 31st. So that's an  
15       additional week. However, in exchange for that, I'm directing  
16       plaintiff's counsel to direct members of the Plaintiffs'  
17       Steering Committee and anyone else who is working on this, to  
18       their knowledge, to not assign any work in any way related to  
19       this litigation to any associate from December 19th midnight to  
20       midnight December 26th.

21          Now, I don't know that that's a normal order, and maybe  
22       it's immediately appealable, and I will certify it if you wish.  
23       But it comes out of an experience I had when I was in private  
24       practice, and I -- I was defending a deposition. It was  
25       actually a third-party deposition that was going to be taken in



1 Boston, Massachusetts, and it was set for December 24th. And I  
2 thought that that was a little outrageous because I was in  
3 San Francisco having to travel to Boston for December 24th.

4 So I went to the magistrate judge, Steel Langford at the  
5 time. They were called Commissioners, by the way, at the time.  
6 And he said: Well, there are a lot of good reasons to take  
7 this deposition, but the reason not to take this deposition is  
8 that I don't want Mr. Breyer to be sitting in a Horn & Hardart  
9 and having a steamed turkey over lumpy mashed potatoes as his  
10 Christmas dinner. Actually, it sounded pretty good given what  
11 I was probably facing anyway, but I appreciated that.

12 And so, look. Partners, you spend your lives as you wish.  
13 But associates, who must take your direction and must -- and  
14 must please you and must obey your directions, they are at your  
15 mercy. Well, not for the week of December 19th to  
16 December 26th in this litigation. Can't control any other  
17 litigation.

18 So any problem with that, Ms. Cabraser?

19 **MS. CABRASER:** Not at all, Your Honor. And we won't  
20 take advantage of that by making a number of field promotions  
21 to partner for that period, although that might be an  
22 alternative. And I hope that this -- this order does become  
23 precedential. I think it's very wise and the nation's  
24 associates would thank you.

25 **THE COURT:** All right. So the -- then the reply will

1 be due on March 4th.

2 I gave the -- I gave McKinsey a couple of extra days in  
3 light of Ski Week, which I don't feel so strongly about.

4 And the argument, that will be on St. Patrick's Day. I  
5 had no idea how I was going to celebrate it this year, but  
6 that's -- I think I should celebrate it by setting aside the  
7 day for all of you to argue this matter. The 17th.

8 **MR. COHEN:** Your Honor, Josh Cohen for McKinsey.

9 **THE COURT:** Yes, Mr. Cohen.

10 **MR. COHEN:** Can I just address the issue that the  
11 Court raised at the outset about the timing of the initial  
12 filing of our Motion to Dismiss?

13 **THE COURT:** All right. Sure.

14 **MR. COHEN:** Putting aside the wisdom of comparing any  
15 case to Bay to Breakers, our view, Your Honor, is that the --  
16 the critical issue here -- and actually the issue that was the  
17 subject of the most discussion among the parties in preparing  
18 this joint proposal, is the need for McKinsey to have a  
19 measurable amount of time with the Master Consolidated  
20 Complaints once they are filed in order to prepare a motion  
21 that is tailored to the specific claims that are being asserted  
22 in those motions.

23 We absolutely are going to use the time between now and  
24 the filing of those motions to begin briefing the -- the effect  
25 of the settlement agreements in 17 different jurisdictions as

1 to 34 different political subdivision's claims.

2 But if we only have four days, Your Honor, to actually  
3 ensure that our motion is speaking to the claims that are  
4 asserted in those complaints once they are filed, we're not  
5 going to be able to do an adequate job of ensuring that the  
6 motion is directed to the pleading.

7 **THE COURT:** Well, that's a good point. Let me just  
8 take a look. Let me just take a look.

9 **MR. COHEN:** What we had discussed with the plaintiffs  
10 is that we -- and this really was the very first issue that we  
11 raised in our first call with them a week ago Monday, was that  
12 we believe we need roughly 30 days after the Complaint is filed  
13 to make sure that the motion that we are filing is directed to  
14 that pleading.

15 You're right. We built in a few extra days because of the  
16 Court's concern about associate time over the Christmas  
17 holiday, and that's why it was not exactly 30 days after the  
18 MCCs were filed. But our concern, Your Honor, is that the  
19 schedule that the Court proposed is going to collapse back --

20 **THE COURT:** Well, it would collapse a little bit.  
21 Let me -- let me address this.

22 Let me -- so I'm going to go back in the other direction.  
23 My question is, since there is no magic to December -- what did  
24 I say? It was December 6th? No. It was -- in your suggestion  
25 it's December 6th. Mine -- I'm actually addressing the

1 plaintiffs, the Master Complaint is December 6th.

2 Now, the question is how much -- how can we advance that?  
3 I mean, is it -- there's no magic in December 6th. Why do you  
4 need until December 6th to file the Master Complaint?

5 **MS. CABRASER:** We need until December 6th to file the  
6 Master Complaint, or we built in until December 6th to file the  
7 Master Complaint, Your Honor, to provide us with sufficient  
8 time to at least have a preview of the A.G. production, which  
9 is occurring on November 4th, and also to make determinations  
10 as to which claims would actually go forward, and then, of  
11 course, to organize the pleadings so that we had consistent  
12 factual allegations across the Complaints and so the defendants  
13 weren't trying to address, you know, a scattershot of  
14 pleadings. So that's why we built in the time.

15 I think a few days -- you know, shaving some time off of  
16 that I think would work. We'll just work a little more  
17 quickly.

18 **THE COURT:** Well, let's see whether you could live  
19 with -- looking at -- I'm trying to figure out, if I were to  
20 say November 22nd for you to file your -- then that's  
21 Thanksgiving week. So, or I could say December 23rd -- I mean,  
22 November 23rd. Doesn't make any difference.

23 I don't want to -- I don't want to necessarily put it,  
24 like, the week after Thanksgiving because that means everybody  
25 is working on Thanksgiving. I mean, that's the reality. I

1 know how it works.

2 I mean, unless you all have become so much more  
3 enlightened, and maybe you have, but I'd like to sort of set it  
4 for -- why not file on the 22nd or the 23rd. Then it's off and  
5 people feel better about it.

6 I understand you don't have the magic of each day and so  
7 forth, but I also -- I also recognize, Ms. Cabraser, you're  
8 entitled -- you're authorized. You know, if you need  
9 additional people because of additional issues and so forth,  
10 you're authorized to do that. That's not a problem.

11 I'm not going to complain -- you can hold me to this, and  
12 I'm sure you will. But I'm not going to complain that too many  
13 people worked on this, if, in fact, the work is done by these  
14 people. I've never found it a lot of unnecessary work,  
15 especially from the firms that I have familiarity with on the  
16 Plaintiffs' Steering Committee, and you just give them some  
17 guidance. And we're now -- after all, we're -- we have  
18 September, October. We've got a lot of time to sort of think  
19 about what to do in this case.

20 I've also found that additional time leads to expansion of  
21 documents, and that's not necessarily consistent with good case  
22 management.

23 So what if I were to say, okay, file your Complaint by  
24 November -- by November 23rd, instead of December 6th. And  
25 there you go.

1           And then I'm going to stick to my other times for filings,  
2       because I think -- I have to think -- number one, I have to  
3       think that McKinsey, having the basic issue of do these  
4       settlements -- are these settlements effective in terms of  
5       releases. I have a pretty good idea what their arguments are  
6       at this point. It's not like, oh, I'll be surprised. You  
7       mean, we have to address this subject. To the contrary.  
8       They've been saying these things for a considerable period of  
9       time.

10           Now, the time is, okay, they are basically legal  
11       arguments, as I understand them to be, so write them out. You  
12       know, now we have -- ask Mr. Cohen. How many lawyers do you  
13       have in your firm, as an example?

14           **MR. COHEN:** In my firm, Your Honor?

15           **THE COURT:** Yes.

16           **MR. COHEN:** There are six of us.

17           **THE COURT:** And Strook and Strook and Lavan and  
18       Morrison, they are comparable; is that right?

19           **MR. COHEN:** Exactly.

20           **THE COURT:** All right. So that's plenty of lawyers  
21       the way I look at it. That's plenty of lawyers to work on  
22       this. Work together.

23           **MR. COHEN:** Could I make one request, Your Honor?  
24       One suggestion to the Court's proposed schedule?

25           **THE COURT:** Yes.

1           **MR. COHEN:** Given that filing the Consolidated  
2 Complaints on the 23rd would put it just before Thanksgiving  
3 and, therefore, leave us relatively little time with those  
4 Complaints thereafter, is there any reason that we couldn't  
5 have until December the 17th to file the motion, which would  
6 not materially impact the rest of the schedule that the Court  
7 has proposed?

8           **THE COURT:** Here is my concern. I thought about  
9 that. And my concern was you drop it on the 17th. You drop it  
10 on the 17th. I can do that, but the problem is for the  
11 plaintiffs then, you're not going to have the associates  
12 working on it.

13           Is that okay, Ms. Cabraser?

14           **MS. CABRASER:** We'd prefer not, Your Honor. We'll --  
15 we can live with getting -- you know, getting pushed on our  
16 side to the 23rd if -- if the rest of the schedule stays --

17           **THE COURT:** Yeah. I'm going to keep the rest of the  
18 schedule. I am going to keep the rest of the schedule.

19           And I want to say one other thing, Mr. Cohen. You do  
20 have -- you do have the -- you're going to have the last word,  
21 the last written word in this. It's called the reply. I'm not  
22 going to get any sur replies and so forth. I say that. I say  
23 that hopefully.

24           But so I'm -- you know, I'm not so concerned about it.  
25 I'm not so concerned that you won't be able to -- between two

1 shots at this, you won't be able to state your arguments,  
2 especially with the size of these firms that are going to be  
3 working on this.

4 So I will amend it to December -- I mean November, what  
5 did I say, 23rd?

6 **MR. COHEN:** Yes, Your Honor.

7 **THE COURT:** Okay. That's the way it is.

8 So now I wanted to say one other thing, the size of these  
9 filings. I actually don't have in my mind what the local rule  
10 is as to the number of pages.

11 My guess is, just a wild guess, is that the parties will  
12 immediately address how large the briefs can be. I think  
13 that's probably right; right? You think that's a fair  
14 expectation that maybe you'll seek to extend the page limit?

15 **MR. COHEN:** Your Honor, given the number of states  
16 and the number of claims that we have in this case, it's a fair  
17 assumption, yes, Your Honor.

18 **THE COURT:** Exactly. And I will certainly grant it  
19 within -- within reason.

20 And I only ask you to be guided by a principle that you  
21 are writing to a person who may have somewhat limited shelf  
22 life in retention and attention to, you know, something that is  
23 so important to the parties. And therefore, therefore, put the  
24 best arguments in the beginning. Put it there. Make it clear.  
25 Don't just throw in the kitchen sink.



1       As soon as I see one bad argument, you know what I do?  
2       Well, you might. I stop reading. This is nonsense. And so  
3       I'm sure that we'll have no bad arguments. I'm sure we will  
4       have good arguments, but make them in the beginning. Make them  
5       clear. Choose your best argument, your best cases, and just  
6       set it out there.

7       Okay. I'm already exhausted. So I also don't want to  
8       detract from the fact that I know -- and I want to really thank  
9       the parties who negotiated this. I know that a lot went into  
10      this. I'm not -- I'm not at all disappointed. I just want to  
11      try to move it along, and this seems to be an approach that I  
12      would take.

13      I also am hopeful, by the way, that in terms of the  
14      argument, that I will be able to suggest questions that the  
15      Court has in light of the filings. Just so -- so that that day  
16      on the 17th, we'll try to focus on what is really still to be  
17      decided by the Court.

18      Now, I'm not suggesting -- when I say "still to be  
19      decided," I can be -- as you know, I can think one thing and  
20      then be talked into something else because what I thought  
21      originally was wrong.

22      But I -- I want to make sure that we have an honest and --  
23      exchange of views and that nobody is blindsided by it. It's  
24      just -- it's too important. It's too important to the  
25      plaintiffs, and it's too important for McKinsey that some -- a

1 surprise comes up. I don't like surprises. As a matter of  
2 fact, no trial lawyer likes surprises. So we're just going to  
3 try to minimize those, if I can.

4 So I would appreciate the parties -- I know that they are  
5 going to furnish the Court with a -- sort of a schedule  
6 consistent with what I've said today.

7 And I would ask, do you have any questions?

8 **MS. CABRASER:** No questions from plaintiffs, Your  
9 Honor, I don't think. Thank you.

10 As we noted in the joint status conference statement,  
11 we're working on a proposed protective order and a proposed ESI  
12 protocol. And we'll get those to the Court, by -- I think the  
13 10th is what we said, unless Your Honor needs --

14 **THE COURT:** No, no. I leave all that up to you. I  
15 leave all that up to you.

16 So anything from the defense?

17 **MR. COHEN:** No, Your Honor. Thank you very much.

18 We will work to get the Court a case management order that  
19 covers the schedule, as well as various other case management  
20 issues roughly contemporaneous with the ESI protocol.

21 **THE COURT:** Okay, okay. I appreciate it. Thank you  
22 very much.

23 **MR. COHEN:** Thank you, Your Honor.

24 **THE COURT:** Okay. Take care. Bye bye.

25 (Proceedings adjourned.)

CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from  
the record of proceedings in the above-entitled matter.

*Debra L. Pas*

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Debra L. Pas, CSR 11916, CRR, RMR, RPR

Monday, September 13, 2021