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19 **UNITED STATES DISTRICT COURT**  
20 **NORTHERN DISTRICT OF CALIFORNIA**

21 IN RE: MCKINSEY & CO., INC.  
22 NATIONAL PRESCRIPTION OPIATE  
23 CONSULTANT LITIGATION

24 This Document Relates to:  
25 ALL ACTIONS  
26  
27  
28

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

**MCKINSEY'S ~~[PROPOSED]~~ TRIBAL  
PLAINTIFF BELLWETHER PROTOCOL**

Judge: Hon. Charles R. Breyer

Courtroom: 6, 17th Floor

Pursuant to the Joint Case Management Statement and Discovery Schedule (ECF No. 440) and the April 6, 2023 Supplemental Schedule (ECF No. 505), McKinsey submits this [Proposed] Tribal Plaintiff Bellwether Protocol.

## **I. Scope of Order**

This Order shall apply to all Tribal Plaintiffs with cases currently pending in MDL 2996 as well as cases that have been or will be originally filed in, transferred to, or removed to this Court and assigned thereto (collectively, the “MDL proceedings”).

This Order is intended to establish procedures for selecting and conducting discovery of and then trying a subset of Tribal Plaintiff cases in these proceedings, consistent with the Court’s charge to promote the just and efficient conduct of the civil actions in these proceedings, to assure uniform and expeditious treatment in pretrial procedures, and to avoid undue delay or cost. Nothing in this Order shall be construed to result in joinder of any Tribal Plaintiffs’ claims, to permit multi-plaintiff bellwether trials, or to govern discovery or trial in any cases not selected under this Order. This Order shall not constitute a determination that venue or jurisdiction is proper in this District in any case pending before the Court, nor shall it constitute consent by any party to have any case tried in this Court. Similarly, all objections to jurisdiction expressly are preserved. Further, this Order shall not be construed to prevent later orders with respect to the selection of additional Tribal Plaintiffs for discovery and/or trial.

## **II. Selection of Tribal Plaintiffs for Bellwether Pool**

### **a. Bellwether Fact Sheet Pool**

On or before the deadline to submit a Tribal Plaintiff Fact Sheet Implementation Order and Tribal Plaintiff Fact Sheet to the Court, a total of 50 Tribal Plaintiffs will be selected for the Bellwether Fact Sheet Pool.

The Tribal Plaintiffs will be selected at random, except that McKinsey and the PSC (in consultation with Tribal case leadership) may each select one Tribal Plaintiff for inclusion in the Bellwether Fact Sheet Pool. The parties will work cooperatively to agree on a method for random selection to select the remaining Tribal Plaintiffs needed to reach 50.

Within 15 days of selection into the Bellwether Fact Sheet Pool, where applicable, each selected Tribal Plaintiff and McKinsey shall either object on *Lexecon* grounds or indicate consent to waive a *Lexecon* objection and any conditions of such waiver. For Tribal Plaintiffs where no waiver has been obtained by the parties that would allow that plaintiff's case to be tried in the Northern District of California, a replacement Tribal Plaintiff case will be added in the same manner as the one that requires replacement. If a Tribal Plaintiff in the Bellwether Fact Sheet Pool is not selected for trial pursuant to this Order, the Court will fully restore the rights of the waiving party/parties to object on *Lexecon* grounds.

Each of the Tribal Plaintiffs selected for the Bellwether Fact Sheet Pool will complete a Tribal Plaintiff Fact Sheet ("PFS") pursuant to the Fact Sheet Implementation Order approved by the Court. The PFS will be served on McKinsey within 60 days from the date the Court enters the Fact Sheet Implementation Order.<sup>1</sup>

**b. Bellwether Trial Selection**

The parties will endeavor to work together to select a first Tribal Plaintiff among the Bellwether Fact Sheet Pool to be worked up for trial. The selection deadline will be 90 days from the Tribal Plaintiffs' deadline to complete the PFS, assuming 90% or more Tribal Plaintiffs (excluding Tribal Plaintiffs whose claims are dismissed or otherwise resolved during the fact sheet completion period) have submitted substantially complete PFS responses by that deadline. The 90-day period will begin to run once the 90% threshold has been met, provided the Tribal Plaintiff(s) McKinsey selected is among the group that has submitted substantially complete responses.

At least 14 days prior to the selection deadline, the parties will meet and confer in an effort to agree upon a first Tribal Plaintiff whose claims will be worked up for trial, which shall be done in a manner consistent with the goal of proportionate identification of a representative first case. If the parties are able to agree, they will submit their selection to the Court no later than the selection deadline. If the parties are unable to agree, the parties shall, no later than the

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<sup>1</sup> The parties' deadline to submit an agreed upon Tribal Plaintiff Fact Sheet and Fact Sheet Implementation Order, or if not agreed upon, competing proposals, is May 5, 2023. (ECF No. 505.)

1 selection deadline, submit to the Court their proposed Tribal Plaintiff and a memorandum not to  
 2 exceed ten (10) pages in support of their selection and in opposition, if applicable, to the opposing  
 3 party's selection. The Court will then select the first Tribal Plaintiff whose claims will be  
 4 worked up for trial.

5 Discovery may begin immediately after selection. Fact discovery will conclude eight  
 6 months following the selection date. Discovery will be governed by the Federal Rules of Civil  
 7 Procedure. Expert discovery will conclude four months following the close of fact discovery.

8 The first case selected for trial will be governed by a scheduling and case management  
 9 order to be entered after selection, which shall address interim expert discovery deadlines,  
 10 dispositive motion deadlines, other pretrial deadlines, and a trial date in 2024. The parties will  
 11 meet and confer in an effort to agree upon the scheduling and case management order and will  
 12 submit an agreed upon proposal, or each side's proposal if agreement cannot be reached, within  
 13 fourteen (14) days of the Bellwether Trial selection.

14 **c. Remedies for Diminishment of Bellwether Fact Sheet Pool; Future Bellwether**  
 15 **Trials**

16 Should Plaintiffs withdraw or dismiss without prejudice a case in the Bellwether Fact  
 17 Sheet Pool, such Tribal Plaintiff will be replaced at McKinsey's selection from other Tribal  
 18 Plaintiffs who have not completed fact sheets. Should McKinsey settle a case in the Bellwether  
 19 Fact Sheet Pool, such Tribal Plaintiff will be replaced at the PSC's selection from Tribal Plaintiffs  
 20 who have not completed fact sheets.

21 Unless otherwise agreed to by the parties or ordered by the Court, the selection of  
 22 additional bellwether trial cases among the Tribal Plaintiffs will be selected pursuant to the  
 23 procedures set forth in this Order. A request to select a future bellwether trial may be made by  
 24 any party (i) within 30 days following the settlement or other resolution of the Bellwether Trial  
 25 case, or (ii) within 30 days following the close of fact discovery in a prior Bellwether Trial case.

26 This Order may be modified by a Stipulated Order of the Parties or by the Court for good  
 27 cause shown.  
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**CASE MANAGEMENT ORDER**

The above PROPOSED TRIBAL PLAINTIFF BELLWETHER PROTOCOL is approved as the Case Management Order and all parties shall comply with its provisions.

**IT IS SO ORDERED.**

DATED: April 28, 2023

  
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CHARLES R. BREYER  
United States District Judge