

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Tushar Bhatia, individually and as the representative of a class of similarly situated persons, and on behalf of the McKinsey & Company, Inc. (PSRP) Profit-Sharing Retirement Plan and the McKinsey & Company, Inc. (MPPP) Money Purchase Pension Plan,

Plaintiff,

v.

McKinsey & Company, Inc., MIO Partners, Inc., and John Does 1-50,

Defendants.

No. 1:19-cv-01466-GHW-SN

**DECLARATION OF KAI RICHTER IN SUPPORT OF PLAINTIFF’S MOTION FOR
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

I, Kai Richter, declare and state as follows:

1. I am a partner at Nichols Kaster, PLLP (“Nichols Kaster”), and am one of the attorneys of record for Plaintiff in the above-captioned action. I submit this declaration in support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement.

Settlement Terms

2. Attached hereto as **Exhibit A** is a true and correct copy of the proposed Class Action Settlement Agreement.¹ The Settlement resolves Plaintiff’s class action claims against McKinsey & Company, Inc. (“McKinsey”), MIO Partners, Inc. (“MIO”), and related John Doe defendants (collectively, “Defendants”) regarding Defendants’ administration and management of

¹ All capitalized terms have the meaning assigned to them in Article 2 of the Settlement Agreement, unless otherwise defined herein.

the McKinsey & Company, Inc. Profit-Sharing Retirement Plan (the “PSRP”) and the McKinsey & Company, Inc. Money Purchase Pension Plan (the “PPPP”) (collectively, the “Plans”).

3. The Settlement Agreement calls for certification of a Settlement Class defined as follows:

All participants and beneficiaries of the McKinsey & Company, Inc. Profit-Sharing Retirement Plan and the McKinsey & Company, Inc. Money Purchase Pension Plan (the “Plans”) at any time from February 15, 2013 through the date the Court enters the Preliminary Approval Order, excluding the Trustees for the McKinsey Master Retirement Trust and members of the Administrative Committee for the Plans at any time during the Class Period, as well as persons who served on the Shareholders Council of McKinsey & Company, Inc. or the Board of Directors of MIO Partners, Inc. at any time during the Class Period.

See Settlement ¶ 2.48. Based on information provided by Defendants, there are approximately 33,000 Class members.

4. Under the Settlement, McKinsey or its insurers will contribute \$39.5 million to a Qualified Settlement Fund (“Settlement Fund”). *Id.* ¶¶ 2.30, 2.42, 5.4, 5.5. The net proceeds of this Settlement Fund (after accounting for any attorneys’ fees and costs, administrative expenses, and class representative service awards approved by the Court) will be distributed to eligible Class Members in accordance with the Plan of Allocation in the Settlement. *Id.* ¶¶ 5.9, 6.1. Under the Plan of Allocation, each eligible Class Member will receive a *Settlement Allocation Score* for each quarter during the Class Period, which shall be the sum of 15 points (if the eligible Class Member had an Active Account at the end of the quarter) plus 0.0020 points for every dollar invested by the eligible Class Member in MIO Funds at the end of the quarter (up to a maximum of 300 points). *Id.* ¶ 6.4.1. The Net Settlement Amount will then be allocated among eligible Class Members on a pro rata basis in proportion to their *Average Settlement Allocation Score* across all quarters. *Id.* ¶ 6.4.2.

5. This Plan of Allocation is designed to reflect the claims that were asserted in the action, and also account for the arguments that Defendants raised concerning the arbitration provision in the Plans.² The first component of the score (15 points per quarter) is designed to approximate the amount of each eligible Class Member's recordkeeping claim, as Plaintiff alleged that the Plan's recordkeeping expenses exceeded a reasonable amount by approximately \$60 per year (\$15 per quarter). *See Complaint*, ¶ 8 (alleging participants paid approximately \$95 per year for recordkeeping services, and that the reasonable market rate was \$30 to \$40 per participant). The second component of the score is designed to approximate the size of the investment claim. Specifically, a score of 0.0020 points for each dollar invested in MIO Funds for each quarter is designed to be consistent with Plaintiff's allegation that MIO received an investment management fee of between 0.64% to 0.94% per year for every dollar invested in MIO Funds (which averages to approximately 0.20%, or 0.0020, per quarter). *See Complaint*, ¶ 6. Likewise, the 300 point limit for purposes of scoring the investment claim in relation to the 15 point amount for purposes of scoring the recordkeeping claim is designed to reflect the relative size of both claims, as we estimated that amount of MIO fees during the Class Period was approximately \$180 million and the amount of excess recordkeeping expenses during the Class Period was approximately \$9 million (reflecting a ratio of 20:1, or 300 points to 15 points). Finally, the maximum total points per quarter (\$315), multiplied by the total number of quarters during the Class Period (less than

² The arbitration provision provides:

No person may bring any claim, lawsuit or other cause of action arising from a combined investment-related loss in excess of \$10,000 experienced on the amount of a Member's accounts in the Plan[s] ... in any court (federal, state or otherwise). Instead, such person must submit such dispute to mandatory, final and binding arbitration as his/her exclusive remedy for claims that meet the criteria set forth herein, unless prohibited by law.

ECF No. 31 at 7.

31, after accounting for partial quarters at the beginning and end of the Class Period), is designed to fall just below the \$10,000 threshold for arbitration in the Plan Documents. *See supra* at n.2.

6. Current Participants will have their accounts in the Plans automatically credited with their share of the Net Settlement Amount. *Id.* ¶ 6.5. Former Participants will be required to submit a claim form, which allows them to elect to have their distribution rolled over to an individual retirement account or other eligible employer plan, or to receive a direct payment by check. *Id.* ¶ 6.6.³ Otherwise, the treatment of Class Members is identical for purposes of the Plan of Allocation.

7. The Gross Settlement Amount in this case (\$39.5 million) compares favorably to other ERISA settlements involving a defined contribution plans. Alternatively, on a percentage basis, the settlement amount represents 0.63% of the Plans' year-end assets as of the most recent reported Form 5500 filings in 2018 (~\$6.23 billion). This also falls within the range of other recent 401(k) settlements, as summarized by the chart below:⁴

³ The claim form also allows the Settlement Administrator to verify the addresses of Class Members who are sent checks. This is an important consideration here given that McKinsey's consultants frequently travel for extended periods of time in connection with their work.

⁴ *See Intravaia v. Nat'l Rural Electric Coop. Ass'n*, No. 1:19-cv-00973, ECF No. 95-2 (E.D. Va. July 31, 2020); *Moitoso v. FMR LLC*, No. 1:18-cv-12122, ECF No. 243-1 (D. Mass. July 2, 2020); *Brotherston v. Putnam Investments, LLC*, No. 1:15-cv-13825, ECF No. 214 (D. Mass. Apr. 17, 2020); *In re M&T Bank Corporation ERISA Litigation*, No. 1:16-cv-375, ECF No. 158 (W.D.N.Y. Dec. 26, 2019); *Velazquez v. Mass. Fin. Servs. Co.*, No. 17-CV-11249, ECF No. 108 (D. Mass. Dec. 5, 2019); *Schultz v. Edward D. Jones & Co.*, No. 4:16-CV-1346-JAR, ECF No. 93-1 (E.D. Mo. Dec. 11, 2018); *Sims v. BB&T Corp.*, No. 1:15-CV-00732, ECF No. 437 (M.D.N.C. Nov. 30, 2018); *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 1:15-CV-09936-LGS, ECF No. 322-1 (S.D.N.Y. Aug. 14, 2018); *Richards-Donald v. Teachers Insurance & Annuity Assoc. of Am.*, No. 15-CV-08040-PKC, ECF No. 46 (S.D.N.Y. April 30, 2017); *Yost v. First Horizon National Corp.*, No. 2:08-02293-STA, ECF No. 190 (W.D. Tenn. May 2, 2012); *Abbott v. Lockheed Martin Corp.*, No. 06-701-MJR-DGW, ECF No. 491-1 (S.D. Ill. Feb. 20, 2015); *Spano v. Boeing Co.*, No. 3:06-cv-00743-DRH-DGW, ECF No. 554-1 (S.D. Ill. Nov. 5, 2015); *Nolte v. CIGNA Corp.*, No. 2:07-CV-02046-HAB-DGB, ECF No. 398-1 (C.D. Ill. June 21, 2013); *Kruger v. Novant Health, Inc.*, No. 1:14CV208, ECF No. 44-2 (M.D.N.C. Nov. 9, 2015); *Gordan v. Mass. Mutual Life Ins. Co.*,

Defendant	Date Settled	Settlement Amount	Plan Assets in Year Settled	Settlement % of Plan Assets
NRECA	7/31/2020	\$10,000,000	\$9,971,802,788 (2018) ⁵	0.10%
Fidelity (Moitoso)	7/2/2020	\$28,500,000	\$16,119,398,751 (2018)	0.17%
Putnam	4/17/2020	\$12,500,000	\$650,995,499 (2018)	1.90%
M&T	9/26/2019	\$20,800,000	\$2,366,481,300 (2018)	0.89%
Mass. Fin. Services	11/21/2019	\$6,875,000	\$852,593,167 (2018)	0.80%
Edward Jones	12/11/2018	\$3,175,000	\$5,859,210,627	0.05%
BB&T	11/30/2018	\$24,000,000	\$4,632,550,462	0.52%
Deutsche Bank	8/14/2018	\$21,900,000	\$3,385,372,412	0.65%
Allianz	12/26/2017	\$12,000,000	\$1,170,130,105	1.03%
Fujitsu	12/6/2017	\$14,000,000	\$1,502,757,150	0.93%
American Airlines	7/7/2017	\$22,000,000	\$10,962,065,208	0.20%
TIAA	5/10/2017	\$5,000,000	\$2,144,212,948	0.23%
NY Life	2/14/2017	\$3,000,000	\$3,117,480,047	0.10%

No. 13-CV-30184-MAP, ECF No. 107-2 (D. Mass. June 15, 2016); *Krueger v. Ameriprise Fin., Inc.*, No. 11-CV-02781 (SRN/JSM), ECF No. 597-1 (D. Minn. Mar. 26, 2015); *Main v. Am. Airlines, Inc.*, No. 4:16-CV-00473-O, ECF No. 127-2 (N.D. Tex. July 7, 2017); *Figas v. Wells Fargo & Co.*, No. 08-cv-4546 (PAM/FLN), ECF No. 257-1 (D. Minn. Mar. 18, 2011); *Bilewicz v. FMR LLC*, No. 13-10636-DJC, ECF No. 53-1 (D. Mass. July 3, 2014); *Urakhchin v. Allianz Asset Management of America, L.P.*, No. 8:15-cv-01614, ECF No. 174 (C.D. Cal. Dec. 26, 2017); *Dennard v. Transamerica Corp.*, No. 1:15-cv-00030-EJM, ECF No. 86-1 (N.D. Iowa); *Andrus v. N.Y. Life Ins. Co.*, No. 16 Civ. 5698 (KPF), ECF No. 66-1 (S.D.N.Y. Feb. 14, 2017); *Anderson v. Principal Life Ins. Co.*, No. 4:15-cv-00119-JAJ-HCA, ECF No. 23-3 (S.D. Iowa). The plan asset information in the chart was sourced from the plans' publicly filed Form 5500s, available at <https://www.efast.dol.gov/welcome.html>.

⁵ Asset figures are reported for 2018 because 2019 year-end data is not yet available from Form 5500 filings with the Department of Labor.

MassMutual	6/15/2016	\$30,900,000	\$2,452,976,418	1.26%
Transamerica/Aegon	5/19/2016	\$3,800,000	\$1,723,051,884	0.22%
Novant Health	11/10/2015	\$32,000,000	\$969,670,230	3.30%
Boeing	11/4/2015	\$57,000,000	\$47,130,387,730	0.12%
Principal	6/29/2015	\$3,000,000	\$2,116,933,587	0.14%
Ameriprise	3/26/2015	\$27,500,000	\$1,546,494,029	1.78%
Lockheed Martin	2/20/2015	\$62,000,000	\$30,447,099,819	0.20%
Fidelity (Bilewicz)	7/1/2014	\$12,000,000	\$13,250,740,623	0.09%
Prudential/CIGNA	6/17/2013	\$35,000,000	\$3,988,214,734	0.88%
First Horizon	5/2/2012	\$6,000,000	\$369,591,201	1.62%
Wells Fargo	3/18/2011	\$17,500,000	\$22,208,369,556	0.08%

8. Finally, as another basis for comparison, the \$39.5 million recovery in this case involving allegedly excessive fees represents approximately 22% of the total amount of fees that MIO received from the Plans in connection with MIO Funds during the class period (\$180 million), and approximately 21% of the combined sum of these MIO fees plus the alleged recordkeeping excess (\$9 million). As explained in the accompanying Memorandum of Law, this recovery percentage is also consistent with other settlements.

9. In addition to the foregoing monetary compensation, the Settlement also provides for prospective relief. Specifically, the Settlement provides that the following procedures shall apply to the management of the Plans on a prospective basis as of the Settlement Effective Date:

- a. For a period of no less than three years, Defendants shall retain an independent investment consultant to provide ongoing review of the investment options in the Plans, and review and approve any communications to participants regarding the Plans' investment options;
- b. For a period of no less than three years, all expense reimbursements by the Plans to McKinsey, MIO, or any other affiliated person or entity will be reviewed and

approved by an independent fiduciary, who shall have final discretion to approve or reject reimbursements.^[6]

- c. Before the expiration of the current recordkeeping agreement for the Plans, McKinsey will issue a request for proposal for recordkeeping services for the Plans.

Settlement Agreement ¶ 7.1. This relief is designed to address the core allegations in the lawsuit, and will provide additional benefits to the Settlement Class for several years to come.

10. In the absence of a settlement, Plaintiff would have faced uncertainty and risk in connection with his claims. Given these risks (which are outlined in the accompanying Memorandum of Law), and the costs and potential delays associated with further litigation, I believe that the Settlement that was negotiated is fair, reasonable, and adequate.

Investigation, Discovery, and Settlement Negotiations

11. Throughout this litigation, our firm has vigorously represented the interests of the class. Prior to filing the Complaint in this action, my colleagues and I conducted a thorough investigation of the claims that were asserted and the factual basis for those claims. Among other things, this included reviewing publicly-available information relating to the Plans, submitting FOIA requests, examining our client's account statements and other documents, and conducting an analysis of the Plans' investments and recordkeeping expenses versus the investments and recordkeeping expenses of other plans. As a result of our investigatory efforts, we were able to file a detailed, 32-page Complaint.

12. On April 22, 2019, Defendants filed a Motion to Compel Arbitration, or in the Alternative, to Dismiss Plaintiff's Complaint. While that motion was pending, the parties agreed to stay the litigation for purposes of mediation, and the Court granted the parties' request for a stay on November 12, 2019.

⁶ McKinsey has agreed to pay this independent fiduciary at its own expense.

13. Following entry of the stay, the parties proceeded with targeted discovery to facilitate mediation. As part of this process, Defendants produced more than 5,800 pages of documents, including Plan documents and disclosures, relevant minutes from Trustee meetings relating to the Plans, reports and recommendations relating to the Plans, and a significant volume of class data and investment data. In addition, our firm engaged an investment expert (Dr. Steve Pomerantz) to consult on appropriate damages comparators and calculation methods.

14. The parties then engaged in a full-day, in-person mediation before Hunter R. Hughes, III on January 30, 2020 in Atlanta. Mr. Hughes is an experienced and well-respected mediator, who has successfully resolved numerous class action cases including many actions involving breach of fiduciary duty claims under ERISA. A copy of his resume is attached as **Exhibit B**. In advance of the mediation, the Parties each submitted written mediation statements.

15. The parties did not reach a settlement during the January 30, 2020 mediation, but agreed to continue negotiations through Mr. Hughes. After several months of extended arm's length negotiations, the parties eventually reached a settlement-in-principle on May 26, 2020, after Mr. Hughes made a mediator's proposal. After reaching an agreement on this mediator's proposal, the parties then negotiated the details of the comprehensive Settlement Agreement that is the subject of the present motion. For the reasons explained above, I believe the Settlement is fair, reasonable, and adequate.

Professional Background

16. I am licensed to practice law in the State of Minnesota, and also have been admitted to practice in several federal district courts and appellate courts across the country. A list of jurisdictions in which I have been admitted is set forth below:

Supreme Court of the United States
1st Circuit Court of Appeals
2nd Circuit Court of Appeals
3rd Circuit Court of Appeals
6th Circuit Court of Appeals
8th Circuit Court of Appeals
9th Circuit Court of Appeals
U.S.D.C. for the Eastern District of Michigan
U.S.D.C. Western District of New York
U.S.D.C. Minnesota
Minnesota Supreme Court

17. I have been actively engaged in the practice of law since 1999, and have substantial class action experience and other complex litigation experience. Since joining Nichols Kaster in April 2010, my practice has focused exclusively on class action cases. I have been appointed class counsel for litigation or settlement purposes in more than twenty class cases. In connection with those cases, I have personally negotiated class action settlements providing for more than \$300 million in available relief to class members nationwide.

18. I am currently co-leading our firm's ERISA Class Action Team. In addition to the present case, the firm's lawyers (including myself) have been appointed class counsel for litigation and/or settlement purposes in seventeen other ERISA class action cases, as set forth below:

- *Brotherston v. Putnam Investments, LLC*, 1:15-cv-13825 (D. Mass.)
- *Andrus v. NY Life Ins. Co.*, 1:16-cv-05698 (S.D.N.Y.)
- *Main v. American Airlines, Inc.*, 3:16-cv-01033 (N.D. Tex.)
- *Bowers v. BB&T Corp.*, 1:15-cv-00732 (M.D.N.C.)
- *Stevens v. SEI Invs. Co.*, No. 2:18-cv-04205 (E.D. Pa.)
- *Urakhchin v. Allianz Asset Mgmt. of America, L.P.*, 8:15-cv-01614 (C.D. Cal.)
- *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, No. 5:15-cv-03698 (N.D. Cal.)
- *In re M&T Bank Corp. ERISA Litig.*, 1:16-cv-00375 (W.D.N.Y.);
- *Wildman v. American Century Servs., LLC*, No. 4:16-cv-00737 (W.D. Mo.)

- *Moreno v. Deutsche Bank Am. Holding Corp.*, No. 1:15-cv-09936 (S.D.N.Y.)
- *Clark v. Oasis Outsourcing Holdings Inc.*, No. 9:18-cv-81101 (S.D. Fla.)
- *Moitoso v. FMR LLC*, No. 1:18-cv-12122 (D. Mass.)
- *Velazquez v. Mass. Fin. Servs. Co.*, 1:17-cv-11249 (D. Mass.)
- *Beach v. JPMorgan Chase Bank, N.A.*, No. 1:17-cv-00563 (S.D.N.Y.)
- *Larson v. Allina Heath System*, No. 17-cv-03835 (D. Minn.)
- *Mass v. Regents of the University of California*, No. RG17-879223 (Alameda County Super. Ct.); and
- *Intravaia v. Nat'l Rural Electric Coop. Ass'n*, No. 1:19-cv-00973 (E.D. Va.);

19. Our firm took the *Putnam* case to trial in April 2017 and took the *American Century* case to trial in September 2018. We received final court approval of settlements in *New York Life*, *American Airlines*, *BB&T*, *SEI*, *Allianz*, *Fujitsu*, *Deutsche Bank*, *Oasis*, *Massachusetts Financial Services*, and *Allina*, and also recently received preliminary court approval of settlements with *Putnam*, *M&T*, *FMR LLC a/k/a Fidelity Investments*, and the *National Rural Electric Cooperative Association (NRECA)*. We won contested class certification motions in *Putnam*, *BB&T*, *Allianz*, *American Century*, *Deutsche Bank*, *JPMorgan Chase*, and the *University of California*. We also defeated motions to dismiss in several of these cases in whole or in part (*Putnam*, *American Airlines*, *BB&T*, *Allianz*, *Fujitsu*, *M&T*, *American Century*, *Deutsche Bank*, *Massachusetts Financial Services*, *JPMorgan Chase*, *University of California*, and *NRECA*), as well as in *Morin v. Essentia Health*, 2017 WL 4083133 (Sept. 14, 2017), *report and recommendation affirmed*, 2017 WL 4876281 (D. Minn. Oct. 27, 2017), *Reetz v. Lowe's Companies, Inc.*, No. 5:18-cv-00075 (W.D.N.C.), *Nelsen v. Principal Global Investors Trust Company*, No. 4:18-cv-00115 (S.D. Iowa), and *Karpik v. Huntington Bancshares Inc.*, No. 2:17-cv-1153 (S.D. Ohio).

20. The firm is viewed as a leader in ERISA 401(k) cases. According to a recent Bloomberg BNA article, “Nichols Kaster has been the driving force” behind recent 401(k) self-dealing litigation. *See* Jacklyn Wille, *Deutsche Bank Can’t Shake 401(k) Fee Lawsuit*, Bloomberg BNA (Oct. 17, 2016). Attorneys from Nichols Kaster have been interviewed by National Public Radio’s “All Things Considered”, the Wall Street Journal, Bloomberg, Financial Times, Investment News, Pensions & Investments, Bankrate.com, and several trade publications in connection with their ERISA work. I also have spoken by invitation at several national conferences and seminars on ERISA litigation, including: (1) a webinar on “Fee Litigation” sponsored by the American Bar Association (November 12, 2019); (2) an employee benefits program sponsored the American Law Institute (October 24, 2019); (3) a Professional Liability Directors & Officers conference on a panel regarding “Plan Fee Litigation” (February 6, 2019); (4) an American Bankers Association Insurance Risk Management Conference on a panel concerning excessive fee ERISA class actions (February 5, 2019); (5) an American Law Institute webcast on excessive fee litigation (November 28, 2018); (6) the American Law Institute’s tax-exempt and government plans education series (September 24, 2018), where I co-presented on “The Current State of Fee Litigation and Its Implications”; (7) the American Conference Institute’s National Forum on ERISA Litigation (on both March 1, 2017 and November 2, 2017), where I was a member of the “Fiduciary Investment Litigation Update” panel; and (8) the Retirement Advisor Council’s annual meeting (May 22, 2018), where I was a member of a panel on “The Moving Litigation Frontier”.

21. Based on my personal experience and Nichols Kaster’s firm-wide experience litigating ERISA cases, I believe that we were well-equipped to negotiate the Settlement that was reached in this case. For further background, a copy of our firm resume is attached as **Exhibit C**.

Settlement Administrator

22. Analytics Consulting, LLC (“Analytics”) has been selected to serve as the settlement administrator in this matter. Analytics has extensive experience administering class action settlements, including several ERISA settlements, and previously served as the Settlement Administrator in connection with the *New York Life* and *Deutsche Bank* settlements in this District. A copy of Analytics’ company profile is attached as **Exhibit D**.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 10, 2020

/s/Kai Richter
Kai Richter