UNITED STATES DISTRICT COURT
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. and MIO Partners, Inc., Defendants.	No. 1:19-cv-1466-GHW-SN **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

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INTRODUCTION

On September 18, 2020, this Court preliminarily approved the Parties' Class Action Settlement Agreement, which resolves Plaintiff's claims against Defendants under the Employee Retirement Income Security Act ("ERISA") relating to the McKinsey & Company, Inc. (PSRP) Profit-Sharing Retirement Plan and the McKinsey & Company, Inc. (MPPP) Money Purchase Pension Plan ("Plans"). *ECF No. 94*. The Court found on a preliminary basis that the terms of the Settlement are "sufficiently fair, reasonable, and adequate to warrant sending notice of the Settlement to the Settlement Class," and approved the distribution of the Settlement Notices as specified in the Settlement Agreement. *Id.* ¶ *1.D*. Since that time, an Independent Fiduciary has confirmed that the Settlement terms are reasonable, *see Declaration of Kai Richter in Support of Motion for Final Approval of Class Action Settlement ("Third Richter Decl."), Ex. 1*, and only one Class Member out of more than 35,000 has objected to the Settlement. *See id., Ex. 2*. As discussed below, this objection misapprehends the terms of the PSRP and the applicable release language in the Settlement. *See infra* at 21-22. Accordingly, Plaintiff respectfully requests that the Court overrule the objection and grant final approval of the Settlement. Defendants do not oppose this motion as parties to the Settlement.

BACKGROUND

I. PROCEDURAL HISTORY[1]

On February 15, 2019, Plaintiff Tushar Bhatia filed a Class Action Complaint against McKinsey & Company, Inc. ("McKinsey") and MIO Partners, Inc. ("MIO"), asserting claims for breach of fiduciary duty, prohibited transactions, and equitable restitution under ERISA. *See*

[1] The procedural history of the litigation was previously recounted in Plaintiff's briefing in support of his motion for preliminary approval of the Settlement (*ECF No. 74*) and his pending motion for attorneys' fees and costs, administrative expenses, and class representative service award (*ECF No. 97*). For ease of reference, Plaintiff has recounted that history here.

ECF No. 1. In summary, Plaintiff alleged that McKinsey adopted certain in-house funds ("MIO Funds") for the Plans that are managed by MIO, and not offered in any other retirement plan. *Id.* ¶¶ *28-31.* Plaintiff alleged that the MIO Funds performed worse than alternative, lower-cost investment options, and that MIO received over $20 to $36 million per year in investment management fees in connection with these funds. *Id.* ¶¶ *32, 42-45.* Further, Plaintiff alleged that Defendants failed to appropriately monitor and control the Plans' administrative expenses. *Id.* ¶ *87.*

On April 22, 2019, Defendants filed a Motion to Compel Arbitration, or in the Alternative, to Dismiss Plaintiff's Complaint. *ECF No. 30*. Plaintiff responded to Defendants' motion on May 20, 2019, *ECF No. 35*, and Defendants filed a reply on June 10, *ECF No. 43*. On November 12, 2019, while the motion was pending, the parties agreed to a stay of the litigation for purposes of mediation, which the Court granted on the same date. *ECF No. 55.* As a result, no decision on Defendants' motion was entered.

Following entry of the stay,[2] the parties proceeded with targeted discovery to facilitate mediation. *Declaration of Kai Richter in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement, ECF No. 75 ("First Richter Decl.")* ¶ *13.* As part of this process, Defendants produced several thousand pages of documents, including Plan documents and disclosures, relevant minutes from Trustee meetings relating to the Plans, and reports and recommendations relating to the Plans, as well as class data and investment data. *Id.* Class Counsel also engaged an investment expert to consult on appropriate damages comparators and calculation methods. *Id.*

On January 30, 2020, the parties engaged in a full-day, in-person mediation. *Id.* ¶ *14.* Although a settlement was not reached during the mediation, the parties continued to negotiate

[2] The stay was extended, at the parties' request, while settlement discussions continued. *See ECF Nos. 59, 61, 63.*

through the mediator over the next several months. *Id. ¶ 15.* After extensive arm's-length negotiations, the parties reached a settlement-in-principle on May 26, 2020. *Id. & ECF No. 64.* The terms of the Settlement are memorialized in the Settlement Agreement that has been preliminarily approved by the Court. *See ECF Nos. 91-01, 94.*

II. SETTLEMENT TERMS

A. Monetary Relief

Under the Settlement, Defendants will contribute a Gross Settlement Amount of $39,500,000 to a common Settlement Fund. *Settlement Agreement ("Settlement"), ECF No. 91-01 ¶ 2.30.* After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Compensation approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members in accordance with the Plan of Allocation in the Settlement. *Id. ¶ 5.9.* Under the Plan of Allocation, each eligible Class Member[3] 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.*[4] The Net Settlement Amount will then be allocated among eligible Class Members on a pro rata basis in proportion to their *Average*

[3] The certified Settlement Class is 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 September 18, 2020, 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 ECF No. 94 at 3.

[4] As previously discussed in connection with preliminary approval, the first component of the score is designed to approximate the amount of each eligible Class Member's recordkeeping claim, and the second component is designed to approximate the relative size of the investment claim in comparison to the recordkeeping claim. *First Richter Decl. ¶ 5.* This scoring system also accounts for the fact that Class Members with larger account balances in MIO Funds had relatively larger investment claims, but were subject to a greater risk of being subject to arbitration if their claims exceeded a threshold amount ($10,000 during the Class Period). *Id.; see also ECF Nos. 82, 85.*

Settlement Allocation Score across all quarters. *Id.* ¶ *6.4.2*.[5]

Current Participants will have their Plan accounts automatically credited with their share of the Settlement Fund. *Settlement* ¶ *6.5.* Former Participants will be required to submit a claim form that will allow 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.* Any uncashed checks will revert to the Settlement Fund and will be used to defray the Plans' administrative expenses. *Id.* ¶¶ *6.11, 6.12.*

B. Prospective Relief

The Settlement also provides for prospective relief. Specifically, McKinsey has agreed that the following procedures shall apply to the management of the Plans on a prospective basis:

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

Id. ¶ *7.1*.

C. Release of Claims

In exchange for the relief provided by the Settlement, the Settlement Class will release Defendants and affiliated persons and entities (the "Released Parties") from all claims:

- That were asserted in the Action or that arise out of, relate to, are based on, or have any connection with any of the allegations, acts, omissions, purported conflicts,

[5] If the dollar amount of the settlement payment to an Authorized Former Participant is calculated by the Settlement Administrator to be less than $5.00, then that Authorized Former Participant's payment or pro rata share shall be zero for all purposes. *Settlement* ¶ *6.4.2.*

representations, misrepresentations, facts, events, matters, transactions or occurrences asserted in the Action;[6] or

- That would be barred by *res judicata* based on the entry by the Court of any Final Approval Order; or

- That relate to the direction to calculate, the calculation of, and/or the method or manner of allocation of the Qualified Settlement Fund pursuant to the Plan of Allocation or to any action taken or not taken by the Settlement Administrator in the course of administering the Settlement; or

- That relate to the approval by the Independent Fiduciary of the Settlement Agreement [*see infra* at § V, 7-8], unless brought against the Independent Fiduciary alone.

Id. ¶ *2.44*. The parties agree that this release is specific to the claims that were asserted in relation to the Plans under ERISA, and German participants are not releasing any claims regarding their entitlement to their German pensions under German law. *Third Richter Decl. Exs. 3-4.*

III. PRELIMINARY APPROVAL OF SETTLEMENT

Plaintiff filed a motion seeking preliminary approval of the Settlement on August 10, 2020. *See ECF No. 73.* The Court held a conference regarding Plaintiff's motion on August 13, 2020, *ECF No. 78*, and subsequently requested additional letter briefing, *ECF No. 80*. After reviewing the letters from Class Counsel and an additional declaration from Plaintiff's expert (Steve Pomerantz, Ph.D.) relating to the Plan of Allocation, *see ECF Nos. 81, 82, 85*, the Court held a follow-up conference on September 9, 2020, *see ECF No. 86*. On September 18, 2020, the Court preliminarily approved the Class Action Settlement. *ECF No. 94.*[7]

[6] The release language goes on to provide certain examples that are not repeated here due to space limitations. The full release language, incorporated by reference, is in the Settlement ¶ 2.44.1.

[7] Prior to the Court's Preliminary Approval Order, the parties submitted an updated version of the Settlement Agreement on September 16, 2020, which addressed matters discussed at the conference on August 13, 2020 and certain typographical errors. *See ECF No. 91-1.* All references to the Settlement Agreement herein are to this updated version.

IV. CLASS NOTICE AND REACTION TO SETTLEMENT

Pursuant to the Court's Order preliminarily approving the Settlement, Analytics mailed the appropriate Settlement Notice (and Former Participant Claim Form, if applicable) to each of the Class members identified by the Plans' recordkeeper. *See Mitchell Decl. ¶¶ 9-10* In total, 35,973 Settlement Notices were mailed, including 27,608 Notices to Current Participants and 8,365 Notices to Former Participants. *Id. ¶ 7.*

Prior to sending these Notices, Analytics cross-referenced the addresses on the class list with the United States Postal Service National Change of Address ("NCOA") Database. *Id. ¶ 8.* In the event that any Settlement Notices were returned, Analytics re-mailed the Notice to any forwarding address that was provided, and performed a skip trace in an attempt to ascertain a valid address for the Class Member in the absence of a forwarding address. *Id. ¶¶ 12-13.* As a result, the notice program was very effective. Out of 35,973 Settlement Notices that were mailed, only 4% were ultimately undeliverable despite these efforts. *Id. ¶ 14.*

In the event that any Class Members desired further information, Analytics established a settlement website at www.mckinseyerisasettlement.com. *Id. ¶ 15.* Among other things, the Settlement Website included: (1) a "Frequently Asked Questions" page containing a clear summary of essential case information; (2) a "Home" page and "Important Dates" page, each containing clear notice of applicable deadlines; (3) a "Court Documents" page, which includes case and settlement documents for download (including the Complaint, the Settlement Agreement, Settlement Notices, Former Participant Claim Form, Plaintiff's Motion for Preliminary Approval of Class Action Settlement and supporting declarations and exhibits, the Preliminary Approval Order, Plaintiff's Motion for Approval of Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Service Award and supporting declaration

and exhibits); (4) contact information for Class Counsel and Defendants' Counsel; and (5) email, phone, and U.S. mail contact information for Analytics. *Id.* In addition, Analytics created and maintained a toll-free telephone support line (1-855-460-1240) as a resource for Class Members seeking information about the Settlement. *Id. ¶ 16.* This telephone number was referenced in the Notices, and also appears on the settlement website. *Id.*

The deadline to submit objections to the Settlement was January 20, 2021. *ECF No. 94 at ¶ 6.* As of that date, only one objection to the Settlement was received. *See Third Richter Decl. ¶ 4 & Ex. 2.*[8] As discussed below, that objection arises from a misunderstanding of the terms of the relevant Plan language (which includes German members) and the terms of the release (which does not apply to any pension rights such German members may separately have under the German Pension Plan). *See infra* at 21-22. No other objections to the Settlement have been received. However, one class member did write to say "thank you" for the work that was done in connection with the Settlement. *See Third Richter Decl. Ex. 6.*

V. REVIEW AND APPROVAL BY INDEPENDENT FIDUCIARY

Pursuant to Paragraph 3.1 of the Settlement and applicable ERISA regulations,[9] the Settlement was submitted to an independent fiduciary (Fiduciary Counselors) for review following the Court's preliminary approval order. *See Third Richter Decl. Ex. 1.* After reviewing the Settlement and other case documents, and interviewing counsel for each of the Parties, the Independent Fiduciary concluded:

> The Settlement terms, including the scope of the release of claims, the amount of cash received by the Plans, and the amount of any attorneys' fee award or any other sums to be paid from the recovery, are reasonable in light of the Plans' likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone.

[8] No further objections have been received since that time. *Third Richter Decl. ¶ 5.*
[9] *See* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830.

Id. at 11. Accordingly, the Independent Fiduciary "authorize[d] the Settlement in accordance with PTE 2003-39" and "approve[d] and authorize[d] the settlement of Plaintiff's Released Claims on behalf of the Plans" and "g[a]ve a release in its capacity as a fiduciary of the Plans, for and on behalf of the Plans." *Id. at 13.*

ARGUMENT

I. STANDARD OF REVIEW

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any settlement agreement that will bind absent class members. Fed. R. Civ. P. 23(e)(2). After notice to class members and a hearing, a court may approve a class action settlement if it is "fair, adequate, and reasonable, and not the product of collusion." *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000).

Whether to approve a proposed class action settlement is a matter of judicial discretion. *See Maywalt v. Parker & Parsley Petroleum Co*., 67 F.3d 1072, 1079 (2d Cir. 1995). However, there is a "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (internal quotation marks and citation omitted); *see also In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998); 4 NEWBERG ON CLASS ACTIONS ("NEWBERG") § 11:41 (4th ed. 2002). As a result, "Courts should give proper deference to the private consensual decision of the parties . . . [and] should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation . . . ." *Clark v. Ecolab Inc.*, No. 04 CIV. 4488 (PAC), 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (citations omitted). A court "must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case" because "[s]uch procedure would emasculate the very the purpose for which settlements are

made." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

In determining whether a proposed class action settlement is fair, reasonable, and adequate, courts review both the "substantive terms" of the settlement and the "process" by which the settlement was reached. *Weinberger v. Kendrick*, 698 F.2d 61, 73-74 (2d Cir. 1982). In particular, Federal Rule of Civil Procedure 23(e)(2) identifies the following four factors that the Court should consider: (1) adequacy of representation, (2) existence of arm's-length negotiations, (3) adequacy of relief, and (4) equitableness of treatment of class members. Fed. R. Civ. P. 23(e)(2). In addition, courts in this Circuit have traditionally considered the following factors (the "*Grinnell* factors") as part of their review: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all of the attendant risks of litigation. *Grinnell,* 495 F.2d at 463; *see also Wal-Mart Stores*, 396 F.3d at 117; *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-cv-1113 (VAB), 2016 WL 6542707, at *7 (D. Conn. Nov. 3, 2016) (applying *Grinnell* factors in determining that recent ERISA class settlement was "substantively fair" for plan participants). The Rule 23(e) factors "supplement rather than displace these *Grinnell* factors." *In re GSE Bonds Antitrust Litig.*, No. 19-CV-1704 (JSR), 2019 WL 6842332, at *1 (S.D.N.Y. Dec. 16, 2019).[10]

[10] Consistent with the intent of the 2018 amendments to the Federal Rules of Civil Procedure, only those *Grinnell* factors that are relevant to this Settlement are addressed here. *See* Fed. R. Civ. P. 23(e)(2) advisory committee note

II. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

The relevant factors outlined above overwhelmingly favor approval of the Settlement in this case. Further, the Independent Fiduciary's report and almost total absence of objections further confirm that the Settlement is fair, reasonable, and adequate.

A. The Class Representative and Class Counsel Have Adequately Represented the Class

Rule 23(e)(2)(A) requires the Court to find that "the class representatives and class counsel have adequately represented the class." This adequacy standard is more than met here.

The Class Representative, Tushar Bhatia, holds degrees in both management and computer science, and worked as a Senior Engagement Manager at McKinsey from 2011 to 2018 (first in India and later in the United States). *See Declaration of Tushar Bhatia in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement, ECF No. 76 ("Bhatia Decl.")* ¶ *2.* Plaintiff initially joined the Plans in July 2015 and remained a participant in the Plans until April 2019. *Id.* ¶ *3.* From July 2015 until December 2017, Plaintiff invested his account assets in MIO Funds, but later transferred the monies in his accounts to a target-date fund managed by State Street when that investment option became available in the Plans. *Id.* ¶ *4.* At the outset of the litigation, Plaintiff signed a written acknowledgement of his duties as a class representative, and he has sought to fulfill those duties throughout the course of the case. *Id.* ¶ *5 & Ex. 1.* Among other things, Plaintiff (1) reviewed the allegations in the Complaint; (2) provided information and documents to counsel to assist in the prosecution of the action; (3) reviewed the briefing in connection with Defendants' Motion to Compel Arbitration, or in the Alternative, to Dismiss; (4) submitted a declaration in opposition to Defendants' motion (*ECF*

(2018) (observing that the new Rule 23(e) factors are intended to help the court and counsel focus on the most pertinent considerations: "This amendment . . . directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.").

No. 36), as well as a second declaration in support of the Settlement; (5) reviewed Plaintiff's mediation statement; (6) traveled from Seattle to Atlanta to attend the mediation, and participated in the mediation in person; (7) reviewed the Settlement Agreement in its entirety; and (8) communicated with counsel throughout the case. *Bhatia Decl. ¶ 6.* Plaintiff falls within the proposed Settlement Class and is not aware of any conflicts between himself and any other class members. *Id. ¶ 11*. Accordingly, Plaintiff is an adequate class representative. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (adequacy inquiry looks for "conflicts of interest between named parties and the class they seek to represent"); *In re Global Crossing Secs. & ERISA Litig.*, 225 F.R.D. 436, 452 (S.D.N.Y. 2004) (finding class representatives adequate where their claims arose from the same alleged course of conduct and were based on the same legal theories as the class members).

Class Counsel are also adequate. In a similar ERISA action in this District, Judge Schofield appointed the same counsel (Nichols Kaster, PLLP) to represent a similar class, finding that "Plaintiffs' counsel are experienced litigators who serve as class counsel in ERISA actions involving defined-contribution plans[.]" *Moreno v. Deutsche Bank Am. Holding Corp.*, No. 15 Civ. 9936 (LGS), 2017 WL 3868803, at *11 (S.D.N.Y Sept. 5, 2017) ("*Moreno I*"). Indeed, a Bloomberg BNA article stated that "Nichols Kaster has been the driving force behind [the] flurry of litigation over proprietary mutual funds." Jacklyn Wille, *Deutsche Bank Can't Shake 401(k) Fee Lawsuit*, Bloomberg BNA (Oct. 17, 2016). As detailed in the attorney declaration in support of their motion for attorneys' fees, Class Counsel have (1) won favorable rulings on dispositive motions and/or class certification in over a dozen ERISA cases; (2) recently tried two ERISA class actions; (3) successfully litigated an appeal before the First Circuit in *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17 (1st Cir. 2018) ("*Brotherston II*"); and

(4) negotiated numerous ERISA class action settlements in addition to the present Settlement. *Declaration of Kai Richter in Support of Plaintiff's Motion for Approval of Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Service Award, ECF No. 98 ¶¶ 7-8.* Based on their experience, the firm's attorneys have been interviewed by several media outlets in connection with their ERISA work, and Nichols Kaster's undersigned counsel also has spoken at multiple national forums on ERISA litigation. *Id. ¶ 9.* Accordingly, Class Counsel are well qualified to represent the class. *See Global Crossing*, 225 F.R.D. at 453 (finding class counsel adequate where they had "extensive experience" in ERISA litigation and federal class actions). At all times, they have vigorously represented the interests of the class in this litigation. *First Richter Decl. ¶ 11.*

B. The Settlement Is the Product of Arm's-Length Negotiations Between Experienced Counsel Following Early Discovery

The second factor examines whether "the proposal was negotiated at arm's-length." Fed. R. Civ. P. 23(e)(2)(B). A class action settlement "will enjoy a presumption of fairness" where the settlement "is the product of arm's-length negotiations conducted by experienced counsel knowledgeable in complex class litigation." *In re Excess Value Ins. Coverage Litig.*, No. M–21–84RMB, MDL–1339, 2004 WL 1724980, at *10 (S.D.N.Y. July 30, 2004); *see also Wal-Mart*, 396 F.3d at 116. That is precisely the situation presented here. Class Counsel and Defendants' counsel (Morgan Lewis & Bockius, LLP) are knowledgeable and experienced in complex class actions such as this and were assisted in their negotiations by Hunter R. Hughes, III, an experienced and well-respected mediator. *See First Richter Decl. ¶ 14 & Ex. B.* The Settlement was reached only after several months of negotiations following the initial mediation session, culminating in a mediator's proposal from Mr. Hughes that both sides ultimately accepted. *Id.* ¶ 15. At all times, the negotiations were conducted at arm's length. *Id.* Accordingly, this factor

also favors settlement approval. *See GSE Bonds*, 2019 WL 6842332, at *2 (finding procedural fairness evidenced by arm's-length negotiations where parties engaged an experienced mediator to facilitate extensive and informed negotiations).

Although the case was resolved early in the litigation process prior to formal discovery, "[f]ormal discovery is not a prerequisite [to a fair Settlement][.] [T]he question is whether the parties had adequate information about their claims." *Global Crossing*, 225 F.R.D. at 458; *see also In re AOL Time Warner, Inc. Secs. & ERISA Litig.*, No. MDL 1500, 02 Civ. 5575(SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006) (relevant inquiry "is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement"). Here, the parties had sufficient information to evaluate the case for purposes of settlement: (1) Class Counsel undertook an extensive investigation of the factual and legal bases for Plaintiff's claims prior to commencing the action, *First Richter Decl. ¶ 11*; (2) the parties' legal positions were staked out in their motion papers (which were vigorously contested); (3) Defendants produced a significant number of documents and information to Plaintiff prior to the mediation, *id. ¶ 13*; (4) Class Counsel had the necessary experience and qualifications to evaluate the parties' legal positions and the early discovery that was produced, *see supra* at § II.A at 11-12; and (5) Class Counsel retained an expert to assist them in their analysis. Under these circumstances, it was appropriate for the parties to explore an early settlement. *See Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-cv-1113 (VAB), 2016 WL 6542707, at *8 (D. Conn. Nov. 3, 2016) ("Although formal discovery had yet to occur at the time the parties engaged in settlement negotiations, Class Counsel conducted extensive investigation into the facts, circumstances, and legal issues associated with this case before agreeing to the Settlement."); *accord Andrus v. New York Life Ins. Co.*, No. 2:16-cv-

05698, ECF No. 84 (June 15, 2017) (approving early settlement of similar ERISA action involving same counsel for both sides).[11]

C. The Relief Provided by the Settlement Is Fair, Reasonable, and Adequate

The third factor under Rule 23 is whether "the relief provided to the class is adequate" in light of "the costs, risks, and delay" of further litigation and other relevant considerations.[12] *See* Fed. R. Civ. P. 23(e)(2)(C). This factor is also met here.

1. The Recovery Is Substantial and Compares Favorably to Other ERISA Settlements

As the Independent Fiduciary noted in its Report, the recovery provided by the Settlement is "reasonable in light of the Plans' likelihood of full recovery, the risks and costs of litigation, and the value of the claims forgone." *Third Richter Decl. Ex. 1 at 1.* Indeed, the $39,500,000 settlement amount in this case represents one of the larger settlements that has been negotiated in a similar ERISA case involving a 401(k) plan. *See First Richter Decl. ¶ 7.* By comparison, the ERISA settlements that were approved in the *Deutsche Bank, TIAA*, and *New York Life* cases in this District were $21.9 million, $5 million, and $3 million, respectively. *Id.*

The recovery measures favorably not only on a gross basis, but as a percentage of Plan assets. The $39.5 million settlement amount constitutes approximately 0.65% of Class Members' total assets in the Plans ($6.2 billion). *Id.* By comparison, the recoveries in *Deutsche Bank, TIAA*, and *New York Life* represented 0.66%, 0.23%, and 0.09% of plan assets. *Id.* In this regard, the

[11] Although this case was settled early, Class Counsel are no strangers to lengthy ERISA litigation. As noted above, Class Counsel have recently taken two ERISA class cases to trial (*see supra* at 11), and litigated the *Deutsche Bank* ERISA action in this District to the very eve of trial before it was settled. *See Moreno v. Deutsche Bank Americas Holding Corp.*, No. 15 Civ. 9936 (LGS), ECF No. 321 at 5 (S.D.N.Y. Aug. 14, 2018) ("the parties reached a settlement-in-principle on July 8, 2018 immediately preceding the scheduled start date of trial." (internal parentheses omitted)).

[12] Other relevant considerations include (1) the terms of any award of attorneys' fees, (2) any related agreement, and (3) the effectiveness of any proposed distribution method. The first consideration has been addressed in connection with Plaintiff's Motion for Attorneys' Fees, *see ECF No. 97*, and with respect to the second consideration, there are no agreements relating to the Settlement other than the fee agreement that Class Counsel already has reported in connection with that motion, *id.* at n.10. The third criteria is discussed in Section II.D below. *See infra* at 19-20.

Deutsche Bank case is a particularly good marker because it also involved claims relating to proprietary funds that made up a portion of the plan's investment menu, and excessive recordkeeping fees. *See Moreno I*, 2017 WL 3868803, at *2.

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).[13] *See First Richter Decl. ¶ 8.* These recovery percentages are also reasonable in relation to other cases. *See Sims v. BB&T Corp.*, No. 1:15-CV-732, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) (approving $24 million ERISA 401(k) settlement that represented 19% of estimated damages); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-01614, ECF No. 185 (C.D. Cal. July 30, 2018) (approving $12 million settlement in ERISA case involving proprietary funds and allegations of excessive fees, where that amount represented approximately one-quarter of estimated total plan-wide losses of $47 million); *Johnson v. Fujitsu Tech. & Business of Am., Inc.*, No. 16-cv-03698-NC, 2018 WL 2183253, at *6-7 (N.D. Cal. May 11, 2018) (approving $14 million settlement in ERISA case involving alleged excess fees, where that amount represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages").[14]

Further, in addition to the foregoing monetary relief, the Settlement also provides for prospective relief, including (1) independent third-party review of the investment options in the

[13] 39.5 million / [180 million + 9 million] = 20.9%.

[14] *See also Acevedo v. Workfit Med. LLC*, 187 F. Supp. 3d 370, 381 (W.D.N.Y. 2016) (recovery of approximately 23% of maximum recoverable damages was reasonable); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012) (approving recovery of approximately 13% of maximum provable damages); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses").

Plans and any communications to participants regarding those investment options; (2) independent third-party fiduciary review and approval of all proposed expense reimbursements by the Plans to McKinsey, MIO, or any other affiliated person or entity; and (3) a request for proposal process for recordkeeping services prior to the end of the current recordkeeping contract. *See supra* at 4. This relief is designed to address the core issues in the lawsuit, and also supports approval of the Settlement. *See Moreno v. Deutsche Bank Americas Holding Corp.*, No. 15 Civ. 9936 (LGS), ECF No. 348 at 4-5 (S.D.N.Y. Mar. 7, 2019) (finding that "non-monetary benefits", including independent fiduciary review of the proprietary investments in the plan, "have significant value for Plan participants")*; accord Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 Civ. 4270(PAC), 2009 WL 5851465, at *4 (S.D.N.Y. Mar. 31, 2009) (finding that settlement was "fair, reasonable, and adequate" where it provided for "meaningful injunctive relief").

2. Continued Litigation Would Have Entailed Significant Risk

In the absence of a settlement, Plaintiff would have faced potential litigation risks. *See In re WorldCom, Inc. ERISA Litig.*, No. 02 Civ. 4816 (DLC), 2004 WL 2338151, at *6 (S.D.N.Y. Oct. 18, 2004) (noting that there is a "general risk inherent in litigating complex claims such as these to their conclusion."); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) ("Litigation inherently involves risks."). The Settlement was negotiated while Defendants' Motion to Compel Arbitration and, in the Alternative, to Dismiss Plaintiff's Complaint was pending. Although Plaintiff believes there is strong support in this District for the type of claims asserted here,[15] it is uncertain whether he would have prevailed on the motion.

[15] *See Moreno v. Deutsche Bank Am. Holding Corp.*, No. 15 Civ. 9936 (LGS), 2016 WL 5957307 (S.D.N.Y. Oct. 13, 2016) (denying motion to dismiss ERISA breach of fiduciary duty claims involving proprietary funds and recordkeeping expenses); *Leber v. Citigroup 401(k) Investment Cmte.*, No. 07–Cv–9329 (SHS), 2014 WL 4851816,

Specifically, with regard to the motion to dismiss, this was not a typical case involving proprietary mutual funds, as it dealt with unique in-house investments. The Northern District of California recently dismissed a complaint in another ERISA class action where the plaintiffs similarly alleged imprudence related to nontraditional investments that were allegedly underperforming and expensive but failed to identify "meaningful benchmarks" against which to compare the challenged funds. *Anderson v. Intel Corp. Investment Policy Committee*, No. 19-CV-04618-LHK, 2021 WL 229235, at *8 (N.D. Cal. Jan. 21, 2021). With regard to the motion to compel arbitration, this is an issue that is rapidly evolving in class action litigation. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (holding that class arbitration cannot be compelled where the arbitration provision is "ambiguous"); *AT&T Mobility, v. Concepcion*, 563 U.S. 333, 339 (2011) (stating that the FAA reflects a "'liberal federal policy favoring arbitration'"). Even if he had prevailed, Defendants would have been entitled to interlocutory appeal of any denial of their motion to compel arbitration, *see* 9 U.S.C. § 16(a)(1)(c), which would have further prolonged the proceedings before litigation in this Court could even go forward.

Assuming that Plaintiff did prevail on the motion and any initial appeal relating to arbitration, a successful outcome was not assured. In two recent class action trials involving defined contribution plans (including one trial in this District), the defendants were the prevailing party. *See Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 711 (W.D. Mo. 2019).[16] Moreover, even if Plaintiff prevailed on the issue of liability, significant issues would have remained regarding proof of loss. *See Sacerdote*, 328 F. Supp. 3d at 280 (finding that "while there were deficiencies in the

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at *4 (S.D.N.Y. Sept. 30, 2014) ("Essential to the plausibility of plaintiffs' claims was the allegation that the Affiliated Funds charged higher fees than those charged by comparable Vanguard funds.").

[16] The defendants also prevailed at trial in *Brotherston v. Putnam Invs., LLC*, No 15-13825-WGY, 2017 WL 2634361 (D. Mass. June 19, 2017), before that trial court ruling was partially vacated on appeal in *Brotherston II*.

Committee's [fiduciary] processes—including that several members displayed a concerning lack of knowledge relevant to the Committee's mandate—plaintiffs have not proven that … the Plans suffered losses as a result."); *Wildman*, 362 F. Supp. 3d at 710 (finding plaintiffs failed to prove a loss to the plan based on the testimony of Dr. Steve Pomerantz, the same expert retained by Plaintiff in this case).

None of this is to say that Plaintiff lacked confidence in his claims. However, given the risks of further litigation, "it is reasonable … 'to take the bird in hand instead of the prospective flock in the bush.'" *In re Partsearch Techs., Inc.*, 453 B.R. 84, 99 (Bkrcy. S.D.N.Y. 2011) (quoting *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974)). As other courts have noted, "settlement of a 401(k) excessive fee case benefits the employees and retirees in multiple ways." *Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016).

3. ERISA Class Cases Are Complex, Expensive, and Often Lengthy

At a minimum, continuing the litigation would have resulted in complex and costly proceedings, which would have significantly delayed relief to class members even if Plaintiff ultimately prevailed. ERISA 401(k) cases such as this "often lead[] to lengthy litigation." *Krueger v. Ameriprise Fin., Inc.*, No. 11–CV–02781, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015). Indeed, these cases can extend for a decade before final resolution, sometimes going through multiple appeals. *See, e.g., Tussey v. ABB, Inc.*, 850 F.3d 951 (8th Cir. 2017) (recounting lengthy procedural history of case that was initially filed in 2006, and remanding to district court a second time); *Tibble v. Edison Int'l*, No. CV 07-5359 SVW (AGRx), 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining remaining issues ten years after suit was filed in 2007).[17]

[17] In the few cases where a larger aggregate settlement amount was negotiated, the class had to endure years of protracted litigation. *Cf.*, *Tussey v. ABB, Inc.*, No. 06-CV-04305-NKL , 2019 WL 3859763, at *1-2 (W.D. Mo. Aug.

The long time horizon of many of these cases is, in part, a function of their complexity. It is well-recognized that "ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation." *Krueger v. Ameriprise Fin., Inc.*, No. 11–CV–02781, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015). The complexity of these types of cases (particularly this case involving novel investments) further weighs in favor of approval of the Settlement. *See Kemp-DeLisser,* 2016 WL 6542707, at *9 (finding complex damages analysis weighed in favor of ERISA class settlement); *In re WorldCom, Inc. ERISA Litig.*, No. 02 Civ. 4816 (DLC), 2004 WL 2338151, at *6 (S.D.N.Y. Oct. 18, 2004) (observing that ERISA fiduciary breach claims are "complex" and contain "inherent" risks in litigating them to their conclusion); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *2 (S.D. Ill. July 17, 2015) (noting that ERSIA 401(k) cases are "particularly complex").

D. The Relief Provided by the Settlement Will Be Efficiently and Equitably Distributed

The Settlement also treats Class Members equitably and will be delivered through an effective method of distribution. As noted above, the Net Settlement Amount will be allocated among all eligible Class Members on a *pro rata* basis pursuant to a common formula as set forth in the Plan of Allocation. *See supra* at 3-4. That formula was discussed in detail in connection with Plaintiff's preliminary approval motion, and is supported by declarations from both Class Counsel and Plaintiff's investment expert. *See First Richter Decl. ¶ 5; Declaration of Steve Pomerantz, Ph. D., Concerning the Proposed Plan of Allocation (ECF No. 85).* In light of this, the Independent Fiduciary concluded that the Plan of Allocation "reasonably balance[s] litigation

16, 2019) ($55 million settlement achieved after 13 years of litigation); *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW , 2016 WL 3791123, at *1, 4 (N.D. Ill. Mar. 31, 2016) ($57 million settlement achieved after nine years of litigation); *Abbott v. Lockheed Martin Corp.*, No. 06-cv-701, 2015 WL 4398475, at *1 (S.D. Ill. July 17, 2015) ($62 million settlement achieved after 8.5 years of litigation).

risks from different claims." *Richter Decl. Ex. 1 at 8.* In response to the Settlement Notices, there have been no objections to the Plan of Allocation.

Current Participants will have their accounts automatically credited with their share of the Settlement Fund. *Id. ¶ 6.5.* Although Former Participants are required to submit a Claim Form for administrative reasons—to specify a cash payment or rollover election and to verify their identity and current address before any check is mailed—they are entitled to the same proportional share of the Settlement. *Id. ¶ 5.6.* This method of distribution has been approved in numerous ERISA class action settlements, including the *Moreno* and *Andrus* cases in this District and the *M&T* settlement in the Western District of New York. *See Moreno v. Deutsche Bank Americas Holding Corp.*, No. 1:15-cv-09936, ECF No. 322-1 at ¶¶ 6.5-6.6 (S.D.N.Y. Aug. 14, 2018); *Andrus v. New York Life Ins. Co.*, No. 2:16-cv-05698, ECF No. 66-1 at ¶¶ 6.5-6.6 (S.D.N.Y. Feb. 14, 2017); *In re: M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-00375, ECF No. 159-1 at ¶¶ 6.5-6.6 (Dec. 26, 2019); *see also Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 478-79 (E.D. Pa. 2007).

E. The Independent Fiduciary and Overwhelming Majority of Class Members Support the Settlement

The positive response from the Independent Fiduciary and the Class as a whole also support the Settlement. After completing the review required by Paragraph 3.1 of the Settlement and applicable law (*see supra* at n.9), the Independent Fiduciary concluded, "[g]iven the substantial expense and risk involved in further litigation, the difficulty in prevailing on the merits and establishing damages, and the delay that would have resulted in providing any relief to the Class if the matter had been prolonged through trial and appeal, the amount of the Settlement ... is reasonable." *See Third Richter Decl., Ex. 1 at 11-12.* The Independent Fiduciary further found the scope of the release and the proposed Plan of Allocation to also be reasonable.

Id. at 12. Moreover, the Settlement received nearly unanimous approval from the Settlement Class, as only one class member out of more than 35,000 (0.003% of the Class) objected to the Settlement. The Court may infer from this that the overwhelming majority of Class Members believe the Settlement is fair, reasonable, and adequate. *See Charron v. Pinnacle Group N.Y. LLC*, 874 F. Supp. 2d 179, 198 (S.D.N.Y. 2012) ("The Court cannot help but conclude that the silence and acquiescence of 99% of the Class Members speaks more loudly in favor of approval than the strident objections of the 1% against it."), *aff'd sub nom. Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 167–68 (S.D.N.Y. 2007) ("[T]he relatively small number of objections . . . militate in favor of approving the settlement as fair, adequate, and reasonable."). As the Second Circuit has noted, "the absence of substantial opposition is indicative of class approval[.]" *Wal-Mart Stores,* 396 F.3d at 118.

The sole objection should be overruled. In summary, the objector believes that he was improperly included in the class and has no interest in the suit because he was a member of the German Pension Plan ("GPP"), and he is concerned about giving up his "freedom to sue" McKinsey & Co. concerning the GPP. *See Third Richter Decl. Ex. 2 at 1-2.* Both of these grounds for the objection are unfounded. The PSRP specifically includes "German Members," *see Third Richter Decl. Ex. 5*,[18] and the objector is identified in the PSRP data as an account holder, *see Third Richter Decl. Exs. 3-4.* Thus, GPP members including the objector are properly included in the Settlement Class. Further, the release in the Settlement Agreement does not include any potential claims against the GPP. Under Paragraph 2.44 of the Settlement Agreement, the "Released Claims" are specific to the claims asserted in the lawsuit relating to

[18] Under the PSRP, German members are entitled to the greater of the value of their PSRP account and their pension promise under the GPP. *See id. at § 13.3-13.4.*

"the Plans", which are defined to include only the PSRP and MPPP, *see Settlement Agreement ¶ 2.38.* Therefore, claims against the GPP are not included within the definition of Released Claims, as Defendants' counsel has acknowledged. *See Richter Decl. Ex. 4.*[19] Because the only objection regarding the Settlement is based on a misunderstanding of the Plan and release terms, Plaintiff respectfully asks that it be overruled. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10-11 (S.D.N.Y. Feb. 1, 2007) (overruling as moot one objection where class member misunderstood class definition and whether she was properly included, and another objection where objector was assured certain claims would not be released).

III. THE CLASS NOTICE PROGRAM WAS REASONABLE AND EFFECTIVE

Finally, the class notice program in this case also was reasonable and satisfied the requirements of Due Process and Rule 23. The "best notice" practicable under the circumstances includes individual notice to all class members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). That is precisely the type of notice that was provided here.

As noted above, the Settlement Administrator mailed the Court-approved Settlement Notices to Class Members via U.S. Mail to their last known address. *See supra* at 6. This type of notice is presumptively reasonable. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985); *Langford v. Devitt*, 127 F.R.D. 41, 45 (S.D.N.Y. 1989) ("[N]otice mailed by first class mail has been approved repeatedly as sufficient notice of a proposed settlement."); *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814, at *11 (S.D.N.Y. Sept. 9, 2015) ("Here, the robust Notice Program, which included mailing individual Notices to the last known address of all Class members, more than meets the requirements of due process, Rule 23,

[19] Consistent with defense counsel's acknowledgement, Class Counsel has informed the objector that his claims against the GPP are not released (with defense counsel copied on the email), *see Third Richter Decl. Ex. 3.*

and the notice standards articulated by the Second Circuit."). The record reflects that 96% of Settlement Notices were successfully delivered. *Mitchell Decl. ¶ 14.* This confirms the effectiveness of the notice program in this case. *See, e.g.*, *In re Facebook, Inc., IPO Sec. and Deriv. Litig.*, 343 F. Supp. 3d 394, 411 (S.D.N.Y. 2018) (finding notice reasonable where 95% of packets were delivered, noting "[t]he relevant question is not whether some individual shareholders got adequate notice, but rather whether the class as a whole had notice adequate to flush out whatever objections might reasonably be raised.") (quotation marks and citation omitted); *Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 52 (W.D.N.Y. 2018) (finding similar notice method reasonable where class counsel "[t]ook reasonably sufficient steps to ensure that potential class members received the notice by utilizing software programs to verify the initial mailing addresses as well as to secure additional locational data after several class notices were returned as undeliverable" and citing additional cases).

The content of the Notices also was reasonable. Both Settlement Notices included, among other things: (1) a summary of the lawsuit; (2) a clear definition of the Settlement Class; (3) a description of the material terms of the Settlement; (4) a disclosure of the release of claims; (5) instructions for submitting a claim (in the event that one was required); (6) instructions as to how to object to the Settlement and a date by which Settlement Class members must object; (7) the date, time, and location of the final approval hearing; (8) contact information for the Settlement Administrator; and (9) information regarding Class Counsel and the amount that Class Counsel would seek in attorneys' fees[20] (as well as the proposed service award). *See Mitchell Decl. Exs. 1 & 2.* This was more than sufficient to "apprise the prospective members of the class of the terms of the proposed settlement and of the options . . . open to them in connection with the

[20] In the exercise of their discretion, Class Counsel are seeking a lower fee percentage (20%) than the amount they were allowed to seek under the Settlement (25%). The Notices reported the higher percentage as a "not to exceed" amount.

proceedings." *Wal-Mart Stores*, 396 F.3d at 114 (quoting *Weinberger*, 698 F.2d at 70); *see also In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (settlement notice "need only describe the terms of the settlement generally"). Notably, no Settlement Class Member has claimed that the Notices were deficient, and to the extent they had any questions, they could review the settlement website, call the toll-free telephone line, or contact the Settlement Administrator or Class Counsel.

IV. THE COURT SHOULD REAFFIRM CERTIFICATION OF THE SETTLEMENT CLASS

In its Order for Preliminary Approval of the Settlement, the Court preliminarily certified the following Settlement Class:

> 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 September 18, 2020, 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.

ECF No. 94.

In his memorandum of law in support of his motion for preliminary approval, Plaintiff established that: (1) the class was sufficiently numerous; (2) Plaintiff raised common issues in the Class Action Complaint; (3) Plaintiff's claims are typical of other class members' claims; (4) Plaintiff is an adequate class representative; (5) Class Counsel is experienced and competent; (6) class certification is appropriate under Fed. R. Civ. P. 23(b)(1)(A) due to the risk of inconsistent adjudications; and (7) class certification is appropriate under Fed. R. Civ. P. 23(b)(1)(B) because any individual adjudication would be dispositive of the interests of other class members. *ECF No. 74 at 20–25*. Nothing has changed since the Court preliminarily certified the class for

preliminary approval. Accordingly, the Court should reaffirm its approval of Settlement Class for purposes of final approval.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order granting final approval of the Settlement in the form submitted herewith.

Respectfully Submitted,

Dated: February 3, 2021

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