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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

IN RE: MCKINSEY & CO., INC.)
NATIONAL PRESCRIPTION OPIATE)
CONSULTANT LITIGATION) **No. 21-md-02996-CRB**
_____)

San Francisco, California
Thursday, July 29, 2021

TRANSCRIPT OF PROCEEDINGS VIA ZOOM WEBINAR

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(Appearances continued on next page)

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Official Reporter - U.S. District Court

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24 (Appearances continued on next page)

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24 (Appearances continued on next page)

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BY: JOSH A. COHEN, ESQ.

1 Thursday - July 29, 2021

10:05 a.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Calling Civil action 21-md-2996, In re
5 McKinsey & Company, Inc., National Prescription Opiate
6 Consultant Litigation.

7 One by one, Counsel, please state your appearances for the
8 record.

9 **MS. CABRASER:** Good morning, Your Honor. Elizabeth
10 Cabraser, of Lieff Cabraser, appearing for various plaintiffs.

11 **MR. SARKO:** Good morning, Your Honor. Lynn Sarko,
12 from Keller Rohrback, on behalf of the Washington State cities
13 and counties, King County, Washington, and Skagit County,
14 Washington.

15 **MR. PRESNAL:** Good morning, Judge. Justin Presnal,
16 with Simmons Hanly Conroy. I'm here representing some of the
17 New York plaintiffs, cities and counties.

18 **MS. BENEDETTO:** Good morning, Your Honor. TerriAnne
19 Benedetto on behalf of Mr. Dugan, who I understand was unable
20 to access the Zoom, on behalf of Teamsters Local 404.

21 **MR. MILLER:** Good morning, Your Honor. Lloyd Miller,
22 at Sonosky Chambers, on behalf of the Navajo Nation and other
23 Indian Tribes in this matter.

24 **MS. SUTTON:** Good morning, Your Honor. Tara Sutton,
25 from Robins Kaplan in Minneapolis, on behalf of The Fond du Lac

1 Band of Chippewa Lake Superior.

2 **MR. MEHRI:** Good morning, Your Honor. This is Cyrus
3 Mehri, of Mehri & Skalet in Washington D.C., on behalf of the
4 Independent Public Schools; specifically, West Virginia and
5 Kentucky schools have filed so far.

6 **MS. BAIG:** Good morning, Your Honor. Aelish Baig,
7 with Robbins Geller, on behalf of various plaintiffs.

8 **MR. SCALIA:** Good morning, Your Honor. David Scalia,
9 with the Dugan Law Firm on behalf of Teamsters Local 404.

10 **MS. HIGGINS:** Good morning, Your Honor. Anna Higgins
11 on behalf of Series 17-04-631, LLC.

12 **MR. PIERS:** Good morning, Your Honor. Matthew Piers,
13 Hughes, Socol, Piers, Chicago, also on behalf of certain public
14 school district claims.

15 **MR. BICKFORD:** Good morning, Your Honor. Scott
16 Bickford, Martzell, Bickford, and Centola in New Orleans, on
17 behalf of NAS children.

18 **MR. FRIEDMAN:** Good morning, Your Honor. This is Jeff
19 Friedman and Matt Conn, Friedman, Dazzio firm. We're here on
20 behalf of the states of Alabama, Georgia, and Tennessee in
21 class actions on behalf of cities and counties.

22 **MR. NEFZGER:** Good morning, Your Honor. Will Nefzger,
23 Bahe, Cook, Cantley, and Nefzger, here on behalf of several
24 local governments.

25 **MS. BRITO:** Good morning, Your Honor. Nicolle Brito,

1 with Robbins Geller, on behalf of various plaintiffs.

2 **MR. MARTINEZ:** Good morning, Your Honor. This is Juan
3 Martinez on behalf of West Virginia cities and counties.

4 **MR. SOBOL:** Good morning, Your Honor. Tom Sobol, with
5 Hagens Berman Sobol Shapiro, co-counsel with the Dugan firm and
6 Ms. Benedetto, for Teamsters 404 and other third-party payor
7 interests.

8 **MR. FASTIFF:** Good morning, Your Honor. Eric Fastiff,
9 of Lief Cabraser Heimann & Bernstein, on behalf of numerous
10 plaintiffs.

11 **MR. RICE:** Good morning, Your Honor. This is Joe
12 Rice, of Motley Rice, here on behalf of MDL 2804 as well as a
13 number of individual subdivisions that have filed.

14 **MS. HUMPHREYVILLE:** Good morning, Your Honor.
15 Catherine Humphreyville, of Lief Cabraser Heimann & Bernstein,
16 on behalf of various plaintiffs.

17 **MR. LEVERIDGE:** Good morning, Your Honor. Richard
18 Leveridge, from Gilbert LLP, on behalf of the Navajo Nation.

19 **MR. ALEXIS:** Good morning, Your Honor. Ralph Alexis,
20 Porteous, Hainkel & Johnson in New Orleans, on behalf of
21 Allegiance Healthcare Network and other Louisiana private
22 hospitals.

23 **MS. HUDSON:** Good morning, Your Honor. Jenna Hudson,
24 of Gilbert LLP, on behalf of the Navajo Nation.

25 **THE COURT:** Do we think that's it? Dangerous

1 question.

2 Well, let's -- obviously, if there are other appearances,
3 then these people can speak out during the course of the
4 proceedings.

5 This is the first status conference in the newly-created
6 MDL, and I think that I can make an observation that perhaps
7 everyone, everyone, agrees with, which is that this forum was
8 not anybody's first choice. At least to my knowledge, it
9 wasn't anybody's first choice.

10 So I am sure that you are all, in equal measures,
11 surprised and delighted to be here. And we will proceed on
12 that assumption because I think you're here, obviously.

13 So let's talk about what I would like to talk about today,
14 which is, essentially, the response to my request that the
15 parties be prepared to discuss the status of lawsuits pending
16 in the MDL, including tagalongs and motions to remand the
17 February 2021 settlements -- settlement agreements with the
18 state AGs; defendant's position on liability, broadly speaking,
19 because I think it's highly -- it's complicated; and, finally,
20 the efforts to preserve evidence.

21 I don't think there's much to be said about that because
22 I'm satisfied, unless some party is not, that McKinsey has
23 taken steps in order to instruct their entities not to destroy
24 any evidence. And if there's anything that is of concern in
25 that regard, of course, I'm prepared to discuss it this

1 morning.

2 There are several other things that -- let me add to our
3 agenda. One is I want to set up a process, which I will send
4 out an order today or tomorrow, outlining how the plaintiffs'
5 steering committee and lead counsel will be selected.

6 In other words, I'd like to have applications by
7 plaintiffs for that particular role and how they see it. And I
8 will explain in my order what I would like in terms of
9 submission.

10 I also want to announce that Magistrate Judge Sallie Kim
11 will be handling the discovery matters in this action as well
12 as any other related matter from time to time that we may give
13 her. But all pleadings should reflect that in parenthesis she
14 is the magistrate judge who will assist the Court and, I would
15 say, the parties, in seeing this litigation move in an orderly
16 fashion.

17 So let me start by -- let me start by what I think is an
18 issue that I need to address at the outset, several of them,
19 but one is the effect, if any, of settlements that have been
20 already achieved by McKinsey and various parties relating to
21 the issues that are the subject of this litigation.

22 As I understand from the submission that I received from
23 McKinsey, that while -- McKinsey says that they have reached
24 settlements in all 50 states, five territories, and the
25 District of Columbia.

1 What I think they meant by that, at least what I
2 understood them to mean by that, is that there are entities of
3 different kinds in these different states, and they have
4 achieved settlements with these entities in various states. I
5 didn't read it to mean that they had achieved settlement with
6 50 attorney generals, but that may not be the case. And I'll
7 be apprized of that fact.

8 What I am interested in doing is trying to, first, to the
9 extent I can -- because the parties would not disagree as to
10 this -- separate those entities or those plaintiffs that the
11 defendant does not contend they have achieved a settlement
12 with.

13 Now, principal, what I see is entities which are part of
14 Native Americans, Indian settlements that -- that I don't think
15 the parties argue -- that is, McKinsey, argues -- that they've
16 achieved a settlement with them. But that's the purpose of
17 today's hearing, to see whether that understanding on my part
18 is correct.

19 So to the extent that there are entities out there
20 represented this morning by plaintiffs' counsel to which it's
21 conceded there has not been a settlement, I want to deal with
22 those.

23 To the extent that there are the remaining group, which is
24 those people that McKinsey maintains a settlement has been
25 achieved, I want to tee that up for a resolution, to the extent

1 I'm able to, in the first instance, because it just seems to
2 me, practically speaking, if somebody has settled, then
3 McKinsey is entitled to the effect of that settlement, absent
4 other circumstances of which I'm not aware, the benefit of the
5 settlement, which is it's been settled.

6 And then it doesn't seem to me that there's any necessity
7 for that party, after I rule, to continue with the litigation
8 if I maintain that it's been settled.

9 So I think that's a winnowing process that can be achieved
10 relatively quickly in this litigation, and I think it's the
11 very first thing, though normally -- if there is a normal --
12 normally, that's not what an MDL would address. Though I think
13 any litigation would address both. "Judge, we settled this
14 case." So, of course, you're going to take a look at it.

15 Then I want to try to figure out in my own mind what
16 impact any of that would have with respect to remands. Now,
17 remands, it's argued, as I understand it, basically, that this
18 doesn't have jurisdiction, that the case was brought to the MDL
19 litigation and it should return to the state court litigation
20 from whence it sprang. And that is something that I do want to
21 address.

22 However, to be candid with everyone on this call, it is
23 not the first determination that I intend to make. I intend to
24 take a look at what is the field -- really, the litigating
25 field in front of me and then figure out whether any part of

1 that litigating field -- that is, that has not been rendered
2 moot by a settlement -- and how they should proceed. Whether
3 they should proceed in state court, whether it's an advantage
4 to stay here for a bit, we'll see.

5 Usually the claim of remands is, "We want an early, a
6 prompt adjudication of our claims." That's what plaintiffs
7 say. And they point to the fact that they filed in state court
8 seeking a resolution of the claim in a timely fashion, prompted
9 by a number of things, including the fact that this is a health
10 crisis and, therefore, it is a serious matter that isn't just
11 addressed by way of eventual judgments in the case. I'm
12 sympathetic to that.

13 I understand that when one looks at an MDL or any
14 litigation, one has to look beyond the factor of is it simply a
15 request for some money which can be satisfied at some point in
16 the future, or is it a request for money which will seek an
17 abatement of the nuisance, if that's what it is, immediate
18 relief, which may be warranted and necessary for some divisions
19 of any state to allocate resources in light of the opioid
20 epidemic.

21 So I don't think I need any urging by the plaintiffs to
22 try to get a rapid determination of this case. Anybody who
23 knows me knows that when you're all here -- somebody did make
24 an observation you put on your track shoes. And, indeed, the
25 track shoes are on for all of us.

1 We want to seek as quick a resolution as we can of these
2 various matters. And, to that end, I am going to suggest to
3 the parties that we set up a schedule for as prompt a
4 resolution of the efficacy or the impact of the February 2021
5 settlement.

6 I'm also mindful, thanks to the disclosures, that it is
7 anticipated that in the first week of November, consistent with
8 settlement agreements that have already been achieved or
9 settlements that have already been achieved, there is going to
10 be a disclosure of information to the settling parties of
11 materials related to McKinsey's activities with respect to the
12 work that they performed in connection with the distribution --
13 maybe that's the wrong word -- of the opioids; marketing and so
14 forth. That is a subject matter which is up in this lawsuit.

15 And maybe I'm naive in this regard, but I think that at
16 least some portion, and I'm hopeful some large portion, of
17 discovery -- of the issues relating to discovery will be
18 satisfied by the disclosure of this information.

19 I noted, when I read through one of the settlement
20 agreements, that there's a protocol, first of all, for
21 materials that are not disclosed, that are otherwise
22 privileged. I understand that must go through some process.

23 But I found interesting, and in a good way, that a number
24 of these materials will -- or the materials that will be
25 disclosed will also become accessible to the public. And I

1 think that that information will be very helpful in informing
2 everyone's judgment as to what is important to litigate and
3 what is less important to litigate.

4 Litigation -- and when I see all of you in front of me,
5 it's a bit ridiculous, in my opinion, to substitute for your
6 experience. But, of course, I'm the judge. So I would say
7 that there are a thousand issues one can address. And I've had
8 some experience now in the opioid litigation, in the bellwether
9 situation, of seeing that a thousand may be an understatement
10 of all the different avenues that a case can take.

11 I don't see this case, this MDL, proceeding in that
12 manner. I think that at least in terms of parameters and in
13 terms of what really was done in this case will be disclosed to
14 the parties, assuming that there are some parties left after
15 the settlement. And I think the answer is yes.

16 And that may very well focus everyone's attention on what
17 do we need to -- what depositions do we need to take and what
18 do we need to know? And then we can tee up the various legal
19 issues that may be generated by that type of inquiry.

20 Well, okay. There's my usual long-winded introduction to
21 where I think we are right now. And I would be interested --
22 maybe I'd like to hear from some plaintiffs first; in
23 particular, those who are representing Native Americans.

24 And I have to tell you, I confess I don't know whether to
25 call people Indians or Native Americans. I understand there's

1 a controversy over that, so I hope I'm not offending anybody.

2 But at least those people are representing sovereign
3 Tribes. And I know that Ms. Cabraser is one of them, and there
4 may be others as well. Give me some thought as to whether or
5 not they -- whether there's an argument that somehow -- maybe I
6 have to ask McKinsey, does McKinsey -- let me start that way.
7 Let me ask McKinsey.

8 Who do you think is, in the words of Leo Durocher,
9 "Include me out"? Who would McKinsey say would not be part of
10 the settlements that were achieved up to the present?

11 **MR. COHEN:** Your Honor, good morning. Josh Cohen
12 appearing for McKinsey.

13 I would say, Your Honor, that the Court is certainly
14 correct that the effect of early adjudication of the issues
15 surrounding the settlement could result in a significant
16 winnowing of the case.

17 The chart that we submitted to Your Honor as Exhibit A to
18 our pretrial submission listed 48 cases. Since that time, two
19 additional cases have been filed and tagged. So we're up to a
20 total of 50. Of those 50, 32 are filed by political
21 subdivisions. We believe that we have settled with all 32 of
22 those political subdivisions.

23 When McKinsey entered into a settlement agreement or a
24 series of settlement agreements with all 50 states' attorney
25 general as well as attorneys general from five territories,

1 each of those agreements was reached with the attorney general
2 for that state. And McKinsey did that in an effort to be a
3 responsible corporate citizen, as the attorneys general
4 recognized in the statement, in order to get funds
5 expeditiously to communities that needed them.

6 We understood that we were settling with all 32 of the
7 political subdivisions and all other political subdivisions
8 that could potentially be filing similar claims.

9 We think it would be inappropriate, as a matter of both
10 law and also bad policy, to allow those subdivisions to
11 continue this litigation and effectively seek to double dip on
12 settlements that were reached by the highest law enforcement
13 officials in their respective states.

14 So that's an indirect way of answering the Court's
15 question. There are 32 of 50 that we believe we have settled
16 with. The remainder consist of Tribal organizations as well as
17 healthcare payers, a couple of other stray plaintiffs. But the
18 lion's share of the plaintiffs that have sued in these
19 proceedings are political subdivisions with whom we believe we
20 have settled.

21 **THE COURT:** All right. So we have -- doing the
22 math -- and this is about as complicated as math I can do, I
23 have 18 nonsettlers, 18 entities, who McKinsey would say,
24 concede, or whatever the right word is, "We have not come to a
25 settlement with respect to them."

1 **MR. COHEN:** I think that's a fair --

2 **THE COURT:** And the way we'll know that number with
3 specificity, or who's part of it -- and we'll make sure we do
4 this by the end of this hearing -- is I would direct McKinsey
5 to file motions to dismiss as to the potential settlers; that
6 is, the political subdivisions which McKinsey believes they
7 have already achieved a settlement.

8 **MR. COHEN:** And, Your Honor, let me respond to that,
9 if I may, for a moment.

10 We certainly want to make sure that this issue is decided
11 early in the case. It is a threshold issue. It could have
12 significant winnowing effect.

13 It is somewhat more complicated than the Court may
14 initially assume inasmuch as the issue is the same for all of
15 these various subdivisions; however, the analysis is highly
16 state specific because of the relationship between a state and
17 its political subdivisions.

18 And so the potential issue with filing a series of motions
19 to dismiss directed at each of these individual political
20 subdivisions is it very quickly becomes a large, complex
21 universe that the Court would need to sift through in the first
22 instance.

23 The procedure that we intended to recommend for the
24 Court's consideration is, we believe, a more efficient
25 approach, which would be to take a subset of the states, so

1 political subdivisions in a subset of the states, and present
2 to the Court briefing on the reasons why those claims are
3 precluded by release and *res judicata* and allow that initial
4 batch of rulings to control or to influence the outcome as to
5 the remainder. We think that could be done more quickly and
6 more efficiently.

7 However, when it comes to selecting that subset, it may
8 very well make sense to have conversations with the plaintiffs'
9 steering committee, once it is constituted, to figure out
10 exactly which states those should be and to present to the
11 Court an efficient plan for adjudicating.

12 The one other thing I would say in that regard is the
13 Court has zeroed in on this particular threshold issue with
14 good reason, but it's not the only reason we consider it to be
15 ripe for potential early determination.

16 As we noted in our submission, McKinsey is not a
17 distributor or a manufacturer or marketer or seller of opioids.
18 It's in a very different position than other defendants against
19 whom similar claims have been asserted. And that gives rise to
20 a host of defenses, some of which can be determined early in
21 the case without, necessarily, the need for significant, if
22 any, discovery.

23 And so, in terms of thinking about an efficient way to
24 proceed, we've considered the possibility of engaging in
25 discussions with plaintiffs' steering committee to figure out

1 if there are other threshold issues that could be determined
2 early in the case alongside or in close proximity to the issue
3 of release and *res judicata*.

4 So we hear the Court and we agree that it makes sense to
5 get this issue teed up quickly, but exactly how we do that may
6 depend -- could be influenced by some discussions with
7 plaintiffs' steering committee once that committee is formed.

8 **THE COURT:** Well, I don't want to discourage that.
9 Obviously, when I look at a case I have to remember this is not
10 the Court's case; it's the parties' case. And if the parties
11 are amenable to discussions, of course, they should pursue
12 those.

13 I look at all of you, or at least some subset of you, and
14 see a wealth of talent and experience. And this is not like,
15 oh, this is the first case arising out of the opioid crisis.
16 There's a long track record, and a lot of discovery has already
17 been done and certain issues have been adjudicated.

18 On the other hand, I want to make sure that I don't get
19 bogged down in a sort of seriatim -- series of decisions where
20 I chop off this or keep this and chop off that and so forth. I
21 just think it's important to have a meaningful analysis of the
22 settlement -- the scope of the settlement.

23 And I don't know whether your proposal would be, look,
24 let's take five states, let's take ten states, let's take three
25 states and let's look at it. I think, in a way, that if the

1 parties can agree as to how it ought to be done, then I'm not
2 opposed to it. I'm not opposed to it.

3 What I'm opposed to is a protracted litigation where each
4 issue seriatim goes through one or two months of briefing and
5 we finally get to the end of the year and we say, great, we've
6 decided four cases, four issues.

7 And I've also been -- well, let's see. I think that I
8 would not be surprised if I decide an issue one way and then
9 attorneys think, ah, but this is slightly different, and that
10 difference makes -- that distinction makes a difference because
11 of where we sit and what we are.

12 So I sort of think that the problem with just letting it
13 spin out is that each set of counsel, each situation, the
14 differences are emphasized in connection with why you shouldn't
15 follow the overall ruling of the Court or the sense of the
16 Court. And, again, it prolongs the litigation.

17 So I don't want to see something like 32 lawsuits, 32
18 adjudications. Though, I'm not saying that they're not
19 individualized. What I'm saying is I don't want to spend 32
20 years trying to decide 32 cases. I want to try to do it
21 immediately.

22 And do not worry about overburdening the Court. We have
23 the capacity to move and chew gum at the same time -- it may
24 look like that -- and adjudicate any number of these issues.

25 I will try to tightly control the number of pages that are

1 filed and the process by which we do it. But it may be that we
2 could divide somehow the 32 into a manageable way of dealing
3 with it, especially if there's no disagreement that State X and
4 State Y and State Z basically has the same law or treats it the
5 same way.

6 And it may be -- practically speaking, it may be a
7 substantial decision affecting a number of the plaintiffs in
8 this case. So I don't know that. I don't have any information
9 on that. I assume McKinsey does, and I assume that a number of
10 the plaintiffs do.

11 It's a little bit hard to talk about this without having a
12 plaintiffs' steering committee and a representative plaintiffs'
13 lead counsel or co-counsel.

14 So I don't want to cut people off and I don't want to
15 favor one plaintiffs' counsel over another, but I think that
16 what I would probably like to do is move ahead quickly on
17 the -- on the appointment of a plaintiffs' steering committee
18 and then invite discussion between McKinsey and the plaintiffs'
19 steering committee as to how to approach this.

20 Do you have a sense, Mr. Cohen, as to, you know, what
21 would be the first round of motions relating to the impact of
22 the settlement?

23 **MR. COHEN:** In terms of the number, Your Honor?

24 **THE COURT:** Yes. Yeah.

25 **MR. COHEN:** It seems to make sense to us to present to

1 the Court somewhere on the order of four to six states, which
2 is -- may include multiple political subdivisions. Right?
3 It's political subdivisions in four to six states for initial
4 determination by the Court.

5 **THE COURT:** Okay. Well, what I would probably like to
6 do -- I'm not going to order that now. I'd like to see what
7 the plaintiffs' steering committee view is of that process.

8 I think the plaintiffs' steering committee also will have
9 to address the process of those entities, and there are
10 presently 18, in which there is no suggestion that they have
11 settled. And so I would like to hear from the plaintiffs'
12 steering committee as to how those should proceed and what
13 timetables are we working on.

14 If we were to proceed with a motion to dismiss in four to
15 six cases, what timetable are you looking at, Mr. Cohen?

16 **MR. COHEN:** Your Honor, would the Court intend to
17 order the filing of the master consolidated complaint --

18 **THE COURT:** Yes.

19 **MR. COHEN:** So assuming that the Court were to direct
20 that and we got that on file, you know, within 60 days of the
21 appointment of a steering committee, we would be prepared to
22 move forward on briefing this *res judicata* issue, you know,
23 within 30 to 60 days after that.

24 **THE COURT:** Okay. Well, I would anticipate that we
25 could get a master complaint filed relatively quickly after the

1 filing of a -- after the selection of a plaintiffs' steering
2 committee. I don't know that it would take 60 days. It
3 doesn't seem to me that it ought to. But, again, I need to
4 hear from plaintiffs' counsel as to what they think is doable.

5 So I'm not sure I'm going to buy into your timetable, but
6 I don't think you expected that I necessarily would. I do want
7 to move things along.

8 So I think that sort of addresses the issue of how we want
9 to proceed on these motions, except that if the plaintiffs'
10 steering committee -- if the plaintiffs' steering committee is
11 unable to arrive at an agreement, obviously, with defense
12 counsel, then I think I have to intervene quickly to try to
13 resolve it.

14 I see Ms. Cabraser has raised her hand, so why don't I
15 call on her.

16 **MS. CABRASER:** Thank you very much, Your Honor. We
17 just wanted to give you a preview of the plaintiffs' thoughts
18 on McKinsey's submissions.

19 We did all put on our track shoes and had our first track
20 meet of all plaintiffs' counsel from all 50 of the MDL cases,
21 by Zoom on Monday, to discuss the McKinsey submissions and some
22 initial thoughts on behalf of plaintiffs. And I'll attempt to
23 introduce and facilitate those.

24 Of course, a PFC has not yet been appointed by the Court.
25 We all agree that that should be done quickly. And if our

1 experience thus far, working together as plaintiffs' counsel,
2 is any predictor, I'm sure we'll all be able to work together
3 with and for the committee Your Honor appoints.

4 With respect to the subdivision cases, the local
5 government cases, we appreciate Mr. Cohen's recognition that
6 this is not a cut-and-dried or simple matter. It is case
7 specific.

8 And, in fact, there are three plaintiffs' attorneys
9 present this morning who represent subdivisions in states in
10 which it is contended that the release by the attorneys general
11 is not effective.

12 And just to give you some color on that issue, without
13 arguing motions, Justin Presnel, of Simmons Hanly ConRoy, is
14 here on behalf of New York subdivisions, a state in which the
15 AG has noted, I believe -- and he'll correct me if I'm wrong --
16 that the release does not bar subdivisions.

17 Mr. Lynn Sarko, of Keller Rohrbach, will present, with
18 permission, on a similar issue in Washington State.

19 And Juan Martinez, of Morgan & Morgan, will present on
20 this issue in West Virginia, again, just to give Your Honor
21 some color on this issue.

22 And I would note that everyone on the plaintiffs' side, in
23 every category of cases, believes we do not need to proceed
24 seriatim, that we can proceed on multiple fronts since there
25 are major categories of plaintiffs completely unaffected by the

1 McKinsey AG settlement. And we can talk to you more about our
2 thoughts on proceeding with discovery and pleadings when
3 that -- when that comes up.

4 Also, we have two representatives of the over 259
5 federally-recognized Tribes whose claims are reflected in the
6 13 Tribal cases filed to date, Mr. Lloyd Miller, of Sonosky
7 Chambers, and Ms. Tara Sutton, who are happy to give you some
8 brief color on the Tribal claims.

9 And, finally, the third-party payer claims, the health
10 plan and Union health claims are also present in this case,
11 completely unaffected by the McKinsey settlement. And a
12 representative of the Dugan firm and Mr. Sobol are here to
13 present on those.

14 And, finally, or not so finally, there are also two NAS
15 babies cases here similarly unaffected. There are public
16 school cases that have a particular perspective. Cyrus Mehri
17 is here for the public school cases.

18 And to give you an example, should you wish, of a
19 particular group of subdivisions, Mr. Will Nefzger can present
20 on the local government cases' perspectives.

21 **THE COURT:** Well, that's helpful.

22 Let me make this suggestion and see whether you think it's
23 appropriate. I could listen to everybody. In other words, all
24 these different groups. As to some, I think McKinsey may say
25 they're not affected, and it would be unnecessary for me to

1 have to adjudicate something in that regard. They're simply
2 not affected.

3 Conceded, they've already said to us, well, there were 18
4 of these entities as of today which were not affected. All
5 right. Fine. Then I don't have to say anything about them
6 other than try to figure out an appropriate discovery plan and
7 how to proceed. Have to do that. They're not going away.
8 Their claims are viable in this litigation.

9 There may be some which are -- which have brought remand
10 motions. And those will have to be adjudicated. But there may
11 be others who have not. And as to them, they are entitled --
12 both entities, both positions, are entitled to an adjudication.
13 Okay. That's one thing.

14 And I could listen to the arguments about it, but what I
15 want to do, rather than today listen to the arguments about it,
16 I want to see whether people sitting down, understanding the
17 basic parameter of what I want to do, can reach an accord.
18 Because, again, I go back to the fact that you people, not me,
19 know the case, or at least arguably know the case; and,
20 therefore, you're in the best position to move it along. And
21 you sit down with a plaintiffs' steering committee, you sit
22 down with McKinsey, and you see what you can work out and you
23 see what makes sense.

24 And if there's an issue as to that, I'm going to be
25 available by telephone or by Zoom or even by court appearance

1 to try to resolve it immediately, if that can be done
2 immediately.

3 So that's really, in a sense, what you want to avoid.
4 That is to say you don't want to just hop up in front of me.
5 You want to be able to see whether or not you're able to
6 achieve some agreement as to that.

7 But do I appreciate the complexity. I understand that
8 it's not going to be a cookie-cutter resolution. But, you
9 know, you have to -- you know, judges have to get wet. You
10 have to dive into the water. You have to start somewhere, and
11 you can't have endless discussions about where in the pool
12 you're going to jump because those are endless by definition.

13 So I think what I take from this is I understand some of
14 the complexities. I don't want to address the merits. And I
15 want to get that committee formed as quickly as I can and get
16 them to meet with McKinsey and then come up with a plan, you
17 know.

18 And I don't want to sit around and wait for filing of --
19 you know, the nuts and bolts can be done. This isn't like the
20 first time you have to address a master complaint. But I sure
21 don't want to sit around and wait two to three months for that
22 master complaint and then decide how to proceed with these
23 settlements. I just think that's unfair. That's unfair to
24 everybody.

25 You know, I mean, unless somebody were going to tell me

1 why there would be something in the master complaint that would
2 somehow change the release that McKinsey believed it had
3 achieved with respect to particular entities, which I assume an
4 argument may be -- could possibly make that argument. I don't
5 know whether that argument would be successful.

6 And I don't really want that argument to drive this
7 litigation into it's too big. You know, as they all say, it's
8 just too big to settle; too complicated; can't handle it; too
9 big to fail; too big to settle; all of those things. So, you
10 know, that's sort of the way I look at it.

11 Let me ask you this -- and, Ms. Cabraser, you've had
12 experience; Mr. Rice, you've had experience -- how much time do
13 I really need to give the parties -- I'm now talking about
14 plaintiffs -- to submit proposals with respect to a plaintiffs'
15 steering committee? Not very long; right?

16 **MS. CABRASER:** Your Honor, Elizabeth Cabraser.

17 Not very long. As you can see, we have all met. There
18 has been representation from a hundred percent of the MDL
19 cases. All of the plaintiffs have already met. We've thought
20 about the issues that you raised in your order. We thought
21 about McKinsey's responses. We've discussed them. We will
22 continue to do so. Track shoes don't come off.

23 I'm sure we can meet whatever schedule you set for
24 applications for leadership appointments. And I'm also sure
25 that whatever group you appoint will be able to move swiftly,

1 particularly informed by this hearing, to discuss with McKinsey
2 counsel not only a schedule and a method for testing the
3 McKinsey release but also an expedited discovery schedule
4 because we want to make sure that, in addition to the documents
5 McKinsey is proposing to produce publicly on November 4th, we
6 also have a fulsome set of discovery materials that are
7 responsive to all of the allegations in the complaint so that
8 we can proceed.

9 And, of course, it doesn't take long to designate or file
10 a consolidated or master complaint for each of the categories
11 if to do so will advance the litigation.

12 **THE COURT:** Well, I think it might advance the
13 litigation. I don't think it would take too long to do under
14 these circumstances.

15 Well, let me ask the parties, is there anything -- I
16 raised a number of issues in my order. Is there anything that
17 the parties feel and any of the lawyers feel ought to be
18 addressed at this hearing that hasn't been discussed?

19 **MR. SARKO:** Yes, Your Honor, Lynn Sarko.

20 **THE COURT:** Yes, Mr. Sarko.

21 **MR. SARKO:** Very brief. I just want to make sure that
22 the record is clear and that there was not a misstatement by
23 Mr. Cohen. And that is, in Washington State the settlement
24 agreement with the attorney general, which was not submitted to
25 this Court with their attachments -- and I'm happy to submit --

1 specifically says that McKinsey waives its ability to argue
2 that the release applies to political subdivisions in the
3 state.

4 And, in fact, the Washington State Attorney General
5 notified every single county prosecuting attorney that its
6 settlement did not release any of the local subdivision claims.

7 There was a discussion as to which bucket Washington State
8 is in. It seems fairly clear to us that we're just like
9 Tribes, but I want to be clear that McKinsey didn't make a
10 mistake and misspeak today.

11 **THE COURT:** Well, my guess -- thank you, Mr. Sarko.

12 My guess is that, in varying degrees, a number of
13 plaintiffs' counsel believe that they're not included, or
14 precluded, maybe that's a better word, or adjudicated by
15 *res judicata*, that they're not out in the rain, that they're
16 part of this process.

17 And that's what I need to address. I think, in the first
18 instance, once a plaintiffs' steering committee is constituted,
19 you know, you will sit down in short order -- and there are 50
20 plaintiffs -- and you will start saying this is conceded, this
21 is not, this is an issue, and so forth, and group them, and
22 group them.

23 And then, depending on those groupings, it may be to take
24 a representative, one or two out of group one, one or two out
25 of group two. You know, I don't have to just go through all

1 the people in group one, all the people in group two. I could
2 take some variations of it.

3 Yours, as you suggest, has a variation, has an
4 exclusionary clause. Fine. That will either be conceded by
5 McKinsey or not. But that's pretty close to -- I can
6 adjudicate that.

7 I don't think I need -- you know, sometimes things are
8 decided just on the language of the document, you know. I'm
9 not necessarily an originalist, but if there's a piece of paper
10 that says something, I like to look at it and see what it says
11 and see whether it's susceptible of any reasonable alternative
12 interpretation.

13 **MR. COHEN:** Your Honor --

14 **THE COURT:** So I think we can do this. But this is a
15 cumbersome procedure, in a hearing such as today, to try to
16 winnow it out.

17 I mean, you see what I want to do. I want to get a very,
18 very realistic picture early on as to who's in or, better,
19 who's out; that is, out of the release. Or in. I don't care,
20 doesn't make any difference. I'm starting to sound like Leo
21 Durocher.

22 So you got the message. I think you can all figure it
23 out. And it will be aided by a very rapid selection of a
24 plaintiffs' steering committee and lead counsel.

25 **MR. COHEN:** And, Your Honor, if I may briefly, Josh

1 Cohen for McKinsey.

2 **THE COURT:** Yes, go ahead.

3 **MR. COHEN:** To Mr. Sarko's point, we did include with
4 our submission an example of one of the two agreements, which
5 is, in nature, akin to Washington's and does contain language
6 of the sort that Mr. Sarko is referring to.

7 Our view is that that language does not alter the ultimate
8 conclusion that *res judicata* applies to Washington and West
9 Virginia as well. And, as the Court says, that will be one of
10 the issues that will be presented to the Court, ultimately, for
11 determination.

12 **THE COURT:** Okay. That's always the danger of having
13 this kind of discussion about the individual claims is that
14 people take different positions. Fine. And they should. But
15 that's -- that's what I'm going to decide.

16 All right. Anything else that you feel ought to be
17 addressed?

18 **MR. ALEXIS:** Your Honor.

19 **THE COURT:** Mr. Alexis, you have to speak up.

20 **MR. ALEXIS:** Yes, sir.

21 If you please, Ralph Alexis. I just want to point out to
22 the Court we have not yet filed our suit, or suits, and just
23 wanted to make that known on behalf of groups of private
24 hospitals in Louisiana. And we just wanted to make that known.

25 **THE COURT:** I'm sorry, what have you not filed? I

1 didn't hear that.

2 **MR. ALEXIS:** We have not yet filed our suits on behalf
3 of groups of private Louisiana hospitals, but we will do so in
4 the reasonably near future. And I just wanted to state that so
5 that that would be clear.

6 **THE COURT:** Well, of course. I mean, the door is open
7 to filings. If there's a filing that would be appropriate in
8 terms of either your representation or a claim made, and so
9 forth, yeah, of course, please proceed.

10 **MR. ALEXIS:** Thank you, Your Honor.

11 **THE COURT:** I'm not foreclosing that. This is open
12 season. Open season.

13 **MR. ALEXIS:** Thank you, Your Honor.

14 **THE COURT:** That's always a dangerous thing for a
15 judge to say, but it's always open.

16 Mr. Rice, you look like you're poised to say something.

17 **MR. RICE:** Good to see you again, Judge.

18 **THE COURT:** Good to see you.

19 **MR. RICE:** The only thing I miss is our friend
20 Francis, who is not, unfortunately, with us.

21 **THE COURT:** Yes, that was very sad, very untimely.

22 **MR. RICE:** Yes, big loss.

23 Judge, just a couple of points. During the MDL-2804
24 discovery, there has been some discovery exchanges with
25 McKinsey and some documents produced. And there should be zero

1 burden to have those duplicate production early on, if not
2 immediately, so that people could have a group of core
3 documents at their disposal.

4 It's also my understanding that McKinsey, prior to the
5 settlement with the attorney generals, went through quite a bit
6 of discovery to the attorney generals, and documents have
7 already been produced that may be duplicated in the November
8 production but are clearly already in existence. And, again,
9 very little burden.

10 So we could get a jump start on preparing the master
11 complaint if we could go ahead and have the documents that have
12 already been produced quickly produced into this MDL.

13 **THE COURT:** Well, here's what I would like to do. And
14 I don't disagree with that. Here's what I would like to do.
15 I'd like to move ahead, appoint the plaintiffs' steering
16 committee. I would like the plaintiffs' steering committee to
17 meet with McKinsey.

18 I would like that, in the course of that discussion, they
19 ought to, one, address the issue of which settlement -- which
20 settlement agreements, arguably, from the plaintiffs' point of
21 view, or the defense, preclude further litigation with respect
22 to the plaintiffs that they represent. I'd like to know that.
23 I'd like them to have that discussion.

24 Next, as to disagreements with respect to the reach of the
25 settlement agreement, I'd like them to go into the pot and then

1 figure out how then to address it by way of motions, which can
2 be adjudicated quickly, which can be adjudicated with respect
3 to its impact.

4 After all, McKinsey is telling me, look, Judge, you can
5 decide two or three or four of these and it will have a -- my
6 word, not theirs -- a profound impact on the course of the
7 litigation. Maybe they're right, maybe they're wrong, but
8 let's try to see if there can be some agreement as to how to do
9 it. Eventually, it'll have to be done. So if it's going to
10 have a substantial impact on the litigation, I'd like it done.

11 And then, third, I think we can take Mr. Rice's suggestion
12 and have the plaintiffs' steering committee outline to McKinsey
13 what documents ought to be produced immediately, which have
14 already been produced, I guess, in the other litigation or in
15 the settlement discussions, or whatever it is, to which there
16 is no objection, and they can be produced forthwith.

17 Because I know that whatever happens, whatever we decide
18 about the impact of the settlement, probably -- though McKinsey
19 might not be delighted to hear it, but probably there will be
20 continuing ongoing litigation with respect to these claimants.
21 I don't know. But if there is, I'd like to get that started.

22 But I don't want to get it started without a plaintiffs'
23 steering committee and without a meeting. And then we'll just
24 see how reasonable everybody is. Of course, I know everybody's
25 going to be reasonable because I've never had an unreasonable

1 lawyer appear in front of me in the long run. So -- and I'm
2 here for the long run.

3 So let's do it that way. And I appreciate Mr. Rice's
4 suggestion.

5 Anything else?

6 Good. Hearing nothing else, and realizing that the
7 Giants-Dodgers game begins in an hour and 15 minutes, we will
8 recess this with the thanks of the Court, and I'll get out an
9 order quickly on the plaintiffs' steering committee.

10 Thank you very much.

11 (Counsel thank the Court.)

12 **THE CLERK:** That concludes this morning's proceedings.

13 Thank you.

14 (At 11:03 a.m. the proceedings were adjourned.)

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16 **CERTIFICATE OF REPORTER**

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

19 DATE: Friday, July 30, 2021

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Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter

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