



**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**IN RE: OPIOID LITIGATION**

**CIVIL ACTION NO. 19-C-9000**

**THIS DOCUMENT APPLIES TO ALL CASES**

**ORDER ESTABLISHING COMMON BENEFIT FEE FUND**

Before the Panel is the Proposal of Attorney General Patrick Morrissey, as Plaintiffs' Coordinator, for Entry of an Order Establishing a Common Benefit Fund. Based upon review of the Proposal and the Responses thereto, the Panel makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Upon prior motion by Plaintiffs' Coordinator, the Panel entered an Order Authorizing Common Benefit Fund and Appointing a Common Benefit Fund Commissioner (Transaction ID 66985632).

2. The Order recognized the Panel's authority as a matter of equity to order payment of common benefit attorneys' fees and litigation costs in the event of a recovery of money through litigation or settlement. *Id.* at 2-3.

3. The Panel further found that "authorization of a Common Benefit Fund and appointment of a Common Benefit Fund Commissioner" will help fairly and expeditiously resolve matters in this Mass Litigation. *Id.* at 4.

4. To this end, the Panel appointed the Honorable Christopher Wilkes to serve as Common Benefit Fund Commissioner and in this capacity to confer with counsel for the parties to develop a proposal for the terms of the Common Benefit Fund, which Plaintiffs' Coordinator then was to submit to the Panel for approval. *Id.*

5. Pursuant to the Panel’s Order, Commissioner Wilkes has conferred with counsel regarding the terms of the Common Benefit Fund.

6. Commissioner Wilkes also has reviewed the Common Benefit Order entered by Judge Dan Aaron Polster in *In re Nat’l Prescr. Opiate Litig.*, No 1:17-md-2804 (N.D. Ohio) (the “MDL”). See MDL Order Establishing Common Benefit Fee Fund and Directing Certain Payments (ECF 3794). In addition, he reviewed other Common Benefit Fund Orders and authorities, including the Manual for Complex Litigation.

7. Based on Commissioner Wilkes’s conferrals, review, and recommendations, Plaintiffs’ Coordinator submitted a Proposed Order Establishing Common Benefit Fee Fund on November 3, 2021.

8. The proposal reflects agreement among Coordinating Counsel for the State and Co-Lead Counsel for the Counties and Cities on how attorneys’ fees and case costs should be awarded to Plaintiffs’ counsel in the event any or all Plaintiffs are successful in obtaining a judgment on or settlement of Plaintiffs’ claims against or with any or all Defendants.

9. Having reviewed Plaintiffs’ Coordinator’s proposal and the Responses thereto, and recognizing the need for a single unified process for awarding attorneys’ fees and case costs across the entire Mass Litigation that encourages Plaintiffs’ counsel to work cooperatively and efficiently together, the Panel orders as follows.

**ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby:

**ORDERED** that the Proposal of Attorney General Patrick Morrisey, as Plaintiffs’ Coordinator, for Entry of Order Establishing Common Benefit Fund is **ADOPTED** as set forth below; and it is further

**ORDERED** that the Panel hereby establishes a single process for awarding attorneys' fees and case costs that will apply across the entire above-captioned Mass Litigation before the Panel, including but not limited to the cases set for trial against the Manufacturer, Distributor, and Pharmacy Defendants; and it is further

**ORDERED** that the process for awarding attorneys' fees shall include awards for Common Benefit work done to advance the greater good for all Plaintiffs, while also taking into consideration the contingency fee contracts that are otherwise not enforceable against Abatement funds the Court may award or a settlement may establish; and it is further

**ORDERED** that the Panel will in the event of any judgment for Plaintiffs or settlement determine the amount of the gross attorneys' fees to be awarded; and it is further

**ORDERED** that the Common Benefit Fund Commissioner shall determine what general guidelines all attorneys should follow in contemporaneously reporting the work done to ultimately form a portion of the information needed by the Panel in reaching fair and equitable fee determination.

**ORDERED** that the Common Benefit Fund Commissioner will recommend, subject to the Panel's review upon request, an allocation of the amount of the gross attorneys' fees award to provide for both Common Benefit work performed by Plaintiffs' counsel as well as work Plaintiffs' counsel have undertaken to represent their own clients pursuant to contingency fee agreements, while recognizing that an individual attorney or law firm may be eligible for fees both for Common Benefit Work and for work done in furtherance of representing a specific client under a contingency fee agreement; and it is further

**ORDERED** that Plaintiffs' attorneys who believe their work has provided benefit to all Plaintiffs shall seek payment of attorneys' fees for such work through the Common Benefit Fund; and it is further

**ORDERED** that all payments awarded to attorneys based upon consideration of contingency fee agreements shall be determined by the Common Benefit Fund Commissioner using a fair and equitable process, with any award subject to review by the Panel for reasonableness based upon the factors recognized under applicable West Virginia law; and it is further

**ORDERED** that the Common Benefit process established by this Order applies whether money is recovered through judgment or settlement, and whether the judgment or settlement is obtained in connection with abatement of the public nuisance, statutory remedies, or on any other basis; and it is further

**ORDERED** that in the event of any settlement, attorneys' fees must be negotiated and designated separately from any abatement funds, statutory remedies, or any other affirmative relief obtained from the settling defendant, and must be approved by the Panel, which will retain jurisdiction to review and approve Plaintiffs' attorneys' fees after any judgment or settlement in any or all of the cases consolidated before the Panel; and it is further

**ORDERED** that the following factors are to be considered in recommending or approving awards of attorneys' fees:

- (1) The benefit provided by the attorney's work to obtaining a judgment in or settlement of the case; work that is not authorized by Plaintiffs' Coordinator or by Co-Lead Counsel for the Distributors litigation and/or that is repetitive or duplicative of other work will not be eligible for compensation as common benefit work;

- (2) The payment to which the attorney would be entitled pursuant to his or her contingency fee agreements, which shall be considered as relevant, though not determinative, as to the amount of an award; and
- (3) The attorney's assistance to the administration of the claim for statewide public nuisance and the allocation of any recovery for the abatement of the nuisance if the Court finds the Plaintiffs prove the existence of a public nuisance, including joining a memorandum of understanding reached among Plaintiffs to govern the allocation and use of funds obtained through the litigation;

and it is further

**ORDERED** that any Plaintiffs' attorneys or law firms that seek to recover Common Benefit attorneys' fees must report their time contemporaneously and in a uniform fashion to the Court-appointed Time Manager, John Jenkins of Smith, Cochran & Hicks PLLC, who is an independent accountant selected by the Common Benefit Fund Commissioner; and it is further

**ORDERED** that Plaintiffs' attorneys' submissions to the Time Manager must provide sufficient detail for the Time Manager to make a determination whether the work described therein is authorized common benefit work, with the Time Manager's determinations subject to review by the Common Benefit Fund Commissioner; and it is further

**ORDERED** that, in recognition of the considerable expense of prosecuting the cases in this Mass Litigation, which to date have been borne by private counsel for the Attorney General and private counsel for the Subdivisions, there shall be established an Expense Assessment Fund as determined by the Common Benefit Fund Commissioner. An attorney's participation in the Expense Assessment Fund shall be a positive relevant factor for the Common Benefit Fund Commissioner to consider in awarding Common Benefit attorneys' fees; and it is further

**ORDERED** that all Plaintiffs' attorneys and firms participating in this Mass Litigation shall pay a Common Benefit Fee to the MDL Plaintiffs' Executive Committee for use of MDL

work product, in accordance with the Form Participation Agreement acknowledged or executed by counsel for all Plaintiffs; and it is further

**ORDERED** that the Panel strongly *encourages* all West Virginia political subdivisions with filed cases that have not previously been tried or settled in State or Federal Court to participate in one statewide settlement negotiation.

A copy of this Order has this day been electronically served on all counsel of record via File & ServeXpress.

It is so **ORDERED**.

**ENTERED:** November 4, 2021.

/s/ Alan D. Moats  
Lead Presiding Judge  
Opioid Litigation

/s/ Derek C. Swope  
Presiding Judge  
Opioid Litigation