



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 21-C-9000 PHARM

THIS DOCUMENT APPLIES TO:

**STATE OF WEST VIRGINIA *ex rel.*
PATRICK MORRISEY, Attorney General,**

Plaintiff,

v.

Civil Action No. 22-C-111 PNM

THE KROGER CO., *et al.*,

Defendants.

ORDER DETERMINING LITIGATION COST AMOUNT

Now pending before the Court is the *Joint Motion for Determination of Litigation Cost Amount* ("Joint Motion") (Transaction ID 70588968) filed by the parties on August 8, 2023. Having reviewed the Joint Motion and the Kroger West Virginia State-Wide Opioid Settlement Agreement ("Settlement Agreement") signed by the parties on May 2, 2023, and attached to the Joint Motion as Exhibit A, the Court finds:

1. The Settlement Agreement provides that Kroger will pay the Settlement Sum of \$68,000,000, inclusive of the "Litigation Cost Amount" and the "Remediation Amount."

Section III.A. of the Settlement Agreement states:

Settlement Sum. The Settlement Sum is \$68,000,000, reflecting a substantial premium for the State given the unique facts and circumstances associated with the Actions, including without limitation the imminent trial date and the impact of opioid abuse and misuse in the State. The Settlement Sum shall be inclusive of (1) the Litigation Cost Amount attributable to reimbursement of the State's and Participating Local Governments' reasonable attorney fees, costs, and expenses incurred through the Execution Date in connection with their Claims against Kroger and the Released Entities in the Actions, and to be disbursed as provided in Section IX below; and (2) the Remediation Amount attributable to the Alleged Harms, which shall be used to fund opioid abatement and treatment activities

throughout the State and disbursed as provided in Section IV below. Kroger does not concede that these activities constitute cognizable abatement. For the avoidance of doubt, the Remediation Amount equals the aggregate amount paid or incurred by Kroger hereunder other than amounts that constitute the Litigation Cost Amount. The Qualified Settlement Fund Administrator shall place the Litigation Cost Amount and the Remediation Amount into separate sub-funds within the Qualified Settlement Fund pending their disbursement as provided in this Settlement Agreement. On or before the Participation Date, the State shall provide to Kroger Election and Release Forms (in the form annexed as Exhibit D) demonstrating that (1) at least 96% of the population of Litigating Local Governments, (2) at least 96% of Counties, and (3) at least 96% of the population of Non-Litigating Local Governments as of the Participation Date that are Class I or Class II Local Governments have become Participating Local Governments (collectively, the “Participation Threshold”). For the avoidance of doubt, the requirement that Kroger pay the Settlement Sum pursuant to this Agreement shall become binding only upon the State’s provision to Kroger of Election and Release Forms demonstrating that it has met the Participation Threshold.

3. Section III.B. of the Settlement Agreement further states:

Timeline for Settlement Sum Allocation and Payments. Provided that the State has met the Participation Threshold, within three (3) business days of the earliest of either Kroger’s receipt of Election and Release Forms demonstrating that the Participation Threshold has been met or the Participation Date, the Parties shall jointly file with the Court a request that the Court determine what portion of the Settlement Sum constitutes the Litigation Cost Amount. The State agrees that it will not seek a Litigation Cost Amount percentage greater than that sought from any other settling party, and it is the Parties’ expectation and intent that the Litigation Cost Amount percentage shall be no greater than for any other settling party. If the Court has not issued an order regarding the portion of the Settlement Sum that constitutes the Litigation Cost Amount by October 2, 2023, the Parties will meet and confer and will agree by October 9, 2023 on an allocation as between the Remediation Amount and the Litigation Cost Amount, subject to revision by the Court. If the parties agree on an allocation as between the Remediation Amount and the Litigation Cost Amount and the Court later orders a different allocation as between the Remediation Amount and the Litigation Cost Amount, the State agrees to cooperate with Kroger in preparing any tax forms reasonably requested by Kroger, including but not limited to those set out in Section XI.D. Kroger shall pay the Settlement Sum pursuant to the following schedule:

1. Within fifteen (15) days after Kroger’s receipt of Election and Release Forms demonstrating that the Participation Threshold has been met, Kroger shall make a \$34,000,000 upfront payment (the “Initial Payment”) into the West Virginia Qualified Settlement Fund;

2. A \$12,000,000 payment into the Qualified Settlement Fund on June 30, 2024;
3. A \$12,000,000 payment into the Qualified Settlement Fund on June 30, 2025;
4. Four (4) annual payments of \$1,000,000 on the same payment date (June 30) from 2026 to 2029 (for the avoidance of doubt, the annual payments will be made respectively on (1) June 30, 2026; (2) June 30, 2027; (3) June 30, 2028; (4) June 30, 2029); and
5. Three (3) additional annual payments of \$2,000,000 on the same payment date (June 30) from 2030 to 2032 (for the avoidance of doubt, the annual payments will be made respectively on (1) June 30, 2030; (2) June 30, 2031; (3) June 30, 2032) (together with the payments identified above in subsections III.B.2, 3, and 4, the “Subsequent Payments”).

4. The parties represent that on August 2, 2023, the State submitted to Kroger the Local Government Election and Release Forms demonstrating that the Participation Threshold has been met.

5. The parties further represent that Kroger needs the differentiation of the “Litigation Cost Amount” for tax-reporting purposes and for purposes of compliance with the Ongoing Common Benefit Order (Doc. 4428) in *In re National Prescription Opiate Litigation*, Case No. 1:17-md-2804, pending in the United State District Court for the Northern District of Ohio, Eastern Division.

Having reviewed the Joint Motion and Settlement Agreement, the Court **ORDERS** the following allocation of the Settlement Sum, subject to further Order of the Court: (1) the Litigation Cost Amount as specified in Section III.A. of the Settlement Agreement shall be Fifteen Percent (15%) of the Settlement Sum; and (2) the Remediation Amount as specified in

Section III.A. of the Settlement Agreement shall be Eighty-Five Percent (85%) of the Settlement Sum.

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

It is so **ORDERED**.

ENTERED: August 8, 2023.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation