



**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 CLARIFYING MDL 2804 COMMON BENEFIT PAYMENTS**

On February 26, 2024, this Court entered an order clarifying the procedures necessary for compliance with the obligations imposed by the MDL *Ongoing Common Benefit Order* (Doc. #4428) (05/09/2022) and *Order Clarifying Ongoing Common Benefit Order* (Doc. #4503) (06/08/2022) (“MDL Common Benefit Order”).<sup>1</sup>

This Court previously 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.”<sup>2</sup> As this Court’s Common Benefit Fund Commissioner noted, “[t]he Panel recognizes the existence of the MDL Participation Agreements, which have been executed by most if not all attorneys in the West Virginia MLP Opioid Litigation. Having access to such work product makes it feasible for the West Virginia MLP to maintain its trial schedule in an orderly and efficient fashion while relieving West Virginia attorneys from thousands of hours of necessary work in discovery.”<sup>3</sup>

The MDL Court incorporated the Participation Agreement into its *Ongoing Common Benefit Order*<sup>4</sup> and ordered “an MDL Common Benefit assessment of 7.5% of gross recoveries from any Opioid Case that: (1) is not brought by a State Attorney General, and (2) is not

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<sup>1</sup> *Order Regarding Motion for Clarification Regarding MDL 2804 Common Benefit Payments* (Transaction ID 72142540).

<sup>2</sup> *Order Establishing Common Benefit Fee Fund* (Transaction ID 67071292) entered November 4, 2021, at 5-6.

<sup>3</sup> *Order Regarding Attorney Fees* (Transaction ID 67216768), entered January 7, 2022, at 2.

<sup>4</sup> *Ongoing Common Benefit Order* (Doc. #4428) (05/09/2022) at 11-12.

otherwise included in a global settlement that has its own negotiated, MDL-Court-approved Common Benefit fee and cost structures.”<sup>5</sup> The assessment is payable from the attorneys’ fee portions of such gross recoveries and applies to all settlements and judgments entered after the date of the Order.<sup>6</sup>

The MDL Court later clarified that footnote 11 of the *Ongoing Common Benefit Order* “was designed mostly to illustrate that the common benefit assessment would apply *only to the subdivisions’ share*, not also to the state’s share. And the larger part of the footnote, which the Court highlights and clarifies here, is that ‘the parties may move the Court for modification of the assessment’ depending on the terms of any *actual* settlement.”<sup>7</sup>

The MDL Court described the MDL Common Benefit Assessment as a “back-end, contingent assessment”<sup>8</sup> or “holdback assessment”<sup>9</sup> and noted that “the amount collected pursuant to the 7.5% assessment is *not* necessarily what the Court will award to eventual applicants for common benefit awards. The Court mandates the 7.5% assessment only to ensure appropriate awards of common benefit fees and expenses are possible. . . .”<sup>10</sup> The MDL Court “will enter further Orders as necessary regarding the operation, payment, allocation, award, and

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<sup>5</sup> *Id.* at 18.

<sup>6</sup> *Id.*

<sup>7</sup> *Order Clarifying Ongoing Common Benefit Order* (Doc. #4503) (06/08/2022) at 4.

<sup>8</sup> “This Court, which has ongoing jurisdiction over the ARCOS data produced by the DEA, as organized, analyzed, and made available by the PEC and this Court’s protective and case management Orders, has the authority and may exercise the discretion to condition the use of the data by all parties in the MDL and their counsel, and all non-MDL litigants and their counsel (other than the States), who seek to use it for their non-MDL investigations and cases, upon payment of a back-end contingent assessment. The same is true of the other discovery obtained and managed by the PEC and residing in the MDL Repository.” *Ongoing Common Benefit Order* (Doc. #4428) (05/09/2022) at 10.

<sup>9</sup> “This Court concludes it is appropriate in this case to impose a holdback assessment of 7.5% going forward.” *Id.* at 14.

<sup>10</sup> *Id.* at 16.

distribution of funds held back pursuant to this common benefit assessment, including return of collected funds if applicable.”<sup>11</sup>

To clarify, inasmuch as it has not yet been determined to be for a sum certain, the MDL 2804 Common Benefit Assessment is intended by this Court to be a separate attorney fee/holdback assessment that is separate and apart from the specific 15% attorney fees and expenses awarded by this Court. Should the MDL Court determine that any portion of the Common Benefit Assessment should be returned, this Court **ORDERS** that the funds be returned to the Local Governments, the West Virginia First Foundation, and the State of West Virginia pursuant to the provisions of the West Virginia First Memorandum of Understanding without deduction for any additional attorney fees.

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

It is so **ORDERED**.

**ENTERED:** June 4, 2024.

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

/s/ Derek C. Swope  
Presiding Judge  
Opioid Litigation

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<sup>11</sup> *Id.* at 19.