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May 15, 2024

Jack Van de North
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VIA EMAIL
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Re: Minnesota Opioids Backstop Fund Fee Awards

Dear Special Master Van de North:

I write on behalf of the Minnesota Attorney General's Office ("AGO") in response to your Interim Opioids Memorandum of Agreement Backstop Fund Order ("Interim Fee Award"), which preliminarily awarded legal fees to outside counsel¹ for Minnesota cities and counties that filed opioid-related lawsuits. While the AGO believes that outside counsel should be compensated fairly and reasonably for services performed on behalf of Minnesota cities and counties, it is essential that the process be fully transparent and include the disclosure of all fees awarded from the National Attorney Fee Fund. Accordingly, the AGO requests that, prior to issuing a final fee award, you require outside counsel to disclose information about the process to award common benefit fees to them by the national fee panel and consider the common benefit fees in your analysis.

Background and Need for Special Master

In 2021, the State of Minnesota joined national multistate settlements with opioid manufacturer Johnson & Johnson and opioid distributors AmerisourceBergen, Cardinal Health, and McKesson (the "National Settlement Agreements"). The National Settlement Agreements required the State to solicit Minnesota local governments to join the settlements, and for the State to negotiate with local governments as to how the settlement proceeds would be divided between state and local governments.

Importantly, the National Settlement Agreements included provisions to pay attorneys' fees. Specifically, of the \$26 billion total from the two settlements, \$2.3 billion, or about 8.8%, was reserved to pay attorneys' fees and costs. Of this amount, \$1.6 billion was set aside into a National Attorney Fee Fund, from which private counsel for cities and counties would receive payment upon application to an independent fee panel. The \$1.6 billion was further divided into

¹ Outside counsel fee applicants include Briol & Benson, PLLC, Motley Rice, Crueger Dickinson LLC, Simmons Hanly Conroy LLP, von Briesen & Roper, s.c., Sieben Polk P.A., Heley, Duncan & Melander PLLP, Keller Postman LLC, Consovoy McCarthy PLLC, Campbell Knutson, P.A., Lockridge Grindal Nauen PLLP, Gustafson Gluek PLLC, and Napoli Shkolnik PLLC.

a sub-fund of 60% (\$960 million) to pay for work performed for the common benefit of all local governments (the “Common Benefit Fund”) and 40% (\$640 million) to pay for contingent fees otherwise owed to private counsel for participating cities and counties (the “Contingent Fee Fund”).²

The National Attorney Fee Fund was negotiated by lead national private counsel representing cities and counties. This includes several firms that represent Minnesota subdivisions. These attorneys agreed that the billions of dollars placed into the National Attorney Fee Fund were sufficient to compensate them, and that the overwhelming majority of the funds should go toward abatement of the opioid epidemic. Judge Polster emphasized this on page 3 of his August 2021 Order:

The amounts set aside for payment of attorney fees are the result of a multiple-years-long negotiation between the Settling Defendants, the AGs, and the PEC, with additional input from plaintiffs’ counsel nationwide (including those litigating Opioid cases only in State courts). The amounts reflect a consensus, after significant deliberation and with this Court’s assistance, on what is a reasonable amount for attorney’s fees payable to [private counsel] in this case.

In the fall of 2021, the AGO—using a months-long process of expert panels and working groups—negotiated an agreement between the State and local governments, called the Minnesota Opioids State-Subdivision Memorandum of Agreement (MOA). The parties agreed that the settlement funds would generally be divided with 25% of the funds going to the State, and 75% going to local governments. Local governments additionally insisted on the creation of a “backstop fund”—funded with 7% of the local government share of the settlement—that would be used to pay outside counsel if funds received from the Contingent Fee Fund were insufficient to cover the amount that would be due under any contingency fee agreements with local governments, subject to the 15% cap. The parties negotiated for a Special Master who would receive fee applications from outside counsel and determine fee awards to be paid from the backstop fund.

Fee Applications

Outside counsel timely submitted fee applications pursuant to your backstop fund fee application guidelines, and on April 25, 2024, you issued an Interim Fee Award. Outside counsel included significant information in their applications, including the total settlement amounts for each of their local government clients, the total amount of attorney fees awarded from the Contingent Fee Fund, copies of their contingency fee contracts, and a description of the work they performed to benefit their clients.

The fee applications did not mention, however, the Common Benefit Fund and did not include information regarding the amount, if any, of common benefit fees outside counsel received

² On August 6, 2021, Presiding Judge Polster issued an order (ECF No. 3814) in *In re National Prescription Opiate Litigation* (MDL No. 2804) that capped all applicable contingent fee agreements at 15% and noted that counsel for local governments must waive their contingent fee agreements to receive funds from the National Attorney Fee Fund (the “August 2021 Order”).

Hon. Jack Van de North (Ret.)

May 15, 2024

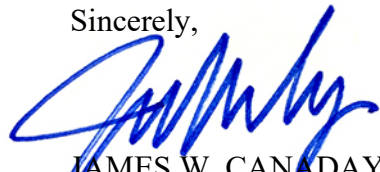
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or will receive from such fund. While not yet finalized, the AGO understands that the national fee panel issued preliminary awards for common benefit fees on February 29, 2024, and that outside counsel have an opportunity to object to their awards.

Disclosing Common Benefit Fund awards as a part of the Minnesota backstop fund fee award process is important for three reasons. First, it serves the vital interest that there be complete transparency and public disclosure related to the backstop fund. Second, the MOA requires that outside counsel's fee applications include "the total amount of fees that [outside counsel] have received or will receive from the National Attorney Fee Fund related to the Litigating Local Governments." Crucially, that includes not just fee awards from the Contingent Fee Fund but also any award of fees from the Common Benefit Fund. Finally, although common benefit fees are not counted toward the 15% contingency fee limit included in the MOA, such additional payments to counsel are certainly relevant to the Special Master's evaluation of the reasonableness of the Minnesota backstop fund awards under Minn. R. Prof. Conduct 1.5 and other relevant laws.

Accordingly, the AGO requests that you require outside counsel to disclose their preliminary awards for common benefit fees—as well as any objections or requests to alter such awards—prior to making a final determination on attorney fees and issuing a final fee award.

Sincerely,



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