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MEMORANDUM

February 1, 2022

TO: TRIBAL CLIENTS

FROM: HOBBS, STRAUS, DEAN & WALKER LLP 

RE: ***Tribal Opioid Settlements with Johnson & Johnson, Major Distributors Announced***

Tribal plaintiffs in the years-long, nationwide multi-district litigation against manufacturers, distributors, and retailers of prescription opioid medications (the “opioid MDL”) have announced two major settlements today: **Opioid manufacturer Johnson & Johnson (J&J) has agreed to pay up to \$150 million over a period of two years, while the three largest distributors of prescription opioids (AmerisourceBergen Corp., McKesson Corp., and Cardinal Health, Inc. (Distributors)) have agreed to pay up to \$439,964,500 over six years** to settle all filed and potential tribal opioid-related claims against them. All federally recognized tribes and Alaska tribal health organizations are eligible to participate in the proposed settlements and need not file a lawsuit in order to participate. The settlements will become effective when certain participation thresholds (discussed below) are met, and settlement funds are to be used by participating tribes and tribal organizations for opioid abatement purposes.

The settlements were formally announced by the parties earlier today in a telephone conference held by Judge Dan A. Polster of the United States District Court for the Northern District of Ohio, who has overseen the massive MDL proceeding since it was created in 2017.¹ The court-appointed Tribal Leadership Committee (TLC), on which our firm serves, negotiated the settlement terms on behalf of the tribal plaintiffs, and we attach the TLC’s statement filed with the MDL court earlier today. Upon hearing the terms of the proposed settlements, Judge Polster granted a motion by the parties to appoint settlement administrators and take other steps to implement the proposed settlements, discussed further below.

Below, we outline the main terms of the proposed settlements, as set forth in the term sheets executed by the TLC and the settling defendants. The parties will be drafting full settlement agreements to be executed once the requirements are met for the settlements to

¹ The MDL consolidated the claims of some 3,000 individual plaintiffs, consisting largely of city and county governments, tribal governments, hospitals, and personal injury victims, among others.

become effective. We note that these settlements do not fully resolve the tribal litigation, as there are several remaining defendants including additional manufacturers, pharmacy chains, and the global consulting firm McKinsey & Company that have not yet settled.² However, these partial settlements will provide much-needed abatement funding to Indian Country, and they represent an historic achievement as the first major settlement of nationwide mass tort litigation to include Tribes as a separate category of plaintiffs based on their sovereign governmental status.

J&J Proposed Settlement Terms

- **Payment and Timing:** J&J has agreed to pay a maximum of \$150 million to eligible tribes and tribal entities over two payments. The first payment of up to \$75 million will be paid 30 days after the effective date of the settlement, and the second payment of up to \$75 million will be paid on the one-year anniversary of the effective date.
- **Abatement Amount, Fees:** Eighty-six percent (86%) of the funds will be paid to an opioid abatement fund for distribution directly to eligible tribes and tribal organizations that opt in. The remaining fourteen percent (14%) will be paid into an attorney fee escrow account.
- **Participation Threshold/Effective Date:** The settlement will become effective when ninety-five percent (95%) of *litigating* tribes and tribal organizations by allocation percentage (discussed further below) elect to participate. (Non-litigating tribes may also choose whether or not to participate, but that will not affect whether the proposed settlement becomes effective.)
- **Reductions and Reallocations for Non-participation:** The total amount of settlement funds will be decreased in proportion to the allocation share of any non-participating *litigating* tribes. The allocation shares of any *non-litigating* tribes that do not opt in to the settlement within three years after the effective date will be redistributed to participating tribes and tribal entities pro rata, unless the non-participating tribe has sued J&J in the interim.
- **Release:** Participating tribes and tribal organizations will be required to sign a release and dismiss any pending claims against J&J.
- **Comparison to State AG Settlement:** J&J also reached a settlement with State Attorneys General (State AGs) where it agreed to pay a maximum of \$5 billion over no more than nine years. The proposed tribal settlement with J&J represents approximately three percent (3%) of the State AG deal. This percentage reflects the disproportionate impact of the opioid crisis on tribal communities, since the population served by tribes and tribal health organizations is closer to one percent (1%) of the total U.S. population. The two-year timeframe for the tribal deal is also significantly shorter than the State AG

² McKinsey is now the sole defendant in a new MDL proceeding based on its role as a consultant in designing and implementing opioid marketing practices that contributed to the epidemic.

deal, meaning that tribes and tribal organizations will receive their share of abatement funds much sooner.

Distributor Proposed Settlement Terms

- **Payment and Timing:** The Distributors have agreed to pay up to \$439,964,500 over a term of six years for a “global” tribal settlement, excluding the Cherokee Nation (which previously entered into a separate \$75 million settlement to resolve its claims against the Distributors in its bellwether litigation). The first payment of \$62,852,071.43 will be paid within thirty days after the settlement effective date, with additional payments to be paid on July 15 of each year.
- **Abatement Amount, Fees:** The payments will be split with eighty-five percent (85%) going to a tribal abatement fund and fifteen percent (15%) to an attorney fee escrow account.
- **Participation Threshold/Effective Date:** The Distributor settlement will become effective when the following two conditions are met: (1) ninety-five percent (95%) of *litigating* tribes and tribal organizations by allocation percentage elect to participate; and (2) at least fourteen *non-litigating* tribes with a population of at least 5,000 members elect to participate. If these thresholds are not met, the court-appointed TLC may ask the Distributors to enter into the settlement agreement with those tribes and tribal entities that wish to join, and the Distributors may, in their discretion, decide whether or not to do so.
- **Reductions and Reallocations for Non-participation:** As with the J&J terms, the total settlement amount will be decreased in proportion to the final allocation percentage of any *litigating* tribes that elect not to participate. With respect to *non-litigating* tribes, the Distributors agree to pay their shares into escrow for four years from the effective date. At that point, if at least two-thirds (2/3) of the non-litigating tribes *by population* have joined the settlement, then the Distributors will continue to pay all non-litigating tribes’ shares into escrow and, on the final payment date, any unclaimed shares up to \$20,000,000 will be reallocated to participating tribes and tribal organizations. If at the four-year mark less than two-thirds (2/3) of the non-litigating tribes have elected to participate, all unclaimed shares will revert to the Distributors and no further payments will be made for non-litigating, non-participating tribes.
- **Comparison to State AG Settlement:** The proposed tribal-Distributor settlement is a slightly smaller percentage as compared with the \$21 billion Distributor State AG settlement—approximately two percent (2%). However, that is in large part due to the fact that the largest tribe in the country by population, the Cherokee Nation, is not eligible to participate. The six-year payment period for the tribal settlement is also significantly shorter than the 18-year payment period for the States and local governments.

Administration of the Proposed Settlements

The settlement funds will be held and distributed through two separate qualified settlement funds. The court order issued today by Judge Polster appoints Special Master David Cohen, who is the Special Master assigned to tribal litigation in the MDL and who mediated the J&J settlement, as Administrator of the qualified settlement funds. The order also appoints both Special Master Cohen and former federal Judge Layn Phillips, who mediated the Distributor settlement,³ to oversee the inter-tribal allocation procedures and to jointly determine final allocations to participating tribes and tribal organizations.

At the request of the tribal plaintiffs, Judge Polster also appointed former Assistant Secretary for Indian Affairs Kevin Washburn (Chickasaw Nation), former Acting Director of the Indian Health Service Mary Smith (Cherokee Nation), and retired KPMG Global Lead partner Kathy Hopinkah Hannan (Ho-Chunk Nation) (who also serves as Chair of the Board of Trustees for the Smithsonian National Museum of the American Indian, among other roles) as Directors of the tribal qualified settlement funds. Their duties under these settlements will include outreach to non-litigating tribes and tribal organizations as well as handling any abatement use reporting that may be required by the final settlement agreements.

Abatement Use Requirements and Allocation

Settlement funds received by participating tribes and tribal organizations must be used for opioid abatement purposes. Such purposes are broadly defined in the settlement term sheets, and expressly include any “culturally appropriate activities, practices, teachings or ceremonies that may, in the judgment of a Tribe or Tribal Entity, be aimed at or supportive of remediation and abatement of the opioid crisis within a tribal community.”

As noted above, Special Master Cohen and former Judge Phillips will oversee the allocation process. It is expected that the final allocation formula will be similar to a formula previously adopted for the tribal opioid abatement trust in the context of the bankruptcy proceeding brought by opioid manufacturer Purdue Pharma and approved in that context by Judge Phillips.⁴ However, the settlement term sheets provide that all participating tribes and tribal organizations will have a right to participate and be heard as part of the allocation process.⁵

³ Judge Phillips was also one of two mediators to oversee negotiations of the tribal settlement as part of the bankruptcy proceedings brought by Purdue Pharma, manufacturers of the prescription opioid OxyContin.

⁴ The Purdue bankruptcy plan, approved by the bankruptcy court, has not yet been implemented pending appeals to the Second Circuit. The appeals do not relate to the tribal trust specifically but could affect implementation of the plan as a whole.

⁵ The allocation formula is based on both tribal population metrics and a collection of opioid harm metrics. Each tribe’s population metric is weighted eighty-five percent (85%) to its Indian Health Service user population and fifteen percent (15%) to its self-reported tribal citizenship population. The opioid harm metrics include the measurement of the volume of prescription opioids that has flowed into a tribe’s service areas, as reported in the DEA’s ARCOS database, and drug and prescription opioid overdose rates imputed to each tribe. The results are also slightly adjusted for area poverty rates and relative cost of health care services. The distribution among Alaska tribes and tribal health organizations was developed by consensus of the Alaska Tribal Caucus Tribal Shares Methodology Workgroup.

Conclusion

Our firm has been deeply involved in the opioid litigation, including the negotiation of the proposed settlements, as part of the court-appointed Tribal Leadership Committee. We are happy to answer any questions you may have about the settlements and your option to participate. Please do not hesitate to contact us with any questions. You may contact Geoffrey Strommer (503-242-1745 or gstrommer@hobbsstrauss.com), Ed Goodman (503-242-1745 or egoodman@hobbsstrauss.com), or Caroline Mayhew (202-822-8282 or cmayhew@hobbsstrauss.com).