

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

the Court enter an order staying distribution of the \$8.2 million that is the subject of the pending appeal.

1. On May 29, 2014, this Court granted Plaintiffs' motion, without opposition from the Defendants, to allow commencement of trust administration distributions before the expiration of appeals by individual claimants from adverse determinations of eligibility by the Claims Administrator. (Dkt. No. 4044 at 1.) The order specifically provided that "[p]rior to commencement of Trust Administration payments, the Plaintiffs shall present to the Court a proposed order setting forth the amount of the distribution, and all amounts being withheld from distribution including projected expenses, claims subject to pending appeals, and the Reserve Fund set forth in the Settlement Agreement." (*Id.*)

2. On July 14, 2014, Plaintiffs reported to the Court that the Department of Interior ("Interior") was working to correct problems that had been identified with respect to land records. Once that information was corrected, Interior would begin calculating the amounts to be distributed to individual class members and provide that information to the Claims Administrator no later than the end of August 2014. (Dkt. No. 4054.)

3. Since then, the parties have worked cooperatively to assist Interior in calculating the distribution amounts. The parties agree that a certain sum of money must be withheld from the distribution due to uncertainty over potential claims and future expenses. For example, it is estimated that \$40.9 million must be withheld for future claims administration, including maintaining the call-in center while distributions are made and handling the tens of thousands of estate claims. Much uncertainty remains over the duration of future claims administration, which is being addressed in a pending motion before the

Special Master. Plaintiffs have requested that unclaimed probate funds be placed in pending IIM estate accounts for distribution through the federal probate system, reducing expense to the Plaintiff class. (Dkt. No. 4039.) Defendants oppose this procedure, insisting that the probate funds should remain in the Settlement Account until each federal probate is completed, extending the claims administration process for an estimated 8 years. As the Special Master is charged with overseeing the estate distributions, \$2 million has been reserved to cover his work in the event it continues over that length of time. Given this uncertainty, Plaintiffs have no choice but to withhold these funds from the distribution to ensure there exists sufficient amounts to complete the settlement administration.

Another \$1.5 million has been held in reserve to cover individual claimant appeals, and \$3.5 million is being held in the Reserve Fund for individuals who did not receive notice of the settlement as provided in the Settlement Agreement. The Defendants do not oppose the withholding of these funds, totaling nearly \$48 million, from the upcoming distribution.

4. On May 16, 2014, the Class Representatives appealed this Court's Expense Application Order. (Dkt. No. 4038.) That appeal is pending in the D.C. Circuit and it could impact up to \$8.2 million in settlement funds.

5. Although the Defendants agreed to withhold the \$48 million for various fees and claims administration costs described above, the Defendants are unwilling to include the \$8.2 million subject to the pending costs appeal without an order from this Court permitting those funds to be withheld pending resolution of the appeal. In correspondence dated August 14, 2014, the Defendants explained that "[i]f you desire to reserve for this rejected expense

[the \$8.2 million subject to the pending appeal] and have that reflected in the payment calculation, you should promptly ask if the district court will stay its order.”

6. This Court should enter an order permitting a stay of distribution of those funds pending the outcome of the appeal in order to prevent irreparable harm to the Plaintiffs. If those \$8.2 million in funds are distributed and the D.C. Circuit were to reverse and remand for an award of those costs, it would be impossible to comply with the D.C. Circuit’s mandate. Once funds are distributed to many thousands of recipients, there is no practical way to recover a portion of those funds mistakenly distributed. Moreover, there exists no harm to absent class members as the parties already are preparing to withhold more than \$48 million for other contingencies and, should the appeal be unsuccessful, the parties can calculate this withholding along with the others and include it, if necessary, in a future distribution.

7. The Court appeared to contemplate this outcome at the May 30, 2014, hearing, when it described the intended withholdings with approval, acknowledging that there was an appeal pending on the costs issue. (Exhibit A, Hr’g Tr. 58, 60.) Accordingly, Plaintiffs respectfully request that the Court enter an order staying distribution of the \$8.2 million subject to the pending costs appeal.

8. Plaintiffs have discussed this motion with Defendants who do not consent to the substance of it but do not oppose its consideration on an expedited basis.

WHEREFORE, Plaintiffs respectfully request that the Court grant this emergency motion to stay distribution of \$8.2 million in settlement funds that are the subject of the

appeal of the Expense Application Order in the D.C. Circuit, pending the outcome of that appeal.

Respectfully submitted this the 25th day of August, 2014.

/s/ David C. Smith
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing EMERGENCY MOTION TO STAY DISTRIBUTION OF SETTLEMENT FUNDS THAT ARE SUBJECT TO PENDING APPEAL AND MEMORANDUM IN SUPPORT THEREOF was served on the following via facsimile, pursuant to agreement, on this 25th day, August, 2014.

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