

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

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| IN RE: 3M COMBAT ARMS) | Case No. 3:19md2885 |
| EARPLUG PRODUCTS LIABILITY) | |
| LITIGATION) | Judge M. Casey Rodgers |
|) | |
|) | Magistrate Judge Hope T. Cannon |
| This Document Relates to:) | |
| All Cases) | |
| _____) | |

**CASE MANAGEMENT ORDER NO. 86
(Notice of Award Determination and Payment Process)**

The Court has received communications from Claimants who are unclear about how their claims are/will be processed and when they may receive payment. As the Settlement Administrator, BrownGreer has posted many Alerts, Procedures, and Frequently Asked Questions on Primary Counsel and Claimants' online Portals and on the public Settlement website. BrownGreer has also issued explanatory emails directly to Counsel and Claimants regarding how the Settlement Program is being implemented. It regularly reports to the Court on Awards paid and on matters that impede or delay payments to Claimants. Nonetheless, the Court is concerned that Participating Claimants may not adequately understand the steps required to reach the point of payment on a claim. The Court further recognizes that Primary Counsel also need to be fully informed on the processes regarding their clients so that Counsel can convey that information to them promptly and correctly.

Accordingly, the Court enters this Order to: (1) explain key elements of the current implementation of the Settlement Program; (2) remind all Primary Counsel of their obligation to keep all clients adequately apprised of their claim and payment status; and (3) ensure compliance with the procedures adopted by the Settlement Administrator.

This Order, albeit lengthy, contains important information about the Claims Review and Payment Process. Primary Counsel, Claimant/clients, and Pro Se Claimants are directed to read the entire Order. Going forward, all Counsel and all Claimants will be charged with knowledge of its content.

Implementation of the Combat Arms Master Settlement Agreement (“MSA I”) and the Combat Arms Settlement Agreement for Wave Cases (“MSA III”) is now well underway. The MSA I Qualified Settlement Fund (“QSF”) received the initial \$250,000,000 funding from the Defendants on December 26, 2023, and \$253,100,000 was deposited into the MSA III QSF on January 31, 2024. BrownGreer has performed the steps necessary for the MSA I QSF to issue payments to 86% of the 19,496 Participating Claimants who elected the Expedited Payment Program (“EPP”) and can be paid in First In, First Out (“FIFO”) Order from the initial funding. By March 12, 2024, BrownGreer had issued initial Notices of Determination on all 1,595 MSA III Wave cases and has begun distributing payments of Base Awards and Recorded Tinnitus Awards to Wave Claimants who

are not eligible for a Point-Based Award. For Wave Claimants who are eligible for a Point-Based Award, those Award amounts cannot be determined until all the Points assigned to Wave Claimants are final and the resulting Point Dollar Value can be calculated. Moving the Program thus far has required substantial effort and constant attention by the Allocation Special Master, BrownGreer, and Pattern Data, with regular oversight by the Settlement Administration team, including the Court.

A. The Processing Steps Necessary to Reach the Payment Stage

1. FIFO Ranking of EPP Claimants: MSA I and the Allocation Methodology direct that EPP Claimants be paid on a FIFO basis. This controls the order in which the Awards of EPP Claimants are processed and paid. BrownGreer's Procedure PT-0001, announced on January 8, 2024, explained that FIFO ranking is assigned based on the date a Claimant signed his/her Release during the Registration phase of the Program, as reflected on the actual Release. BrownGreer's Alert No. 24-0012, published on February 8, 2024, provided further details on FIFO ranking and how Claimants and Primary Counsel could look up the FIFO position of any EPP Claimant. Understanding when an EPP Claimant is likely to receive a Notice of Award Determination and then payment requires Claimants and Primary Counsel to familiarize themselves with those FIFO rules. MSA III Wave Claimants are processed concurrently and are not subject to a FIFO ranking.

2. Review of Claim Materials to Determine the Correct Award: All

information and materials submitted or available on a Claimant must be reviewed to determine a Claimant's EPP Award Level under the MSA I Allocation Methodology or a Wave Claimant's Award Level under the MSA III Allocation Methodology. This includes all DOEHRs data received on Claimants from the Department of Defense, information in the Claimant's Registration Form, and audiogram reports and other medical records submitted by the Claimant or the Claimant's Primary Counsel. BrownGreer has assembled all the data and PDFs of materials transferred to it by ARCHER/CaseLocker to identify the type of documents and correctly place them in the Claimant's file in the Program to be available for claim review. The ability given to EPP Claimants during Registration to "supplement" their files by adding additional documents delayed the full processing of their claims, with thousands of records uploaded around the January 25, 2024 deadline, which also impaired the effort to distribute quickly the initial \$250,000,000 deposit into the MSA I QSF on December 26, 2023. BrownGreer established secure electronic means to transfer all materials to the Allocation Special Master and to the Pattern Data company, which provides the software program to pinpoint the information needed to apply the Allocation Methodology to each Claimant and assist in assessing the Award for which the Claimant is eligible. BrownGreer claim reviewers supplement this process on all claims on which a manual review of records is required. No claim can advance toward payment until that review is done, but these

reviews, numbering in the thousands, have been conducted on an accelerated basis for the EPP FIFO Claimants and Wave Claimants. The Program now is able to make Award payments.

3. Initial Notice of Award Determination: BrownGreer and the Allocation Special Master designed an Initial Notice of Award Determination to announce the outcome of the claim review to the Claimant and the Claimant's Primary Counsel. BrownGreer also built the online system to receive all review determinations in the Notice and issue it to Primary Counsel (or directly to a *pro se* Claimant) to explain the Award outcome. These processes take place through the online Portals BrownGreer makes available to both Primary Counsel and Claimants. No claim can advance toward payment until Primary Counsel accesses this Notice and acts on it according to the instructions from BrownGreer. The EPP Notice explains the EPP Level, the Guaranteed Gross Payment Amount on the claim, deductions for the Common Benefit Fund, and other matters. The Wave claim Notice provides detailed information on the Claimant's Base Award, Recorded Tinnitus Award (if eligible), and Points assigned as a Point-Based Award (if eligible).

4. Request for Reconsideration: The Allocation Methodologies provide that a Claimant may request that the claim review outcome be reconsidered for specific reasons as identified below. The Initial Notice of Award Determination

from BrownGreer specifies the deadline for Primary Counsel to ask for this Reconsideration and how to do so on the Portal. The Notices also allow the Claimant to accept the Award determination reflected in that Initial Notice, which accelerates payment of the award to a Claimant. As the Notice makes clear, no new documents may be submitted on Reconsideration, which is available only where the Claimant can establish that the Settlement Program: (a) made a clerical error; (b) misapplied or misinterpreted the dates of use or dates of service; or (c) selected the wrong audiogram within a cluster of audiograms. In a determined effort to pay the first group of FIFO-ranked EPP Claimants, BrownGreer first advised Primary Counsel of the Awards payable on these FIFO EPP Claimants on January 18, 2024, and began issuing Initial Notices on January 22, 2024. Those early Notices did not contain a Reconsideration option on the assumption that because the EPP Level and Award assigned in the Notice matched the Level and Award the Registration data showed that the Claimant and Primary Counsel had requested, no Reconsideration was needed. Nonetheless, a number of Primary Counsel firms insisted that they be permitted to request Reconsideration to seek a higher EPP Level than had been requested in Registration, which required BrownGreer to begin the process anew and re-issue many Notices. That, in turn, led to delay in the finalization of those claims and diverted time and resources from the processing of other claims.

5. Reconsideration Review: Asking for Reconsideration will postpone

payment on a claim because on Reconsideration, the claim must go through another review (“re-review”) by the Allocation Special Master, Pattern Data, and BrownGreer. The Points Payment to Wave Claimants who will receive a Point-Based Award cannot be quantified until the Point Dollar Value can be calculated, which will not be possible until all Requests for Reconsideration have been re-reviewed and the total of the final Points assigned to all Wave Claimants is known. As a result, a Request for Reconsideration on a Wave claim will postpone the Points Payment to *all* Wave Claimants. Under the systems created by BrownGreer, Reconsideration requests result in a re-review of the claim, following which BrownGreer issues another Notice that announces and explains the final Award outcome on the claim.

6. Notice of Final Award After Reconsideration: The Final Award Notice is issued to an EPP Claimant and Primary Counsel as soon as the Reconsideration review is concluded. This Notice provides final detail on the EPP Level and Award. On a Wave claim, it explains the fixed payments for which the Claimant is eligible, and any Points assigned. The final Notices on Wave Claimants not eligible for a Point-Based Award are being issued as they are accepted or when the 10-day period to request Reconsideration expires without a request being made. Final Notices to Points-eligible Wave Claimants will explain the dollars awarded for Points. Final Notices also contain additional information on deductions from the

Award, which vary depending upon whether the Claimant is represented by Primary Counsel in or outside the payments “Ledgering Process” as described further in this Order.

7. Healthcare Liens: The provisions of MSA I and MSA III regarding the identification and resolution of healthcare liens provided by federal or state law for recovery by federal agencies or state Medicaid agencies require additional steps by BrownGreer to obtain and act on information regarding such recovery interests. The Government Payor Identification Form included in the Registration packet requires all Claimants to state whether they had sought medical treatment for a hearing injury through TRICARE, CHAMPVA, or the Indian Health Service; however, this Form did not ask about state Medicaid. As a result, BrownGreer had to put in place mechanisms for Claimants and Primary Counsel to indicate whether a Claimant received any healthcare for hearing injuries paid for by Medicaid. As required by federal law, BrownGreer executed a query to the Centers for Medicare & Medicaid Services (“CMS”) to determine whether Claimants are Medicare-entitled. The MSAs require BrownGreer to establish “appropriate holdbacks” for the satisfaction of potential healthcare liens against a Claimant’s Settlement Award. BrownGreer has moved from a 25% holdback of the Claimant’s Gross Award for all those with a healthcare lien question (Medicare-entitled or answered “YES” on CHAMPVA, TRICARE, Indian Health Services, or Medicaid) to having no

holdback for CHAMPVA veteran Claimants, a \$17.58 holdback for all Claimants identified by CMS as Medicare-entitled, a \$500 holdback for TRICARE for EPP Claimants and those Wave Claimants receiving only fixed payments, and a 10% holdback of a Wave Claimant's Point-Based Award (not to exceed \$5,000). That leaves the 25% holdback applying only to the small number of Claimants subject to state Medicaid, CHAMPVA (Claimants who did not serve in the military), or an Indian Health Service recovery claim. An Award payment to a Claimant not subject to a potential healthcare lien is not subject to any holdback for liens. The required lien holdbacks necessitate extensive attention from BrownGreer, which in turn results in unavoidable delay in full payment. While it is understandable that lien holdbacks cause frustration among Claimants and Primary Counsel, if BrownGreer were not handling this aspect of the Settlement Program, Primary Counsel would be required to ensure satisfaction of all applicable liens.

B. How Payments are Made

1. Overview of the Payment Process: An Award cannot be paid until all processing steps regarding Notices, Reconsideration, and analysis of healthcare liens information have concluded. At that point, how a represented Claimant is paid depends on whether his or her Primary Counsel is an "In-Ledgering" firm or a "Non-Ledgering" firm. *Pro se* Claimants are paid from the QSF directly. Directions to issue payments from the QSF are made by BrownGreer, in coordination with the

Co-QSF Administrator, Randy Sansom.

2. The Ledgering Process: The Negotiating Plaintiffs' Committee requested that this Program provide Primary Counsel with the option of having the Settlement Administrator issue Award payments to their clients directly or to handle the payments themselves in the traditional manner. This step is referred to as the "Ledgering Process." Primary Counsel choosing to have BrownGreer distribute payments to its clients is known as an "In-Ledgering" firm. Firms opting out of that process are "Non-Ledgering" firms. Importantly, the Notices issued to Claimants differ depending on whether their counsel is In-Ledgering or is Non-Ledgering. The logistics of executing payment of an Award to a Claimant also vary between In-Ledgering and Non-Ledgering firms. BrownGreer reports that 261 Primary Counsel firms (representing 112,863 Participating Claimants) elected to be In-Ledgering, while 73 Primary Counsel firms (representing 137,838 Participating Claimants) are Non-Ledgering. This decision was made by the Primary Counsel firm.

3. Claimants Represented by In-Ledgering Primary Counsel: The Notice issued to Claimants whose Primary Counsel is In-Ledgering shows the deductions from their Award for attorney's fees and litigation costs of all CAE Counsel with a fee interest in the Claimant's recovery. To be able to include that data, CMO 81 and CMO 83 required Primary Counsel to complete an Excel worksheet template provided by BrownGreer and return it by January 8, 2024, for

EPP Claimants in the first FIFO Payee group and by January 31, 2024, for all other clients of the firm. A firm could opt out of the Ledgering Process by notifying BrownGreer of its decision or by not responding to the Court's Orders with the required information. BrownGreer uses the fee and costs answers provided by an In-Ledgering firm to fill in those parts of the Notice to the firm's clients. Because that Notice is to serve as an accounting statement disclosing such deductions to which the Claimant must agree before being paid, BrownGreer created the system to issue the Notice first to Primary Counsel to review. The firm will then forward to the Claimant/client an online link, which allows the Claimant/client to set up a Portal with BrownGreer, view the Notice, sign it to acknowledge and agree to the deductions for the Claimant's Award, and then return that signed Notice to BrownGreer and counsel. When the Claimant goes online, he or she should answer a question about Medicaid if counsel has not previously provided it. The Claimant also should select how to be paid by the QSF (i.e., ACH electronic payment or check, or, if the payment is \$10,000 or less, by Venmo, PayPal, or a Virtual Mastercard). No Claimant's Award payment can enter the disbursement process until Primary Counsel and the Claimant have completed those steps.

4. Claimants Represented by Non-Ledgering Primary Counsel:

Because the Non-Ledgering firms advise their clients directly regarding their attorney's fees and litigation costs, the claim outcome Notices from BrownGreer do

not show those deductions or require a step for the Claimant to sign the Notice and return it to BrownGreer as agreed. Instead, BrownGreer issues these Notices to Primary Counsel with instructions that Counsel must open the PDF, answer a question about Medicaid (if not previously provided), and then accept the Notice. BrownGreer then directs the QSF to issue payment by wire transfer to the law firm, but only after the firm has furnished its wiring instructions and a Form W-9. It then is up to Primary Counsel to pay each Claimant/client their share of the Award.

C. Impediments to Payment of Awards

The QSF has issued payments at least once weekly on all Awards ready to be paid. BrownGreer expects a similar payment cadence to continue, subject to adjustment(s) based on funds available for payment in the QSF and instructions from the Court. Many steps must be completed before an Award is paid to a Claimant, and all impediments to payment must be cleared before Claimants may be paid. Many of the payment impediments (as outlined below) require action by the Claimant and Primary Counsel. In such cases, BrownGreer notifies Primary Counsel of the obstacle delaying payment and what must be done to clear it. No deadlines have yet been set for Primary Counsel to respond, though an EPP Claimant's FIFO rank may be at risk for prolonged inaction by either Primary Counsel or a Claimant.¹ These impediments to payment include:

¹ To the extent it becomes obvious to the Court that law firms and/or Claimants are not

1. EPP or DPP Status: Only EPP Claimants can be paid from the MSA I QSF at this time. Those who elected the DPP will not be reached for payment until after all EPP Awards have been made, which may occur by April 2025.

2. FIFO Ranking: EPP Awards are paid in FIFO order. Claimants who Registered later and have higher FIFO numbers than those who signed Releases earlier will be paid later. BrownGreer has assigned a FIFO rank to every EPP Claimant (based on the Claimant's Release signature date) that is displayed to the Claimant and Primary Counsel on their Portal and in the Notices. EPP Awards cannot be paid until the QSF has the funds from the Defendants to do so, in accordance with the deposit schedule set in MSA I. When those monies arrive in the QSF, they are assigned to EPP Claimants in FIFO order.

3. Supplementation: Notices to Claimants who added Supplemental documents on or before the Registration deadline could be issued only after those materials were linked to the correct Claimant and then reviewed, which, as noted, caused considerable delay given that Claimants and Primary Counsel submitted Supplemental documents up to the last minute of Registration.

4. Reconsideration: Claimants who request Reconsideration cannot be paid until that process is concluded and the Award outcome is final.

responding to BrownGreer in a reasonable amount of time, the Court will issue an order setting a deadline for the response and if that deadline is not met, the Claimant's FIFO rank will be forfeited.

5. Claimants Represented by In-Ledgering Primary Counsel:

Primary Counsel must access the Notice and forward it to the Claimant/client, who then must go online to read it, accept it, and select a payment method. There currently are no deadlines for when these actions must occur, but the Court is monitoring this. Inaction at any one of these points will delay payment.

6. Claimants Represented by Non-Ledgering Primary Counsel:

Primary Counsel must accept the client's Notice and issue payment to the client. The firm must provide BrownGreer with accurate wiring instructions. No deadlines yet apply to these actions, but the Court is monitoring. Delay on any of those steps will interfere with payment.

7. Wave Claim Point-Based Awards: These Final Notices cannot issue and Awards cannot be paid until all Wave Reconsiderations are completed, the Total Points assigned to all Claimants are known, and the Point Dollar Value is determined.

8. Release: The MSAs provide that the Defendants must accept a Claimant's Release as complete before the Program may pay an Award to that Claimant. If the Defendants reject a Release because of signature, name, or other deficiency issue, Primary Counsel are directed to cure the deficiencies. The time it takes Counsel to cure the deficiency in turn delays payment.

9. LOC Issue: If a Loss of Consortium Claim still is being pursued

relating to a Claimant, the Award cannot be paid until that claim is dismissed or the spouse has signed the Derivative page of the Release.

10. Third-Party Funding: CMO 61 requires withholding the Award if a Third-Party Funder issue was reported as to the Claimant in a CMO 61 Declaration and it has not been resolved.

11. 50% Rule: A violation of the 50% Rule, pursuant to which a Claimant may not receive less than 50% of the Final Settlement Award (after deduction of the 9% Common Benefit Fund holdback) because of attorney's fees and costs regardless of other deductions for liens or other matters, will delay both Notice and payment to the Claimant until the matter is resolved.

12. Deceased Claimant: If the Claimant is deceased and the Personal Representative has not submitted proof of representative capacity as required by the MSAs, the Award cannot be paid until Primary Counsel acts.

13. Incapacitated Claimant: No payment may issue if the Claimant is mentally incapacitated and the Personal Representative has not yet submitted proof of representative capacity.

14. Bankruptcy Issue: Where the Claimant has disclosed to BrownGreer that they have sought bankruptcy protection, the Award cannot be paid until Primary Counsel has submitted a waiver of interest by the bankruptcy trustee, bankruptcy court approval, or other steps required by the bankruptcy court.

D. How to Obtain Information on Claim Processing and Payment Status

Claimants and Primary Counsel have multiple avenues to obtain information on the status of a claim or payment of an Award, including:

- (1) Primary Counsel's Portal with BrownGreer allows all authorized personnel at the firm to look up the file and status of any of the firm's clients and to see and download regularly updated reports on all of the firm's clients, their status as Participating or Non-Participating, EPP Notices sent and their status, MSA III Wave Notices, Final Award amounts and deductions, and all payments made to Claimants or the firm.
- (2) Any Claimant can see his or her own information and status on his or her Portal with BrownGreer.
- (3) Claimants represented by Non-Ledgering Primary Counsel are paid their share of their Award by the law firm after the firm receives the funds from the QSF. A Claimant who has not received payment should contact their lawyer to inquire as to why, for at that point BrownGreer has no control over the funds. If 60 days have passed without release of the payment by the firm, the Claimant may contact BrownGreer, who will notify the Court of the stall in payment, unless there is a valid reason for the delay, such as needing bankruptcy court approval or a probate appointment.
- (4) Alerts and Procedures issued by BrownGreer and posted on the Portals provide updates and instructions on the processing and payment of claims. Primary Counsel and Claimants are charged with knowledge of these Alerts and Procedures and so both are directed to stay current on that information.
- (5) Every Primary Counsel firm has one or more "Law Firm Contacts" at BrownGreer to call or email directly on any questions or needs.
- (6) Every *Pro Se* Claimant has been given a direct contact person at BrownGreer to call or email.
- (7) The public website hosted by BrownGreer for the Program, <https://www.combatarmssettlement.com/>, provides FAQs, information, and updates on the Progress of the Program.

- (8) The SettlementAdministrator@combatarmssettlement.com email at BrownGreer can be used by anyone with questions.
- (9) BrownGreer maintains and staffs a toll-free number, 1-833-458-2700, for the Program.
- (10) BrownGreer has advised the Court that it is preparing and will post to Portals and the public website a tool showing the scheduled dates and amounts of the scheduled deposits by Defendants into the MSA I QSF and the EPP rankings likely to be payable from each, as well as when DPP payments *may* be reached.

The information in this Order and made available by BrownGreer should reduce confusion or doubt over what must occur before an Award can be paid, when payments may be made, and why a Claimant's Award has not yet been paid. Primary Counsel are directed to stay familiar with this information, draw upon these resources, and keep their clients fully apprised of their status in the Program. Claimants should not have to contact the Court to learn about the progress on their claims.

SO NOTICED AND ORDERED, on this 21st day of March, 2024.

M. Casey Rodgers

**M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE**