

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, Administrator, et al., :  
Plaintiffs, :  
 :  
 :  
 vs. : C.A. No. 04-312L  
 :  
 :  
 JEFFREY DERDERIAN, et al., :  
Defendants. :

PLAINTIFFS' AMENDED MOTION FOR APPROVAL OF  
SPECIAL MASTER MCGOVERN'S PROPOSED PLAN OF DISTRIBUTION

The *Gray* and *Napolitano* Plaintiffs<sup>1</sup> respectfully move this Court for an Order approving Special Master McGovern's Plan of Distribution. All Plaintiffs, by their counsel, assent to the instant motion.

In support of this Amended Motion, Plaintiffs' incorporate by reference the attached memorandum of law.

Respectfully,

Plaintiffs #13d and e, #17 through #63, inclusive  
#133 through #190, inclusive, #255 through #233,  
inclusive, #240, and #251 through #257, inclusive,  
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By their Attorneys,

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inclusive, #240, and #251 through #257, inclusive,  
and Napolitano Plaintiffs,  
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<sup>1</sup> All Plaintiffs from the *Gray* and *Napolitano* cases, by their counsel, as their signatures appear below.

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, Administrator, et al.,	:	
Plaintiffs,	:	
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vs.	:	C.A. No. 04-312L
	:	
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JEFFREY DERDERIAN, et al.,	:	
Defendants.	:	

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR AMENDED MOTION FOR APPROVAL OF SPECIAL MASTER MCGOVERN'S PROPOSED PLAN OF DISTRIBUTION**

The *Gray* and *Napolitano* Plaintiffs<sup>1</sup> move this Court for approval of Special Master McGovern's Proposed Plan of Distribution (hereinafter "Plan") and file this Memorandum in Support of their Amended Motion.

On November 27, 2007, this Court entered an Order of Reference appointing Professor Frances McGovern as a Special Master and charged him with the task of:

- a. devising a plan for the distribution of settlement proceeds among Plaintiffs; and
- b. submitting said plan for distribution of settlement proceeds to this Court for approval.

(Exhibit 1 - Gray Doc. #1735 – Order Appointing Special Master McGovern).

Special Master McGovern has completed his charge by devising and submitting a plan for the distribution of settlement proceeds in this case. Upon representation of each Plaintiffs counsel, all Plaintiffs have assented to and support Special Master McGovern's Plan.

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<sup>1</sup> All *Gray* and *Napolitano* Plaintiffs are represented by the undersigned counsel of record.

**I. SPECIAL MASTER MCGOVERN HAS COMPLETED HIS CHARGE TO DEVISE AND SUBMIT A PLAN OF DISTRIBUTION OF SETTLEMENT PROCEEDS**

**A. Meetings With Plaintiffs And Plaintiffs' Counsel**

On nine days between December 27, 2007 and January 30, 2008, Special Master McGovern held twenty-one meetings with approximately 306 victims and their families and lawyers. The purpose of these meetings was for Special Master McGovern to explain the process he proposed to use in developing a distribution plan, to describe the potential alternative procedures and plan formulae that exist and to receive input as to both the proposed process and the plan.

The vast majority of these meetings took place in space provided without charge by the Community College of Rhode Island. Each meeting lasted several hours. In addition to these meetings Special Master McGovern also held numerous telephone conferences with victims and their families.

Based on these meetings and additional telephone discussions between Special Master McGovern and Station Fire victims and families, it became apparent that Plaintiffs generally favored a point system such as the one that Special Master McGovern has submitted to this Court. Through and as a result of this collaborative process, and based on his vast experience<sup>2</sup>, Special Master McGovern began developing a plan of distribution.

**B. Special Master McGovern's Proposed Plan of Distribution**<sup>3</sup>

Special Master McGovern's Plan is, in essence, a "point system." Points are allocated to each Plaintiff based on a clear, easily measureable, and objective set of criteria. The value of

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<sup>2</sup> See Curriculum Vitae of Francis McGovern, available at <http://www.law.duke.edu/fac/mcgovern/cv> (last visited February 4, 2009).

<sup>3</sup> A complete copy of Special Master McGovern's Proposed Plan is attached hereto as Exhibit 2.

each point ultimately will be determined by dividing the total number of points allocated amongst all Plaintiffs by the total dollar amount of all aggregate settlements.

Special Master McGovern's Plan creates two tracks for allocating points, one for injury and one for wrongful death. In both instances the point value assigned to each category of harm is based upon the categories of recovery available to a Plaintiff under pertinent state law.

Points may only be allocated once claim forms are completed and sufficient objective documentation has been submitted to a neutral expert for review and approval in accordance with the Plan.

The Plan provides that liens and/or other subrogation interests remain the responsibility of each claimant. Plaintiffs' counsel have been and will continue to negotiate reductions and/or waivers of liens and subrogation interests wherever possible.

#### 1. WRONGFUL DEATH CLAIMS

Under Special Master McGovern's Plan each wrongful death claim is allocated a minimum baseline of 100 points. This is meant to encompass, among other things, damages for "pain and suffering, loss of earning capacity, and funeral and burial expenses." (Exhibit 2 - Proposed Plan). It also takes into account pertinent statutory minimums for wrongful death recovery.

In addition to these 100 base points each wrongful death claim may receive an allocation of additional points as follows:

- Age: ½ point for each year that the decedent was less than the median age of all wrongful death plaintiffs at the time of death. This provision accounts, in part, for damages for loss of wages, loss of additional life expectancy and loss of enjoyment of life and applies equally to all similarly-situated Plaintiffs, regardless of demographics.

- **Derivative claims:**

- Spousal loss of consortium claims: Each surviving spouse is allocated 24 points unless both spouses died in the fire, in which case each spouse is allocated 12 points.
- Loss of parental society and companionship claims: 20 points are allocated for each minor child of a decedent plus 1 point for each year that the minor child was below the age of 18 as of February 20, 2003.

Spousal and parental consortium claims are recognized under state law. The above provisions afford equal treatment for all spouses and children. Individual differences in family relationships are exceedingly difficult to measure, qualify and/or quantify in a mass tort distribution plan.

- **Income adjustment:** 1 point additional for each \$10,000 over \$50,000 per year that the decedent accrued in gross annual earnings.
- **Education adjustment:** 1 additional point is allocated for each complete year of post secondary education if:
  - a) the decedent died within 5 years immediately following the last date of post-secondary education; and
  - b) the decedent had an earnings history of less than \$60,000 in gross annual earnings.

This provision recognizes and attempts to address the fact that a number of Plaintiffs were at the very beginning of their professional and family lives. Because of their young age, some Plaintiffs were too young to earn over \$60,000 per year and were not yet married and/or parents.

- **Survival claims:** This provision applies to the four Plaintiffs who survived for a period of time after February 20, 2003, yet eventually died from their injuries. Additional points are allocated based on the amount of medical expenses they accrued at the rate of 1 point per each \$8,000 of medical expenses.

## **2. INJURY CLAIMS**

The range of injuries suffered by Plaintiffs due to the Station Fire is diverse. Some Plaintiffs have catastrophic, life-altering burns that have required amputation, skin graft surgery, extensive therapy, and other care. Some Plaintiffs experienced psychological injuries only. Medical expenses incurred range from \$0 to well over \$3,000,000.

Special Master McGovern focused his efforts on finding an objective, transparent way to allocate points to these diversely injured claimants. He has determined that the medical expenses incurred by each victim are the only effective, objective basis upon which an allocation of points can be based. He determined that there is a direct relationship between the medical expenses a victim incurs and the amount/degree of his or her pain and suffering, physical injuries, psychological injuries, permanent disability, scarring, loss of earning capacity and lost earnings.

Using medical expenses as a yardstick Special Master McGovern has allocated a base number of 4 points to those victims who had suffered injuries from the fire, but who had not incurred any medical expenses for treatment. For victims with medical expenses less than \$5,000 (as of a cut-off date to be determined), the Plan allocates 4.5 points. For victims with medical expenses greater than \$5,000, but less than \$12,000 (as of a cut-off date to be determined), the Plan allocates 5 points. For those victims with greater than \$12,000 in medical expenses, the Plan allocates 1 point for every \$2,000 in medical expenses incurred (as of a cut-off date to be determined).

There were a small number of severely burned victims who received care at the Shriner's Hospital because of the inability of other hospitals in the region to accommodate additional burn patients. The Shriner's Hospital is a charitable institution that does not charge for its services. Special Master McGovern proposes that the value of the cost of care for victims receiving care at Shriner's Hospital should be determined by an independent expert using comparative costs at relevant hospitals providing similar services in a similar setting.

Lastly, in a continuation of the effort to formulate a plan that is objective and transparent, Special Master McGovern proposes that, as to the loss of consortium and loss of parental society and companionship claims maintained by spouses and minor children of injured Plaintiffs, a presumption should exist that these derivative claims would each receive 5% of the injured Plaintiff's net recovery (unless the presumption is overcome by an agreement of the involved parties).

**C. All Plaintiffs Support Professor McGovern's Plan**

Professor McGovern's Plan provides a distribution system that: a) is tailored to the losses suffered; b) is compliant with state law; c) is reliant on objective criteria in the evaluation of claims; and d) is cost-effective and efficient to implement.

Plaintiffs' counsel have reviewed Special Master McGovern's Plan with each of their clients. During these meetings, Plaintiffs had the opportunity to discuss all aspects of Special Master McGovern's Plan and all of the settlements in principle reached with each defendant. As a result of these meetings, by report of their counsel, all Plaintiffs have assented to Special Master McGovern's Plan and request its approval by the Court.

In compliance with Paragraph 4 of this Court's Order of Reference to Special Master McGovern, the Plan has been reviewed by Special Master William Poore. (Exhibit 1 - Gray

Doc. # 1735 – Order of Reference to Special Master Francis McGovern). Special Master Poore was appointed by this Court “for the purpose of reviewing and commenting on a plan for the distribution of settlement proceeds as such plan relates to minor Plaintiffs.” (Exhibit 3 – Gray Doc. # 1934 - Order of Reference Special Master William Poore). Special Master Poore endorses Special Master McGovern’s Plan.

Special Master McGovern’s Plan was submitted contemporaneously with Special Master Poore’s report.

## **II. NO PARTIES HAVE OBJECTED TO SPECIAL MASTER MCGOVERN’S PLAN OF DISTRIBUTION**

All Plaintiffs have assented to this Plan. No other parties have objected to the Plan.

A few “Responses” to the Plan were filed by several Defendants. None of these Responses objected to Special Master McGovern’s Plan.

These Responses simply argue Defendants’ position that ultimately, even after court approval of Special Master McGovern’s Plan, one or more Special Master(s) or Guardian(s) ad Litem will need to be appointed to review the specific allocation to be received by minor Plaintiffs.

Plaintiffs agree that this issue concerning whether or not a Special Master(s) or Guardian(s) ad Litem is required, and if so the number and function of such a Special Master(s) and/or Guardian(s) ad Litem, will need to be resolved by a separate motion.

## **CONCLUSION**

Plaintiffs hereby request that this Court approve Special Master McGovern’s Proposed Plan of Distribution.

Respectfully,

Plaintiffs #13d and e, #17 through #63, inclusive      Plaintiffs #13d and e, #17 through #63, inclusive,  
#133 through #190, inclusive, #255 through #233,      #133 through #190, inclusive, #255 through #233,

inclusive, #240, and #251 through #257, inclusive,  
and Napolitano Plaintiffs,  
By their Attorneys,

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and c, #14 through #16, inclusive, #80 through  
#132, inclusive, #222; #223, and #242 through  
#248, inclusive,  
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inclusive, #240, and #251 through #257, inclusive,  
and Napolitano Plaintiffs,  
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### CERTIFICATION

I hereby certify that an exact copy of the within document was electronically mailed to the Electronic Case Filing system of the United States District Court for its distribution to all counsel of record and a copy was electronically mailed to *pro se* defendants on the 10th day of February 2009.

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