

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' MOTION
TO ESTABLISH THE STATION SETTLEMENT TRUST
AS A QUALIFIED SETTLEMENT FUND AND
TO APPOINT PAUL A. FINN, ESQ. AS ADMINISTRATOR

The *Gray* and *Napolitano* Plaintiffs¹ respectfully move this Court for an Order establishing the Station Settlement Trust as a Qualified Settlement Fund and appointing Paul A. Finn, Esq. as Administrator. All Plaintiffs, by their counsel, assent to the instant motion.

In support of this 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,
and Napolitano Plaintiffs,
By their Attorneys,

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FOR THE DISTRICT OF RHODE ISLAND

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

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'¹ MOTION
TO ESTABLISH THE STATION SETTLEMENT TRUST
AS A QUALIFIED SETTLEMENT FUND AND
TO APPOINT PAUL A. FINN, ESQ. AS ADMINISTRATOR**

The *Gray* and *Napolitano* Plaintiffs file this Memorandum in support of their motion to establish the Station Settlement Trust as a Qualified Settlement Fund² (hereinafter "QSF") and to appoint Paul A. Finn, Esq. as trust administrator.

I. BACKGROUND

Plaintiffs have reached agreements in principle with Defendants to settle all claims for an aggregate sum of over \$176,000,000.00. Counsel for Plaintiffs and Defendants are currently drafting a release that will require Defendants to deposit agreed-upon consideration into a Qualified Settlement Fund upon execution of the release by all Plaintiffs.

Plaintiffs seek a court order establishing the Station Settlement Trust as a QSF and appointing Paul A. Finn, Esq. as trust administrator so that ample time will be available for the drafting and approval of trust documents and the establishment of an account into which settlement funds will be deposited. A sample Trust is attached as Exhibit 1.

¹ All Plaintiffs represented by counsel in the *Gray* and *Napolitano* actions as their signatures appear below.

² See 26 U.S.C. § 468B (2007); 26 C.F.R. § 1.468B (2005).

II. QUALIFIED SETTLEMENT FUNDS

A. What is a Qualified Settlement Fund?

A Qualified Settlement Fund³ is a separate fund, account or trust that is created (or court-approved) pursuant to IRS regulations that:

- 1) extinguish a defendant's liability upon the execution of a release and the deposit of settlement funds; and
- 2) provide significant tax and financial planning advantages to all parties that would not otherwise be available to them. These advantages include the prevention of premature "constructive receipt" of settlement funds by Plaintiffs and the facilitation of timely "economic performance" by Defendants.

B. Why Establish a Qualified Settlement Fund?

1. Benefits for Plaintiffs

The use of a Qualified Settlement Fund provides Plaintiffs with flexibility in financial planning and a reduction in the time pressures often present when reaching the final stages of a mass tort settlement.

³ A Qualified Settlement Fund is defined by federal regulation as a fund, account, or trust that

(1) . . . is established pursuant to an order of, or is approved by, the United States, any state (including the District of Columbia), territory, possession, or political subdivision thereof, or any agency or instrumentality (including a court of law) of any of the foregoing and is subject to the continuing jurisdiction of that governmental authority;

(2) . . . is established to resolve or satisfy one or more contested or uncontested claims that have resulted or may result from an event (or related series of events) that has occurred and that has given rise to at least one claim asserting liability . . . [a]rising out of tort, breach of contract, or violation of law . . . and

(3) . . . is a trust under applicable state law, or its assets are otherwise segregated from other assets of the transferor (and related persons).

26 C.F.R. §1.468B-1 (2005) (emphasis added).

The flexibility created by a QSF exists because settlement money held in such a fund is not considered “constructively received” by a plaintiff for tax purposes until it is disbursed from the fund to that plaintiff.⁴ A plaintiff who is not yet in “constructive receipt” of settlement money has a greater ability to thoughtfully consider his or her financial planning options (e.g., structured settlements) without the pressures of pending litigation and with the certainty of knowing that a Defendant has already fulfilled its settlement obligations.

This lack of “constructive receipt” for money held in a QSF also assists plaintiffs receiving public benefits such as Medicaid coverage by preserving their income and asset eligibility while public benefit preservation trusts, such as Special Needs Trusts and/or Medicare Set-aside Trusts, are being drafted.

Finally, a qualified settlement fund is a cost-effective method of aggregating individual settlements prior to disbursement. Funds paid into a QSF accumulate interest income that assists in off-setting some of the costs involved in creating and administering such a fund.

2. Benefits for Defendants

A qualified settlement fund also benefits defendants by providing a means for them to bring closure to their role in the litigation. Once a defendant deposits agreed-upon settlement funds into the QSF, in exchange for a full release from the plaintiffs its liability is considered “incurred” for tax purposes because payment into a QSF is considered valid “economic performance”.⁵ A defendant can make a qualified payment into a QSF rather than having to wait

⁴ See 26 C.F.R. § 1.451.2 (establishing that income is “constructively received” when, although it is not actually reduced to a taxpayer’s possession, it is “credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could draw upon it during the taxable year if notice of intention to withdraw had been given”). When a QSF is established, control of disbursement is guided by a plan of distribution and takes place with court oversight. As such, a plaintiff does not have the ability to control the disbursement of this money such that it could be considered constructively received.

⁵ See 26 C.F.R. § 1.468B-3(c) (“[E]conomic performance occurs with respect to a liability described in § 1.468B-1(c)(2) . . . to the extent the transferor makes a transfer to a qualified settlement fund to resolve or satisfy the liability”). This regulation expands upon the general provisions concerning economic performance set forth in 26

for plaintiffs to complete such tasks as negotiating liens, establishing structured settlements, and/or creating public benefit preservation trusts where necessary.

C. What is Required to Establish the Station Settlement Trust as a Qualified Settlement Fund?

There are three requirements that must be met before a Qualified Settlement Fund can be established:

First, the Station Settlement Trust must be established by a court order directing its creation and retaining continuing jurisdiction over the trust. *See* 26 C.F.R. § 1.468B-1(c)(1).

Second, the Station Settlement Trust must be established for the purpose of resolving and/or satisfying claims in the Station Fire litigation that have “aris[en] out of a tort, breach of contract, or violation of law”. 26 C.F.R. § 1.468B-1(c)(2)(ii) (alteration added).

Third, the Station Settlement Trust must be drafted pursuant to relevant state law, or the settlement funds must be “otherwise segregated from other assets of the transferor.” 26 C.F.R. § 1.468B-1(c)(3).

Once these three requirements are satisfied, the resulting trust may be considered a QSF for tax purposes.

As a practical matter, the establishment of a Station Settlement Trust will also require the appointment of an Administrator to carry out the duties of managing the drafting and administration of the trust. As more fully set forth in subsection D below, Plaintiffs request the appointment of Paul A. Finn, Esq. as Administrator.

U.S.C. § 461(h)(2)(C)(ii), which provides that where “liability of the taxpayer requires a payment to another person and . . . arises out of any tort, economic performance occurs as the payments to such person are made.” 26 U.S.C. § 461(h)(2)(C)(ii).

D. Administration of a Qualified Settlement Fund

1. Appointment of an Administrator

The order establishing the QSF should also appoint an administrator to manage the trust and the distribution of its assets pursuant to a court-approved trust and plan of distribution.

It is in the best interest of all parties that the court-appointed administrator be independent from Plaintiffs, Defendants, and any consultants from structured settlement companies. The appointment of an independent administrator will avoid conflicts of interest and will ensure that any Plaintiff pursuing a structured settlement will be able to receive a valid assignment of liability from the QSF to the structured settlement company.⁶

Plaintiffs propose that the Station Settlement Trust be administered by Paul A. Finn, Esq., and that he be duly appointed by the Court as Administrator. Not only is Mr. Finn independent, but he is also highly qualified for this appointment based on his significant experience.

Paul A. Finn, Esq. has thirty years of legal experience as both a practicing lawyer and as President and CEO of Commonwealth Mediation and Conciliation. Since 1992, Mr. Finn has mediated and/or arbitrated over 5,000 claims in Massachusetts, Rhode Island, New York, Pennsylvania, New Jersey, Mississippi and California including clerical sexual abuse claims, medical malpractice claims, general liability and business disputes.

Mr. Finn has extensive knowledge of the Station Fire litigation, having served as the mediator for every agreement in principle that was reached as the result of mediation.

⁶ Pursuant to 26 U.S.C. 130(c), a structured settlement company can only receive an assignment from "a party to the suit". Typically, this would be a Defendant funding a structured settlement rather than providing a cash settlement directly to a Plaintiff. Where a QSF is established, the QSF will qualify as "a party to the suit" if certain requirements are met. *See* IRS Rev. Proc. 93-34 Sec. 4.01. One of these requirements is that the structured settlement company "is neither controlled by, nor controls, directly or indirectly, the designated or qualified settlement fund." *See* IRS Rev. Proc. 93-34 Sec. 4.01(5).

Mr. Finn has substantial knowledge relating to the distribution of settlement funds, having served as Chief Arbitrator and Settlement Administrator for the Archdiocese of Boston and Springfield, Massachusetts Clergy Abuse Claims.

Mr. Finn has co-authored all five editions of Massachusetts Practice Series, Volume 47, "Mediation and Arbitration". He has been a Guest Lecturer for Boston University Law School and is a regular lecturer for continuing legal education seminars.

On September 19, 2003, the State of Rhode Island gave Mr. Finn a commendation for his role as Mediator in the Diocese of Providence Clerical Sexual Abuse Claims.

The *Gray* and *Napolitano* plaintiffs believe that, by virtue of his knowledge of this litigation, his participation as impartial Mediator for many of the claims that resulted in settlements and by virtue of his significant experience, Mr. Finn would be an appropriate Trust Administrator. A copy of Mr. Finn's Curriculum Vitae is attached as Exhibit 2.

2. Responsibilities of a Qualified Settlement Trust Administrator

As outlined in subsection C above, the process by which a QSF is initially created is uncomplicated. The administration of a QSF is likewise straightforward.

After the court orders the establishment of a Qualified Settlement Fund and appoints an administrator, the administrator drafts (or directs the drafting of) the necessary trust instruments and obtains a federal tax identification number for the trust.

The Administrator then opens an interest-bearing account in the name of the trust and the settling Defendants transfer settlement funds to the QSF in exchange for executed releases from Plaintiffs authorizing consideration to be paid into that fund.

Once the Qualified Settlement Fund receives deposits, the Administrator will then manage the trust account, including the filing of relevant annual tax returns and the distribution

of the settlement funds in accordance with a plan of distribution approved by the Court. The Court retains continuing jurisdiction over the QSF and the distribution of its assets until all distributions have been made and the QSF is terminated.

Conclusion

For the reasons set forth herein, Plaintiffs respectfully request that this Honorable Court order the establishment of a Qualified Settlement Fund to be known as the "Station Settlement Trust" and appoint Paul A. Finn, Esq. as Trust Administrator. A Proposed Order is attached as Exhibit 3.

Respectfully,

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#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
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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 6th day of February 2009.

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