

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

FLORENCE WALLACE, ET AL. : **CONSOLIDATED TO:**
Plaintiffs, : **CIVIL ACTION NO. 3:09-cv-0286**
 :
v. :
 : (JUDGE CAPUTO)
ROBERT J. POWELL, ET AL. :
Defendants. :

.....

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

WILLIAM CONWAY, ET AL. :
Plaintiffs, : CIVIL ACTION NO. 3:09-cv-0291
 :
v. :
 : (JUDGE CAPUTO)
MICHAEL T. CONAHAN, ET AL. :
Defendants. :

.....

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

H.T., ET AL. :
Plaintiffs, : CIVIL ACTION NO. 3:09-cv-0357
 :
v. :
 : (JUDGE CAPUTO)
MARK A. CIAVARELLA, ET AL. :
Defendants. :

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

SAMANTHA HUMANIK.	:	
Plaintiffs,	:	CIVIL ACTION NO. 3:09-cv-0630
	:	
v.	:	
	:	(JUDGE CAPUTO)
MARK A. CIAVARELLA, ET AL.	:	
Defendants.	:	

.....

**BRIEF IN SUPPORT OF CLASS PLAINTIFFS’ RULE 60 MOTION FOR
RELIEF FROM ORDER OF COURT TO ESTABLISH DEADLINES FOR
THE CONCLUSION OF THE MERICLE SETTLEMENT**

Class Plaintiffs submit this brief in support of their Rule 60 Motion for Relief from Order of Court to Establish Deadlines for the Conclusion of the Settlement (“Rule 60 Motion”). They respectfully seek relief from this Court’s Order dated December 14, 2012 (Doc. No. 1268) in order to establish and implement reasonable final deadlines the payment of settlement awards, for the Allocation Appeals Process, and the distribution of the holdback percentage of the Enhanced Benefit Fund (the “Holdback Fund”) in accordance with the Master Settlement Agreement (“MSA”).

I. INTRODUCTION

On January 28, 2013, pursuant to this Court’s Final Order and Judgment (“Final Approval Order”) (Doc. No. 1268), letters were sent to all individuals who submitted a Proof of Claim form to participate in the Mericle Class Settlement

(“Settlement Letters”).¹ The addresses that the claimants themselves provided on their claim forms were used. After the mailing, 123 Settlement Letters were returned to Class Counsel as undeliverable and 39 remain in Class Counsel’s possession because updated addresses are unknown. The presence of these undeliverable Settlement Letters creates a situation where the payout of settlement awards and the Allocation Appeal Process have no identifiable end date. The Final Approval Order is silent as to an end date for the initial payout of settlement awards, acceptance and determination of appeals, and the distribution of the holdback fund. For that reason, Plaintiffs respectfully request relief from this Court’s Final Approval Order in the form of the establishment of deadlines for the conclusion of the Settlement.

II. RELEVANT BACKGROUND

A. Court Orders And The Master Settlement Agreement

On December 16, 2011 a settlement agreement was reached between Plaintiffs and Defendants Robert K. Mericle and Mericle Construction, Inc.

¹ There were three different categories of Settlement Letters sent: (1) letters to Settlement Class Members notifying claimants that they qualified for payment under the settlement, listing their award with a written explanation, enclosing a check if their award was above \$0, and advising them of their appeal right; (2) letters to Non-Settlement Class Members notifying claimants that they did not qualify for payment under the settlement and advising them of their appeal right; and (3) letters to claimants who submitted their Proof of Claim form after the Court-ordered deadline and, therefore, were not considered for payment under the Settlement.

(“Mericle Defendants”). The parties thereafter filed a Joint Motion for Preliminary Approval of the Class Action Settlement Between Plaintiffs and Mericle Defendants (“Joint Motion”). (Doc. No. 1005). The Joint Motion sought an order certifying a settlement class pursuant to Federal Rule of Civil Procedure 23(b)(3) and preliminarily approving a partial settlement as defined in the Master Settlement Agreement (“MSA” or “Settlement”).

On February 28, 2012, this Court entered an order granting preliminary approval of the Settlement (“Preliminary Approval Order”). (Doc. No. 1084). The Preliminary Approval Order appointed the undersigned firms as Class Counsel. *Id.* ¶6. The Preliminary Approval Order also appointed Judge Marina Corodemus (Ret.) as the Special Master for Allocation Appeals, to resolve the claims of any Settlement Class Members who elected to dispute the award allocated to them by the Claims Committee. *Id.* ¶17.

On December 14, 2012, this Court entered a Final Order and Judgment (“Final Approval Order”) granting final approval of the Settlement. (Doc. No. 1268). The Court also entered a Memorandum in conjunction with the Final Approval Order (“Final Approval Memo”) setting forth the parameters of the Settlement. (Doc. No. 1267).

The Final Approval Memo states:

Settlement Class Members who submitted timely Proof of Claims Forms will receive a “proposed payment amount with a written explanation” from

the Claims Committee. **If the Settlement Class Member believes the value assigned to his or her claim has been wrongly determined, the Claimant has the option to appeal to the Court-appointed Special Master.**

(Doc. No. 1267 at 11) (emphasis added).

Pursuant to the Final Approval Order and under the MSA, fifteen percent of the Enhanced Benefit Fund shall “remain held back in escrow for the benefit of any Allocation Appellants and to cover the costs associated with the Allocation Appeal Process. In the event that the hold back is not fully depleted, the balance shall be returned to the Enhanced Benefit Fund and shall be distributed in accordance with the MSA.” (Doc. No. 1268, ¶ 9).

The Final Approval Order also clearly states that it does not “preclude Plaintiffs or Class Members from participating in the Allocation Appeal process described in the MSA, if they are entitled to do so under the terms of the MSA.”

(Doc. No. 1268, ¶ 17).

With respect to the Allocation Appeals Process, the MSA states:

F. Special Master For Allocation Appeals

The Parties hereto request that the Court appoint Judge Marina Corodemus (Ret.) as a Special Master to resolve with finality, the award to any Settlement Class Member who appeals their preliminary monetary award as set forth more particularly in the Proof of Claims Form and the Plan of Allocation. The costs of the Special Master shall be paid out of the Cash Settlement Fund following the Court’s Final Order and Judgment.

(Doc. No. 1005-1, Section IV.F.)

B. Settlement Letters

Pursuant to Paragraph 12 of the Final Approval Order,² settlement letters and checks were dated and mailed to claimants using the addresses provided by them on January 28, 2013. The settlement letter stated that any claimant who believed the value assigned to his or her claim was wrongly determined had thirty days from the date of the letter to send a written appeal to be considered by the Court-appointed Special Master.

In total, on January 28, 2013, Class Counsel sent 2,096 Settlement Letters to individuals who submitted a Proof of Claim Form to participate in the Settlement. From this mailing, 123 Settlement Letters were returned to Class Counsel as undeliverable (“Undeliverable Settlement Letters”). Ninety-six of the Undeliverable Settlement Letters had settlement checks³ enclosed. Class Counsel received updated addresses from a number of claimants and re-sent eighty-four Settlement Letters. For those individuals, the Settlement Letters were re-dated and re-sent, thus extending the appeal period for an additional thirty days from the date of the re-sent letter. To date, Class Counsel still have thirty-nine Undeliverable Settlement Letters despite attempts to locate and notify each of the intended

² Paragraph 12 states: Pursuant to the MSA and Notices, Class Counsel are directed to mail Class Members a proposed payment amount together with a written explanation of how that amount was determined postmarked not later than forty-five (45) days after the date of this Final Order and Judgment. Doc. No. 1268 at ¶12.

recipients. Twenty-five of those Undeliverable Settlement Letters contain settlement checks.

Because the Settlement Letter permits thirty days for a claimant to file an appeal, every time a Settlement Letter is re-sent the Allocation Appeal Process is extended and there currently is no identifiable end date. The Final Approval Order is silent with respect to the deadlines for the Allocation Appeals Process.

C. Settlement Checks

1. Original Settlement Checks

All settlement checks state “Void 180 days after issue.” On January 28, 2013, 1,618 settlement checks were mailed. Class Counsel refer to these checks as the “Original Settlement Checks.” The Original Settlement Checks are void on July 27, 2013.

2. Reissued Settlement Checks

Since the mailing of the Original Settlement Checks, forty-four checks were cancelled and reissued by Class Counsel to ensure receipt of the check by the intended Settlement Class Member. Class Counsel refers to these checks as the “Reissued Settlement Checks.” The Reissued Settlement Checks were re-dated with the date they were sent to the Settlement Class Member. As of the date of this Motion, the last Reissued Settlement Check sent was dated May 14, 2013, and will thus be void on November 10, 2013, 180 days after the date it was issued. In

accordance with the proposed schedule below, any additional Reissued Settlement Checks will be marked as void not less than 60 days, rather than 180 days.

The Final Approval Order is silent with respect to a deadline for when Reissued Settlement Checks will be honored. Without a deadline for when the Reissued Settlement Checks will be honored, Class Counsel cannot know the final amount of the Holdback Fund to be distributed and cannot schedule when the Holdback Fund will be distributed.

3. Unaccounted-for Settlement Checks

There are a total of 41 settlement checks that have (1) not been cashed by the payee Settlement Class Member; (2) not been returned to Class Counsel as undeliverable; and (3) are not the subject of an appeal. Class Counsel refers to these checks as the “Unaccounted-for Settlement Checks.”

4. Appeal Settlement Checks

Class Counsel will be issuing additional settlement checks to any Settlement Class Member whose appeal seeking additional funds is granted by the Court-appointed Special Master of the Allocation Appeal Process. Class Counsel refers to these checks as the “Appeal Settlement Checks.”

5. Holdback Fund Checks

Under the Final Approval Order and the MSA, fifteen percent of the

Enhanced Benefit Fund shall “remain held back in escrow for the benefit of any Allocation Appellants and to cover the costs associated with the Allocation Appeal Process. In the event that the hold back is not fully depleted, the balance shall be returned to the Enhanced Benefit Fund and shall be distributed in accordance with the MSA.” (Doc. No. 1268 at ¶ 9). This – plus the value of the Unaccounted-for Settlement Checks at the date those checks become void – constitutes the Holdback Fund.

Assuming that the Holdback Fund is not fully depleted by the Allocation Appeal Process, Class Counsel will make a second distribution to those Settlement Class Members who received enhanced benefit awards under the Settlement. Class Counsel refers to these checks as the “Holdback Settlement Checks.”

III. ARGUMENT

Class Plaintiffs wish to establish and implement reasonable deadlines for the completion of the payment of settlement awards, the Allocation Appeals Process, and the distribution of the Holdback Fund in accordance with the MSA.

Federal Rule of Civil Procedure 60(b) states: “On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect ... (6) any other reason that justifies relief.”

Class Plaintiffs respectfully request relief from the Final Approval Order through the issuance of a supplemental order stating the following:

- **Friday, July 19, 2013** shall be the last day that Class Counsel will accept updated addresses to re-send Settlement Letters.⁴ It shall also be the last day that Class Counsel will cancel and reissue Settlement Checks.
- **Monday, July 22, 2013** shall be the last day that Class Counsel will re-send Settlement Letters and/or Settlement Checks.
- **Saturday, July 27, 2013** shall be the last day that Original Settlement Checks and Unaccounted-for Settlement Checks will be honored. Funds associated with Original Settlement Checks and Unaccounted-for Settlement Checks shall no longer be available to the Settlement Class Members after this date.
- **Friday, August 30, 2013** shall be the last day that written appeals will be accepted. All written appeals must be received by Class Counsel by August 30, 2013 in order to be considered. Written appeals postmarked on or before August 30, 2013 but received by Class Counsel after this date shall not be accepted.
- Reissued Settlement Checks and Appeal Settlement Checks shall not be honored after the date on which they become void, as printed on the face of the check. Reissued Settlement Checks and Appeal Settlement Checks shall be issued so that (a) they will be valid for a period of not less than 60 days from the date of issue and (b) none of them will be valid after **Monday, December 2, 2013**. Funds associated with Reissued Settlement Checks and Appeal Settlement Checks shall no longer be available to the Settlement Class Members after this date.
- Within 30 days after the Original Settlement Checks, Unaccounted-for Settlement Checks, Reissued Settlement Checks, and Appeal Settlement Checks have all either been cashed and/or become void,

⁴ July 19, 2013 for updated addresses allows Class Counsel sufficient time to re-send the settlement letters and checks before the original settlement checks are void on July 27, 2013.

Class Counsel will distribute Holdback Settlement Checks. Holdback Settlement Checks will become void 60 days after the date on which they were issued. At the time that Holdback Settlement Checks become void, if there are funds remaining in the Holdback Fund, Class Counsel will propose a *cy pres* distribution for Court approval.

WHEREFORE, Class Plaintiffs respectfully request relief from the Final Approval Order dated December 14, 2012 by way of the issuance of a supplemental order establishing deadlines for the conclusion of the Settlement.

Dated: May 15, 2013

RESPECTFULLY SUBMITTED,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

By: /s/ Daniel Segal
Daniel Segal, Esquire
Rebecca S. Melley, Esquire
One Logan Square, 27th Floor
Philadelphia, PA 19103

ANAPOL SCHWARTZ

By: /s/ Sol Weiss
Sol H. Weiss, Esquire
Adrienne Walvoord Webb, Esquire
1710 Spruce Street
Philadelphia, Pa 19103

CAROSELLI BEACHER
MCTIERNAN & CONBOY

By: /s/ David Senoff
William R. Caroselli, Esquire
David Senoff, Esquire
Lauren Fantini, Esquire
20 Stanwix Street, 7th Floor
Pittsburgh, PA 15522

JUVENILE LAW CENTER

By: /s/ Marsha Levick
Marsha L. Levick, Esquire
Lourdes M. Rosado, Esquire
1315 Walnut Street, Suite 400
Philadelphia, PA 19107

METZGER & KLEINER

By: /s/ Daniel E. Kleiner
Daniel E. Kleiner, Esquire
Two Penn Center, Suite 1204
Philadelphia, PA 19102

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMIT

I, Sol H. Weiss, hereby certify, that the foregoing BRIEF IN SUPPORT OF CLASS PLAINTIFFS' RULE 60 MOTION FOR RELIEF FROM ORDER OF COURT TO ESTABLISH DEADLINES FOR THE CONCLUSION OF THE SETTLEMENT complies with the Local Rules of this Court. Relying on the word-count feature of Microsoft Word, the entire brief and certificate contains 2,294 words.

/s/ Sol Weiss
Sol Weiss

CERTIFICATE OF SERVICE

I, Sol H. Weiss, Esquire, hereby certify that, a true and correct copy of Brief in Support of Plaintiffs' Rule 60 Motion for Relief from Order of Court to Establish Deadlines for the Conclusion of the Settlement was filed electronically on May 15, 2013 and is available for viewing electronically. Additionally, the foregoing Motion was served via First Class Mail upon the following *pro se* parties:

Mark Ciavarella 15008-067
Federal Correctional Institution
PO Box 5000
Perkin, IL 61555-5000

Michael Conahan
Inmate #15009-067
FCI Coleman Low
PO Box 1031
Coleman, FL 33521

/s/ Sol H. Weiss
Sol Weiss, Esquire