

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	Case No. 06 CR 964
)	
vs.)	
)	Hon. Ronald A. Guzman
MICHAEL E. KELLY)	
)	
Defendant.)	

**MOTION AND MEMORANDUM FOR SECOND
DISTRIBUTION OF RESTITUTION FUND**

The Special Master, Douglas A. Doetsch, by and through his counsel, files this *Motion and Memorandum for Second Distribution of Restitution Fund* (the “**Second Distribution Motion**”) wherein he moves this Court to approve a second distribution of the Restitution Fund in the amount of \$15,000,000 (the “**Second Distribution**”) in accordance with the procedures set forth herein. In support of this motion, the Special Master states as follows:

BACKGROUND

1. On November 20, 2012, this Court entered the *Order Approving Distribution of Restitution Fund* (“**First Distribution Order**”) in which the Court approved a first distribution amount of \$50,000,000 (“**First Distribution**”) to all Eligible Victims [Dkt. No. 1500]. Attached as Exhibit C to the *Motion and Memorandum for Distribution of Restitution Fund* (“**First Distribution Motion**”) [Dkt. No. 1488] was a list of the First Distribution Eligible Victims that set forth each Victim’s Total Restitution Amount (“**TRA**”) and the amount of each Victim’s First Distribution restitution check (the “**First Distribution Eligible Victim List**”). Victims

identified as having a zero or negative TRA on the First Distribution Eligible Victim List were not entitled to participate in the First Distribution or any subsequent distribution.

2. The Claims Processing Agent has determined that there are 8,388 Victim Claims (consisting of 9,137 individuals due to joint claims). Of the 8,388 Victims identified by the Claims Processing Agent, 7,078 were determined to be eligible to participate in the First Distribution due to a positive TRA.

FIRST DISTRIBUTION

3. Pursuant to the terms of the First Distribution Order [Dkt. No. 1500], the Claims Processing Agent has (see also **Exhibit A - Affidavit of Claims Processing Agent**):

- a. Received the sum of \$50,020,000 into a bank account at Fifth Third Bank in the name of “Special Master, Kelly Restitution Fund” (the “**Distribution Account**”), with \$50,000,000 to be used to fund the First Distribution and \$20,000 to be used to pay for bank fees and costs;
- b. Distributed checks in the amount of \$50,000,000 to the 7,078 First Distribution Eligible Victims in the amounts indicated on the First Distribution Eligible Victim List, which was attached as Exhibit C to the First Distribution Motion [Dkt. No. 1488], via the United States Postal Service First Class Regular Mail on December 11 and 12, 2012;
- c. Mailed the “Letter to First Distribution Eligible Victims,” identified as Exhibit D to the First Distribution Motion, along with the physical check for each eligible Victim, informing Victims that the deadline to cash such First Distribution check was one hundred and twenty (120) calendar days from the date of mailing, but in no event later than April 19, 2013. After this deadline, the Victim’s First

Distribution check would be voided and the Victim would forfeit the right to participate in a future distribution;

- d. Mailed the "Letter to Co-Victim Claimants," identified as Exhibit E to the First Distribution Motion, to all Co-Victims who did not receive physical checks in the mail, advising them of the address to which the check would be mailed; and
- e. Mailed a copy of the "Letter to First Distribution Eligible Victims" to the Co-Victims to advise them of the date of the actual distribution, the deadline for negotiating such check and the consequences of their failure to do so.

4. In addition, as many of the Victims in this matter are deceased, the Claims Processing Agent has been working closely with the heirs of deceased Victims to assist them in negotiating the First Distribution checks that were made payable to the estate of the decedent ("**Estate Checks**"). On April 5, 2013, the Claims Processing Agent sent a letter to all known representatives and/or heirs of deceased Victims informing them of the procedure to negotiate their First Distribution check, which involved a Small Estate Affidavit (**Exhibit B - "Small Estate Affidavit Letter"**). On April 8, 2013, this Court entered an order in which the Court approved the use of Small Estate Affidavits to re-issue First Distribution checks to the appropriate heirs or authorized representatives and extended the deadline for cashing such Estate Checks to May 20, 2013 ("**Order Approving Use of Small Estate Affidavits**") [Dkt. No. 1594].

5. The Claims Processing Agent received forty-six (46) Small Estate Affidavits from heirs and/or next of kin of deceased Victims requesting that their First Distribution check be re-issued to the appropriate heir as authorized by the estate procedures of the decedent's state law. The Claims Processing Agent reviewed each request and denied five (5) of the requests due to inadequate information, approved forty (40) such requests and has one (1) Small Estate Affidavit

under review. The forty (40) Small Estate Affidavits approved by the Claims Processing Agent were then submitted to the United States Attorney's Office for its final review and approval. All forty (40) requests for approval were obtained, and the First Distribution checks were re-issued to the appropriate heirs (**Exhibit C – "List of Reissued First Distribution checks pursuant to Small Estate Affidavit"**).

6. On July 9, 2013, the Claims Processing Agent also mailed a letter to the First Distribution Eligible Victims with outstanding checks as of that date (**Exhibit D - "Second Notice to Eligible Victims"**), which constituted a final notice to negotiate their First Distribution checks and reminded them of the consequences of failing to do so.

EXCLUSION OF VICTIMS WHO FAILED TO CASH FIRST DISTRIBUTION CHECK

7. Of the 7,078 First Distribution Eligible Victims who were eligible for a First Distribution check, all but 139 successfully negotiated their check.¹ The remaining 139 outstanding First Distribution checks equal \$849,575.36 (**"Unclaimed Victims"**). A list of the Unclaimed Victims from the First Distribution is attached hereto as **Exhibit E ("Unclaimed Victim List")**. The Claims Processing Agent has used its best efforts to locate these Unclaimed Victims and/or their heirs in order to issue new checks to them at their current address. The

¹ The 139 outstanding First Distribution checks do not include MK006179, Estate of Alexander Joseph Mate, with a First Distribution amount of \$3,342.42, which is currently outstanding. An heir of the Estate of Alexander Joseph Mate has submitted a Small Estate Affidavit requesting that the First Distribution check be re-issued in the name of the heir; however, this Small Estate Affidavit has not yet been approved and therefore the First Distribution check has not yet been re-issued or cashed. The Claims Processing Agent requests that the claim for MK006179 not be extinguished at this time in order to allow the Claims Processing Agent time to review the heir's request. The 139 outstanding First Distribution checks also do not include MK002515 and MK002516, Estate of Gordon Dinsmoor and Estate of Katherine Dinsmoor, with First Distribution amounts of \$1,461.38 and \$7,306.88, respectively. Upon request from the victims' beneficiary, the Claims Processing Agent issued two separate checks for each of these claims, one check payable to each estate for half of the total distribution amount; however, only the checks payable to the Estate of Katherine Dinsmoor were negotiated, leaving the two checks payable to the Estate of Gordon Dinsmoor outstanding. The Claims Processing Agent requests that the claims for both MK002515 and MK002516 not be extinguished at this time in the interest of fairness to the victims' beneficiaries, who have made efforts to negotiate and have successfully cashed checks on behalf of one of the deceased victims.

Claims Processing Agent has undertaken various efforts in this regard, including the following actions: performed internet searches for new location information and/or evidence of death of Victim; internet searches for heirs, relatives, or next of kin; use of investigative tools such as TLO, Accurint and other skip tracing tools to obtain new contact information for the Victim, evidence of death and/or to locate any heirs, relatives, or next of kin; made numerous phone calls to funeral homes, relatives, neighbors, or any next of kin; reviewed all lease documents to locate heirs, relatives or next of kin; wrote letters to Victims at their last known address; and wrote letters to Victim heirs and/or next of kin regarding assistance with negotiating First Distribution checks made payable to the estate of a decedent (*see also* "Affidavit of Claims Processing Agent" – **Exhibit A**). Although the Claims Processing Agent was able to locate numerous Victims through these diverse efforts, the remaining 139 Victims cannot be located, and, as such, each of their First Distribution checks have not been cashed.

8. The First Distribution Order provides that any First Distribution checks which are returned or which have not been cashed within one hundred and twenty (120) days from the date of the mailing of such checks (and in no event later than April 19, 2013), will be voided, the right to receive such payments will terminate, subject only to the sole discretion of the Special Master, and the amounts otherwise distributable to such First Distribution Eligible Victims shall be returned to the Restitution Fund and disposed of according to the Court's further instructions. The Special Master believes that great effort has been made to locate these Unclaimed Victims, but with no success; therefore, the Special Master recommends, in accordance with the First Distribution Order, that the claims of these Unclaimed Victims be stricken from the list of Eligible Victims for the Second Distribution and the amounts of their First Distribution checks

(\$849,575.36) be added to the monies available for subsequent distributions to the remaining eligible Victims.

SECOND DISTRIBUTION

9. The Special Master oversees an account at UBS that contains funds for eventual distribution to the Victims (the “**Restitution Account**”). As of December 31, 2013, the balance of the Restitution Account was approximately \$18,500,000. In addition, as of January 16, 2014, the Special Master has a balance of \$871,405.63 remaining from the \$50,020,000 in the Distribution Account, which consists of: (1) \$849,575.36 in first distribution checks for the 139 victims who did not cash their first distribution checks and who the Claims Processing Agent could not locate; (2) \$7,832.05 in funds from the first distribution where the Claims Processing Agent is in contact with victims in estate or similar situations where the Claims Processing Agent does not recommend cancelling the checks (see footnote 1); (3) \$2,529.44 in interest earned on the Distribution Account funds; and (4) \$11,468.78 in unused funds from the \$20,000 originally placed in the Distribution Account. The amount in the Restitution Account is therefore approximately \$19.3 million.

10. Due to the amount of funds being distributed and the significant number of Victims involved, the Special Master again recommends the use of “Positive Pay.” Positive Pay is a security process used during the First Distribution which involves the verification of the amount of each check as it is presented for payment. Specifically, this involves a security check by Fifth Third Bank as to the amount of each check presented for payment and a second security check by the Claims Processing Agent regarding the same. This process is intended to ensure that each Second Distribution check has not been manipulated. The estimated cost of using this service for the second distribution is approximately \$10,000.

11. As set forth above, the Distribution Account currently has a balance of \$871,405.63. After reserving \$15,000 to pay estimated bank fees and costs associated with Positive Pay and excluding \$7,832.05 for which the Claims Processing Agent does not recommend cancelling checks (as described above and in footnote 1), there will be \$848,573.58 in the Distribution Account available for the \$15,000,000 distribution, and the Special Master therefore requests that \$14,151,426.42 (\$15,000,000 less \$848,573.58) be transferred to the Distribution Account for the second distribution.

12. The Special Master recommends that each Second Distribution Eligible Victim receive a *pro-rata* share of the Second Distribution, which shall be referred to as each Victim's "**Second Distribution Amount.**" Each Eligible Victim's Second Distribution Amount shall be determined by multiplying \$15,000,000 by a fraction: the numerator of which is each Second Distribution Eligible Victim's individual TRA and the denominator of which is the sum of all Second Distribution Eligible Victims' TRAs ("**Second Distribution Fraction**"). The "**Second Distribution Eligible Victim List**" (**Exhibit F**) is a list of all Second Distribution Eligible Victims, together with their Victim ID number, their TRAs, their Second Distribution Fractions and their Second Distribution Amounts. By removing the 139 Unclaimed Victims from the First Distribution Eligible Victim List of 7,078, there are now 6,939 Victims eligible to receive a second distribution.

13. The Special Master recommends that only Second Distribution Eligible Victims identified on the Second Distribution Eligible Victim List be entitled to participate in this Second Distribution, and any possible future distributions, from the Restitution Fund and that any individual or entity not listed on the Second Distribution Eligible Victim List be forever barred from making claims against the Restitution Fund, the Special Master or the Claims Processing

Agent (either in their personal or representative capacities) or their employees, attorneys, officers, directors or agents for any claim whatsoever.

14. The Special Master recommends that the Second Distribution Eligible Victims be provided sixty (60) days from the date of mailing to negotiate or deposit their restitution check. The Special Master further recommends that if a Second Distribution Eligible Victim has not negotiated or deposited his/her distribution check within sixty (60) days of mailing, that, after such time, the checks be voided, the right to receive such payments be terminated (subject only to the sole discretion of the Special Master) and the amounts otherwise distributable to such Second Distribution Eligible Victims be returned to the Restitution Fund and disposed of according to the Court's further instructions. The Special Master further recommends that those Second Distribution Eligible Victims who do not negotiate or deposit their distribution checks within sixty (60) days of mailing shall have no right to participate in future distributions, be removed from the list of Eligible Victims, and that the Claims Processing Agent shall have no further duty to locate these Victims or notify these Victims of future hearings, motions, orders or developments in this case. The Special Master recommends that each Second Distribution Eligible Victim be provided a letter, substantially in the form attached as **Exhibit G** herein ("**Second Distribution Letter**"), informing them of the consequences of failing to cash the Second Distribution check by the deadline indicated therein.

15. There are many Second Distribution Eligible Victim Claims that are jointly owned by more than one individual residing at separate addresses. The Special Master therefore recommends mailing a copy of the Second Distribution Letter to each Co-Victim advising them as to the address where the Second Distribution check was mailed, the deadline for cashing the check and the consequences of their failure to do so.

PRAYER FOR RELIEF

WHEREFORE, the Special Master requests that the Court enter an order as follows:

(a) Holding that the Special Master and the Claims Processing Agent have taken all reasonable steps in conducting the First Distribution and have complied with the Court's prior orders in conducting the First Distribution;

(b) Approving the transfer of \$14,151,426.42 to Fifth Third Bank for deposit into the Distribution Account;

(c) Approving that \$15,000,000.00 be distributed out of the Distribution Account to the Second Distribution Eligible Victims in accordance with the Second Distribution Amounts set forth on the Second Distribution Eligible Victim List (**Exhibit F**) and that the bank fees and costs of Positive Pay be also paid out of the Distribution Account;

(d) Ordering that the Claims Processing Agent distribute the Second Distribution Amounts to the Second Distribution Eligible Victims as provided on the Second Distribution Eligible Victim List within thirty (30) calendar days after entry of the order approving the Second Distribution, and, further, that: (i) the distribution shall be made to the Second Distribution Eligible Victims at each Victim's last known address contained in the records of the Claims Processing Agent and that the checks be mailed via *United States First Class Mail*; (ii) the burden is on the Second Distribution Eligible Victims to notify the Claims Processing Agent of a Second Distribution Eligible Victim's current address and other contact information, and of insuring that a Second Distribution Eligible Victim's name and/or proper contact information are contained in the Claims Processing Agent's records; (iii) the Claims Processing Agent is under no duty or obligation to attempt to determine current address and other contact information for any Second Distribution Eligible Victim; and (iv) that the Claims Processing Agent implement

the security procedures of Positive Pay to ensure the proper negotiation of each Second Distribution check;

(e) Ordering that Second Distribution checks which are returned or which have not been cashed within sixty (60) calendar days from the date of mailing of such checks (but in no event later than _____ 2014), will be void, the right to receive such payments will terminate, subject only to the sole discretion of the Special Master, and the amounts otherwise distributable to such Second Distribution Eligible Victims shall be returned to the Restitution Fund and disposed of according to the Court's further instructions, and that the Claims Processing Agent will, in the mailing of the Second Distribution Amount checks, warn Second Distribution Eligible Victims of this potential loss of rights and the need to promptly cash their checks by including a copy of the Second Distribution Letter, substantially in the form attached as **Exhibit G** and incorporated herein by reference, and further ordering that such Victims shall have no right to participate in future distributions, be removed from the list of Second Distribution Eligible Victims, and that the Claims Processing Agent shall have no further duty to locate these Victims or notify these victims of future hearings, motions, orders or developments in this case;

(f) Ordering that, because of the joint ownership of claims, in conjunction with the mailing of the distribution checks, the Claims Processing Agent shall mail via *United States First Class Mail* a copy of the Letter to Second Distribution Eligible Victims to each Co-Victim reflected in the Claims Processing Agent's records advising them as to the address the check was mailed to, provided however, that failure of the Claims Processing Agent to mail the Letter to Co-Victim Claimants or of the Victims or Co-Victim to receive such letters, shall not give rise to any claim against the Claims Processing Agent, the Special Master or their employees, attorneys,

accountants or agents as the copy of this letter is meant to provide a courtesy notice and does not convey substantive rights to Victims or Co-Victims;

(g) Ordering that, in order to effectuate the distribution of the Second Distribution Amount and all subsequent distributions, the Court releases and discharges the Special Master and the Claims Processing Agent (both in their personal and representative capacities) and their attorneys, accountants, employees, officers, directors and agents and all persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing and distribution of checks and determination of claims filed pursuant to the Claims Procedure or otherwise involved in the administration of the estate, from any act or omission arising out of such involvement in all prior, current and future distributions; and

(h) Ordering that the Kelly Restitution Fund indemnify, defend and hold harmless the Special Master and the Claims Processing Agent (both in their personal and representative capacities) and their attorneys, accountants, employees, officers, directors and agents and all persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing and distribution of checks and determination of claims filed pursuant to the Claims Procedure or otherwise involved in the administration of the estate (the “**Indemnified Parties**”), from and against all actions pending or threatened, whether at law or in equity, in any forum, from liabilities, damages, losses, costs and expenses, including, but not limited to, reasonable attorneys’ and other professionals’ fees and costs, arising from conduct or omission of the Indemnified Parties in connection with this case.

DATED: January 22, 2014

Respectfully submitted,

DOUGLAS A. DOETSCH, not individually but
solely as the Court-appointed Special Master

By: /s/ Douglas A. Doetsch

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