

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT

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RICHARD GOLDSTEIN, et al., )  
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 Plaintiffs, )  
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 v. )  
 )  
 SAVINGS BANK LIFE INSURANCE )  
 COMPANY OF MASSACHUSETTS, *et al* )  
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 )  
 Defendants. )  
\_\_\_\_\_ )

Civil Action No. 98-2330-BLS1  
(Judge \_\_\_\_\_)

**THE PARTIES' JOINT REQUEST FOR INSTRUCTIONS FROM THE COURT CONCERNING FINAL DISTRIBUTION OF UNCLAIMED SETTLEMENT FUNDS**

The Parties respectfully seek instructions from the Court on the most effective way to dispose of the approximately \$690,724 in unclaimed settlement funds that remain in this case after the distribution of settlement checks to the Class comprised of the owners of approximately 400,000 SBLI policies. Plaintiffs' Class Counsel, on the one hand, proposes a second distribution to a portion of the Class (those who would receive \$5 or more) as the most prudent and feasible means for distributing the Classes' remaining monies, with any amounts remaining thereafter to be awarded to two non-profit organizations in equal parts on a *cy pres* basis ("*cy pres* distribution"). The costs of the secondary distribution would be assumed by the Class fund under Plaintiffs' plan. (See Section I below.) Defendant Savings Bank Life Insurance Company of Massachusetts ("SBLI"), on the other hand, supports the immediate *cy pres* distribution of the unclaimed settlement funds in accordance with its reading of the Stipulated Settlement Agreement dated December 29, 2009 ("Stipulation"). (See Section II below.)

Judge Hinkle, who approved the Settlement on May 20, 2010, encouraged the Parties to bring any settlement-related issues to the Court's attention, which this Joint Request seeks to do.

The Settlement and the distribution of settlement funds to the Class through the Settlement Administrator have proceeded smoothly to date without the need for Court intervention. However, the Parties request the involvement of the Court to resolve the last apparent remaining issue. The Court's involvement will aid in the final resolution of this 13-year old case.

**I. PLAINTIFFS' CLASS COUNSEL SEEKS A SECOND DISTRIBUTION TO A SEGMENT OF THE CLASS BEFORE ANY *CY PRES* DISTRIBUTION**

Plaintiffs' Class Counsel seek a second distribution to a segment of the Class (approximately 44,100 Class members) for the reasons set forth in this Section and in the accompanying Declaration of the Court-appointed Settlement Administrator, Garden City Group, Inc. ("GCG").

**A. Background and Terms of the Stipulation**

On May 20, 2010, this Court granted final approval of the Stipulation settling all claims of Class Members and Subclass Members<sup>1</sup> for a total of \$18,675,330 in funds (for a total cumulative benefit of \$21,500,000, per Plaintiffs' estimate, with the administration costs borne by SBLI). On or about September 15, 2010, the Settlement Administrator distributed all of the settlement funds to Class Members by issuing checks, and through SBLI, which credited the policies of current policyholders. Per the Stipulation, all checks expired 180 days after their issuance if not deposited by recipients. As of June 10, 2011, \$690,724 in settlement awards remained uncollected by Class Members after the 180 day check validation period. *See* Declaration of Jennifer M. Keogh ("GCG Declaration") at ¶ 3.

The Plaintiffs believe that the Stipulation anticipated that a small number of Class Members would not collect those funds owed them (given that Class members did not have to file claim forms, and addresses were updated) and set out certain guidelines regarding these Undistributed Settlement Funds:

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<sup>1</sup>The Subclass was divided into three subcategories.

**Undistributed Settlement Funds.** The Parties agree that insofar as unanticipated circumstances arise whereby certain Authorized Claimants' payments are returned or some residue remains in the Escrow Account after distribution of the Settlement Supplemental Dividends by the Administrator, Lead Class Counsel shall apply to the Court for approval for the Administrator to distribute any undistributed funds in the Settlement Fund (after a determination by the Administrator or the Parties that the remaining funds will not be otherwise paid out) to one or more non-profit organizations agreed to by the Parties. None of the Settlement Fund shall revert to the Parties after the Effective Date of Settlement.

Stipulation at ¶ 4.5.7 (emphasis added). The Plaintiffs believe that the Stipulation ensured that settlement funds should not return to the Parties,<sup>2</sup> and further that unclaimed funds should be allocated in accordance with currently accepted *cy pres* principles, where the Class was unable to directly claim those benefits itself.

The Plaintiffs further believe that according to the Stipulation, *cy pres* distribution to one or more non-profit organizations should take place only “after a determination by the Administrator or the Parties that the remaining funds will not be otherwise paid out[.]” With approximately \$690,724 in settlement funds unclaimed, Plaintiffs believe that a *cy pres* distribution is premature. Given the sizeable amount of undistributed funds remaining, Plaintiffs' Class Counsel have concluded that, instead of providing the current remaining funds to *cy pres* recipients, the funds should be “otherwise” distributed in a secondary distribution to a portion of the Class in a manner that is feasible and economically efficient; consistent with the guidance on *cy pres* distributions provided in the cases discussed below, any potential (minimal) amounts remaining after this secondary distribution would then be disbursed in equal *cy pres* payments to the two proposed non-profit organizations designated by the Parties per the Stipulation.

Plaintiffs' Class Counsel have accepted GCG's recommendation for conducting the secondary distribution in a manner that maximizes the amount of funds distributed to Class

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<sup>2</sup>See Stipulation at ¶ 4.5.7.

members versus the amount spent on administrative expenses. Under the scenario preferred by Plaintiffs' Class Counsel, checks will be sent to only Main Class Members who received and cashed checks for \$26 or more in the initial distribution.<sup>3</sup> See GCG Declaration at ¶ 5. In this manner, \$600,724 can be distributed to approximately 44,100 Class Members as a secondary Settlement payment (averaging \$13.62, with a median value of \$9.57) with administrative costs of no more than \$90,000 (approximately 13% of available funds). *Id.* at ¶¶ 5, 8. (The administrative cost for the distribution is roughly \$2.04 on a per recipient basis.) *Id.*<sup>4</sup> The \$26 minimum prior Settlement payment was selected because it will result in a secondary distribution of checks of not less than \$5. *Id.* ¶ 5. Plaintiffs' Class Counsel prefer this scenario because a larger number of Main Class Members would benefit and the distribution would remain economically viable (as the minimum benefit would exceed the administrative cost for each payment). Checks provided in the secondary distribution would be valid for 60 days, after which the remaining amount of unclaimed funds, in addition to any amount remaining from the \$90,000 set aside to pay the administrative costs, will be subject to *cy pres*.

For the reasons articulated in the GCG Declaration, the Plaintiffs' Class Counsel believe that this proposal is superior to a distribution to more members of the Main Class because, as the number of recipients grows, additional expenses mount while the average payment amount diminishes substantially such that more of the funds will be expenses or will remain uncashed by and/or undistributed to the Class. *Id.*, ¶ 7. Plaintiffs' Class Counsel agrees with GCG's position that a distribution to all the over 400,000 total policies in the Class (many having received the

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<sup>3</sup>Main Class Members were those class members entitled to dividends for surplus over the safety fund limit in certain years. Subclass Members are not being included in the secondary distribution because they have received full compensation for their claims already, including interest.

<sup>4</sup>GCG also considered a distribution to Main Class Members who received \$50 or more (Scenario 2), but rejected that proposal because the number of class members receiving payments would be much smaller (approximately 20,800 Class Members) and the relatively modest costs of a secondary distribution make a broader distribution feasible (such that checks on the minimum end of the scale will exceed the distribution cost per check). See GCG Declaration at ¶ 6. Plaintiffs' Class Counsel would support this alternative if the Court prefers.

minimum of \$5), would not be economically feasible or prudent, and supports the proposal for limiting the distribution as discussed above. There would be no additional cost to SBLI under this redistribution proposal.

**B. Plaintiffs' Class Counsel Contend That This Court Has Broad Discretion To Defer Any Cy Pres Distribution**

In this Court's Final Approval Order dated May 20, 2010, Judge Hinkle ordered (in paragraph 25) that "... the Court will retain jurisdiction as to all matters relating to administration, consummation, enforcement and interpretation of the Stipulation and this Order, and for any other necessary purpose." Thus, this Court retains jurisdiction over the final allocation of the unclaimed Settlement proceeds. *See Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978) ("Until the fund created by the settlement is actually distributed, the court retains its traditional equity powers"). Courts have broad discretionary powers in shaping equitable decrees for distributing unclaimed class action funds. *See Lessard v. City of Allen Park*, 470 F. Supp. 2d 781, 782 (E.D. Mich. 2007).

Moreover, there are no nonprofit organizations with an expectation (legal, equitable or otherwise) of receiving the current unclaimed funds in this case. The two *cy pres* recipients proposed by the Parties now are identified for the first time in this motion.

**C. Plaintiffs' Class Counsel Contend that A Secondary Distribution Is Not Impractical**

This Court itself has noted that *cy pres* is to be used when the direct distribution is "impractical." *See Vermont Pure Holdings, Ltd.*, 27 Mass. L. Rptr. 33, \*12 (Mass. Super. 2010) (J. Hinkle) (emphasizing that *cy pres* is based on impracticality of redistribution).<sup>5</sup> The

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<sup>5</sup>Various courts have sought to minimize the amount of a potential *cy pres* distribution in order to provide the most benefit to members of the class. *See, e.g., S.E.C. v. Bear Stearns & Co. Inc.*, 626 F. Supp. 2d 402, 416 (S.D.N.Y. 2009). The goal of minimizing *cy pres* distributions has also been applied in the First Circuit. *See In re Pharm. Ind. Aver. Wholesale Price Lit.*, 588 F.3d 24, 33-35 (1st Cir. 2009) (allowing a District Court decision and settlement agreement to include *cy pres* distributions of remnant settlement funds, but only after "ultimately insist[ing] that the settlement pay class members treble damages before any money is distributed through *cy pres*" where counsel had opined that as much as \$6.8 million of the \$24 million would go unclaimed). *See also In re Publication Paper*

impracticality of a residual settlement distribution has been considered by a number of courts. See *In re Metlife Demutualization Litigation*, 689 F. Supp. 2d 297, 343 (E.D.N.Y. 2010) (“Cy pres remedies are appropriate ‘in circumstances in which direct distribution to individual class members is not economically feasible’ and where ‘the proof of individual claims would be burdensome or the distribution of damages costly.’ *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (internal quotations and citations omitted). A *cy pres* payment, as an adjunct to a payment by other means to some members of the class, is warranted where the amount to be distributed to the remaining class members is small relative to the administrative costs of a direct distribution.”).

Distributions have been held to be economically unfeasible when the amounts to be distributed were minimal or less than the cost of making such a secondary distribution:

- In *Lessard v. City of Allen Park*, a distribution of \$44,000 to 3,100 plaintiffs was deemed impractical. 470 F. Supp. 2d at 783 (“In this case, it does not make sense to direct the unclaimed funds to the parties. Given the administrative costs involved with a second round of payments to all claimants, and the small amount of funds involved (\$44,000 distributed to more than 3,100 Plaintiffs), there would be little benefit to the Plaintiff class of attempting a second distribution of the unclaimed funds.”).
- In *New York v. Reebok Int’l Ltd.*, 903 F. Supp. 532, 536-37 (S.D.N.Y.1995), the court found settlement distribution impractical where individual claims ranged from \$1-\$4 and the cost of administering individual recovery would have been around \$2.50 per claimant.
- In *In re Paracelsus Corp. Securities Litigation*, 2007 WL 433281, at \*2 (S.D. Tex. 2007), the court determined that: “In this case, the evidence shows that it would be onerous or impossible to locate these class members and that it would be economically impracticable to allocate and distribute the remaining funds to the class members who had received and cashed the initial settlement checks. The record establishes that at this late date, it would not be feasible either to locate the class members who did not receive or cash the settlement checks when they were mailed or to allocate the undistributed amount to the individual class members who could be located years ago but whose present whereabouts may well be different.”

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*Antitrust Litigation*, 2009 WL 2351724 (D. Conn. July 30, 2009) (asserting the need to distribute excess settlement funds to achieve class members’ maximum legal recovery, before distributing remnant funds to *cy pres* organizations).

As stated above, the proposed secondary distribution in this case would cost a maximum of \$90,000 (with GCG estimating the cost on a per recipient basis of \$2.04) and produce an average distribution amount of \$13.62 with a median amount of \$9.57. See GCG Declaration at ¶ 5. Plaintiffs' Class Counsel believe that such a secondary distribution would be economically feasible and practical.

**D. Court-Imposed Conditions On Secondary Distributions Are Permissible**

GCG has analyzed a distribution limited to Main Class Members who 1) received a settlement distribution of \$26 or more as checks; and 2) actually cashed those checks. Imposing a minimal threshold for secondary distributions is an accepted practice. Federal courts have allowed secondary distributions that provide a *pro rata* allocation of uncashed checks to class members who would receive at least a minimal amount of additional relief, thereby reducing the administrative cost of secondary distribution. See *In re Gilat Satellite Networks, Ltd.*, 2009 WL 803382, \*3 (E.D.N.Y. 2009) ("if any funds remain in the net settlement fund by reasons of uncashed checks or otherwise ... such funds shall be redistributed to class members who have cashed their checks and who would receive at least \$5.00 from the redistribution."). Limiting a secondary distribution to class members who cashed their initial distribution check is also an accepted practice. See *In re Janney Montgomery Scott LLC Financial Consultant Litigation*, 2009 WL 2137224, \*11 (E.D.Pa. 2009) (approving distribution plan providing that if uncashed settlement checks exceeded \$50,000, the unclaimed amount would be proportionately redistributed to those class members who had cashed their checks).

Consistent with those principles set forth by this Court and others cited above, Plaintiffs' Class Counsel urge that the Court should approve a secondary distribution in order to reduce the amount of the Settlement Fund subject to *cy pres* and to provide additional benefits to those Class Members for whom additional distributions would be economically efficient.

**E. The Defendant will not be Prejudiced**

Finally, the secondary distribution should be approved by this Court because there is no prejudice to SBLI since the settlement funds belong to the Class, are not revertible to SBLI under any circumstances, the costs of the secondary distribution will be paid for out of the settlement funds and any unclaimed funds following the secondary distribution will be awarded *cy pres* to the nonprofit organizations (subject to this Court approval). Moreover, Plaintiffs contend that SBLI's reading of the Stipulation is wrong. SBLI argues below that because the secondary distribution will not be sent to all 400,000 policies comprising the Class (which number includes those who did not cash their checks), the Settlement Administrator has effectively determined "that the remaining funds will not be otherwise paid out," thus justifying paying all the remaining funds directly to *cy pres* recipients. In fact, the Settlement Administrator has expressly found that the funds can and will be "otherwise paid out" (the language in the Stipulation at 4.5.7) through a secondary distribution (which is routine and condoned by the Courts as discussed above), and has opined that the secondary distribution is feasible (and thus meets the common law standards meriting a secondary distribution in the manner proposed). Finally, because the "will not be otherwise paid out" language of the Stipulation is permissive, it clearly anticipates a secondary distribution and does not reform the contract as SBLI argues below.

**II. SBLI ADVOCATES IMMEDIATE *CY PRES* DISTRIBUTION IN ACCORDANCE WITH ITS READING OF THE COURT-APPROVED STIPULATION**

SBLI, on the other hand, recommends that the Court order that all remaining settlement funds in this action be distributed immediately to the non-profit organizations proposed by the Parties in accordance with its reading of the Stipulation, rather than requiring a second mailing that it contends was never part of the Settlement. SBLI believes that an immediate *cy pres*

distribution is consistent with both the terms of the Stipulation and the Final Order of this Court approving the Settlement of this class action.<sup>6</sup>

First, the Stipulation entered by the Parties, and approved by Judge Hinkle, provides for only a single mailing to the Class Members:

4.5.6 Net Settlement Fund Distribution Schedule. Subject to Court approval, distribution of the Net Settlement Fund **shall be made on or around a single date** (or in as short a period as possible), which date or days shall be determined by the Parties in the future with the goal of distributing the funds as soon as practicable, with a goal of approximately 14 days after the Effective Date of the Settlement.

Second, following notice to the Class of the Settlement and the Stipulation, and after the Class had an opportunity to be heard, the Court issued a Final Order on May 21, 2010. In accordance with the Final Order, a settlement distribution totaling the Net Settlement Fund of over \$7 million was made to the owners of 400,000 SBLI policies that comprise the Class. The Stipulation provided for a long time for Class Members to cash their settlement checks (180 days) in order to afford them every opportunity to collect the settlement funds. Nevertheless, part of the Class has not redeemed the Settlement distribution.

Third, SBLI agrees with GCG's position that a secondary distribution to owners of all of the more than 400,000 total policies in the Main Class (many of whom received the minimum of \$5 in the existing distribution) would not be economically feasible or prudent. SBLI believes, therefore, that the requirement under Stipulation ¶ 4.5.7 for a determination to be made by the Administrator or the Parties that the remaining funds will not be otherwise paid out has been satisfied by GCG's conclusion. SBLI further believes that directing a secondary distribution would result in a reformation of contract, which is a remedy unsupported by the facts and

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<sup>6</sup>The Final Order, Section 4, provides:

Pursuant to Massachusetts rule of Civil Procedure 23, the Court approves the Stipulation, the Plan of Distribution as fair, reasonable and adequate as to, and in the best interests of, each of the Parties and the Class Members, and incorporates the terms of the Stipulation into this Order.

circumstances of this case.

Fourth, both the Stipulation and the Final Order specifically provide for the monies remaining in the escrow account after distribution of the Settlement Funds to be paid to non-profit organizations agreed to by the Parties. *See* Final Order, Section 5. The Final Order provides: “[s]uch funds will be paid to one or more non-profit organizations agreed to by the Parties as set forth in the Stipulation in Section 4.5.7 and as disclosed to the Court in the Parties’ final papers in support of the Settlement.” (Stipulation, Section 4.5.7).

Federal courts frequently allow large *cy pres* distributions of unclaimed settlement funds in class action suits, particularly where the distribution of damages is costly. *See Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9<sup>th</sup> Cir. 1990). Distribution of these funds to charity has been viewed as favorable over other alternatives. *See Superior Beverage Co., Inc. v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 478-79 (N.D. Ill. 1993) (outlining case law supporting *cy pres* distribution and ordering distribution pursuant to settlement agreement of unclaimed \$2 million to charities); *In Re Motorsports Merchandise Anti-Trust Litigation*, 160 F. Supp. 1392 (N.D. Ga. 2001) (distributing \$1.85 million in proceeds to nine separate charities).

In summary, SBLI believes that the steps agreed to by the Parties and approved by the Court after notice to the Class should be taken, and, therefore, that the Court should order that the amount remaining in the Settlement Fund be distributed to the non-profit organizations selected by the Parties immediately rather than waiting for another mailing to be conducted.

### **III. THE PARTIES HAVE SELECTED PROPOSED *CY PRES* RECIPIENTS**

Stipulation ¶ 4.5.7 (approved by this Court in the Final Order) provides that any unclaimed settlement funds, after the Administrator or Parties make a determination that any remaining funds will not otherwise be paid out, will be distributed via a *cy pres* award. While the Parties disagree about the timing of the *cy pres* distribution as described above, both parties

agree that non-profit organizations must be selected. The Parties propose the Massachusetts Public Interest Research Group (“MassPIRG”) and Massachusetts Affordable Housing Alliance (“MAHA”) as the *cy pres* award recipients:

- MassPIRG is a non-profit consumer advocacy organization headquartered in Boston that represents the interests of Massachusetts consumers, including on insurance reform issues. As a result, particularly since the vast majority of Class members are from Massachusetts, a *cy pres* award to MassPIRG will benefit the Class. *See, e.g., In re: Massachusetts Smokeless Tobacco Litigation*, No. 03-5038 (Mass. Super. Oct. 23, 2009) (Neel, J.) (ordering final approval of plan providing that any funds not claimed by class members will be distributed *cy pres* to Court-approved non-profits); *see also In Re Wal-Mart Item Pricing Consolidated Class Actions*, No. 02-5006 (Mass. Super. Dec. 21, 2004) (van Gestel, J.) (ordering final approval of plan providing benefits to class by *cy pres* distribution to consumer and charitable organizations serving the class population); and

- MAHA is a non-profit grass roots organization that advocates on behalf of tenants, homebuyers and homeowners to increase affordable housing in the Commonwealth, which is an urgent need in the Commonwealth of Massachusetts. As stated on its website: MAHA “challenges banks, insurance companies, mortgage companies, developers to do more” for affordable housing. SBLI, as an insurance company, has answered that challenge by making charitable contributions to MAHA for affordable housing clients and by providing a computer in MAHA office leased by SBLI.<sup>7</sup> Similarly, Plaintiffs’ Lead Counsel, Adkins, Kelston & Zavez, P.C., and its attorneys, are familiar with the important work of MAHA and have provided it with modest donations over the last decade. Counsel has no other involvement with MAHA. A *cy*

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<sup>7</sup>The small space that SBLI leases in the MAHA building is a charitable donation on the part of SBLI. The space is labeled “SBLI Learning Center” and it houses a computer for educational purposes only. SBLI has never benefited from having that space, or from having a computer installed there. Although MAHA members may use the computer for any purpose, which could include accessing SBLI’s website, the computer is not intended to generate nor has it generated any life insurance sales for SBLI.

*pres* award to MAHA will similarly benefit the Class, inasmuch as the Class is likely, in today's economy, to contain individuals in need of access to affordable housing and/or who otherwise benefit from a more stable housing market.

**IV. CONCLUSION**

For the reasons set forth above, the Parties request that the Court order the Settlement Administrator to take one of the following actions:

(1) Conduct a secondary distribution of unclaimed settlement funds to approximately 44,100 Main Class Members (those who received checks of \$26 or more as part of the initial distribution and will receive at least \$5 now), with the costs of the distribution to be borne out of the settlement funds and any funds remaining after the secondary distribution to be provided as a

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*cy pres* distribution in equal parts to the non-profit organizations designated by the Parties:

Massachusetts Public Interest Research Group and the Massachusetts Affordable Housing Alliance; OR

(2) Proceed directly to the *cy pres* distribution of the unclaimed settlement funds in equal parts to the two non-profit organizations proposed by the Parties.

Dated: June 21, 2011

Respectfully Submitted,

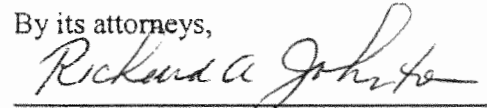
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