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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UTE SISTRUNK,
Plaintiff,

No: C 02-4891 VRW (ARB)
Related to No: C 02-5292 VRW (ARB)

v.

E-filing Case

UNITED STATES OF AMERICA, UNITED STATES POSTAL SERVICE & DAVID W. TYLER, DOES 1-20
Defendants
_____/

CONTINENTAL CASUALTY COMPANY
Plaintiff,

V

UNITED STATES OF AMERICA, UNITED STATES POSTAL SERVICE & DAVID W. TYLER, DOES 1-20
_____/

PLAINTIFFS' JOINT PETITION SEEKING ORDER IMPOSING RESTRICTIONS ON STIPULATION FOR COMPROMISE SETTLEMENT & RELEASE OF FEDERAL TORT CLAIMS ACT

(With proposed Order attached as Exhibit A)

COME NOW, JOINTLY, PETITIONERS UTE SISTRUNK AND CONTINENTAL CASUALTY COMPANY, jointly, by and through their attorneys ("Petitioners"), who

respectfully request an order restricting certain conditions of settlement that Defendant United States of America seeks to impose, which Petitioners allege an estoppel exists preventing application of the subject conditions which additionally are in violation of public policy compelling petition to disclose confidential, privileged information to the United States Attorney and, therefore, are illegal, and hereby state as follows:

1.

Petitioners are Plaintiffs in an action with respect to claims based in tort, under the Federal Tort Claims Settlement Act, arising from alleged negligence that resulted in personal physical injury to Ute Sistrunk, on or about March 28, 2000, filed as a lawsuit in this court, as captioned above (the "underlying lawsuit"). The parties have reached agreement with respect to the total amount that Defendant will pay in exchange for its release from the tort liability and dismissal of this action, as reflected in the Order of Dismissal of Petitioner's joint claim against the Defendant. However, there are additional terms which Defendant seeks to impose on Plaintiff's, more than four months after the agreement, which Plaintiffs believe are not in their best interest; particularly not in the best interest of Ute Sistrunk, the injured person, and which Plaintiffs believe are contrary to public policy compelling Petitioner to disclose confidential privileged information to the United States Attorney and, therefore, illegal. Plaintiffs hereby seek the court's intervention in the unresolved issues, which are extraneous to extinguishing totally the Defendant's liability in exchange for payment of the agreed settlement sum. Upon execution of a Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677 and payment of the settlement sum to the Sistrunk Segregated Settlement Account, the Defendant would be released from all claims and the causes of action against it dismissed with prejudice.

2.

Petitioners hereby apply to this court for the issuance of an Order Imposing Restrictions on Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677, proposed as Exhibit "A," based on the facts and circumstances contained therein, as presented in this Petition and its appended exhibits, and subject to an evidentiary hearing, which the court may direct.

3.

The Torts Branch, Civil Division, United States Department of Justice, is seeking to impose conditions of settlement that are overreaching, unjustified, constitute *ultra vires* policy making, and are in violation of public policy, which causes such conditions to be illegal. A chronology of the events leading up to the imposition of those conditions as supported by the attached Declaration of H. Mal Cameron with Exhibits one through six, (1-6) follows:

(a) On or about January 10, 2006, a joint settlement agreement was reached between Petitioners Ute Sistrunk and Continental Casualty Insurance Company and Defendants United States of America in the amount of One Million, Seven Hundred Fifty Thousand dollars in full satisfaction of Petitioners' Joint Federal Tort Claim against the United States Government if the structured settlement that had been proposed by Petitioners to CMS, (the Center for Medicaid Services) in satisfaction of Medicare's requirement to establish a Medicare Set Aside Trust to fund future medical expenses was accepted as adequate by CMS and subsequently approved by the Oakland Workers' Compensation Appeals Board via Third Party Compromise and Release thereby finding that Petitioner Continental Casualty Insurance Company was no longer required to pay Petitioner Ute Sistrunk's future medical expenses that were caused by the tort of the United States Government and which arose out of the course and scope

of Petitioner Ute Sistrunk's employment with Petitioner Continental Casualty Insurance Company's Insured. While the conditions of a structured settlement and approval by CMS were not explicitly set forth in the January 10, 2006 agreement, the parties understood that such conditions existed.

(b) Prior to accomplishing the $1,750,000 settlement, the United States Attorney had been advised that Petitioner was working with structured settlement broker Steven Chapman in order to evaluate the cost to Petitioner of purchasing structures both for her own benefit (to save on income taxes) and to purchase the structure to fund the MSA proposed to CMS. The United States attorney accepted the settlement demand advising Petitioner's attorneys that he could not prepare a written document referencing the condition associated with Medicare, but that he would interlineate the condition of the requirement for an Order from the Oakland Workers' Compensation Appeals Board approving the Third Party Compromise and Release understanding that no submission was to be made by Petitioners for approval of the Third Party Compromise and Release unless CMS first accepted the proposed MSA. It was anticipated that it would take approximately six months for CMS to act on the proposed MSA.

(c) On or about March 22, 2006 the United States District Court Judge presiding over the Federal Tort Claim entered an Order of Dismissal of Petitioners' Joint claim against the United States Government that could be rescinded if Petitioners submitted a declaration within 90 days advising that the consideration for settlement had not been received. On or about May 15, 2006, CMS accepted the proposed MSA. On June 1, 2006 the Oakland Workers' Compensation Appeals Board Approved the Third Party Compromise and Release. During the first week of June, 2006 a declaration was submitted to the Presiding Judge in the Federal Tort Claim advising that

the consideration for settlement had not been received. On August 7, 2006, an Order issued vacating the conditional dismissal.

(d) It was not until after CMS approval, on or after May 26, 2006, that the United States Attorney then advised for the first by e-mail that recent regulations found at 28 CFR Part 50, Volumne 71, Number 43, pages 11158-11160 dated March 6, 2006 effective April 5, 2006 confirmed upon the United States Attorney the sole power to pick a broker, that the United States attorney was therefore exercising that power by identifying a broker of his choice, that **Petitioners would be prohibited from communicating with that broker and all communications concerning the proposed structures (inferentially including Petitioner's confidential privileged tax status and concomitant personal financial needs) were to be disclosed to the United States Attorney for his routing to the broker. Petitioner was specifically precluded from having any confidential communications with the designated broker. These conditions are unacceptable to Petitioners**.

4.

This court inherently has jurisdiction and authority to rule on the propriety and legality of certain actions by agents of the U.S. Department of Justice, which Petitioners now bring before it. Petitioners allege that certain conditions that the Defendant United States of America, through the United States Department of Justice, seeks to impose on the settlement terms are overreaching, unjustified, constitute *ultra vires* policy making, and are in violation of public policy, which causes such conditions to be illegal. Further, Petitioners assert that the Defendant has not shown cause or justification that the United States of America has an interest in or authority to interfere with the Plaintiffs' right to select financial advisors, including a person to handle the a structured settlement transaction, to designate the payee to receive settlement proceeds from this

lawsuit or to seek the establishment of a qualified settlement fund to receive the settlement proceeds while preserving the Plaintiffs' ability to receive certain tax and public assistance benefits without the involvement of the U.S. Department of Justice or its agents. Specifically:

(a) The Defendant United States of America, through it agents in the Torts Branch, Civil Division, Department of Justice, seeks to impose conditions on the compromise settlement in this case that were not presented as part of the original compromise. Such conditions are not necessarily limited to the imposition of a structured settlement person and restrictions on the transaction that is unacceptable to the Plaintiffs. The Torts Branch uniformly imposes such unwarranted, unreasonable and illegal conditions on settling claimants across the country. Plaintiffs have had access to documents in other cases where the Torts Branch has moved to prevent claimants from seeking measures to avoid such restrictions. One such device is a qualified settlement fund (QSF), which is described and authorized in the Treasury Regulations at 26 C.F.R. § 1.468B-1(c), with authority stemming from the Internal Revenue Code at 26 U.S.C. § 468B. In one such case the Torts Branch, acting through the respective U.S. Attorney where the case was brought, added the following text to its standard "Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677" form for a cash settlement of a filed lawsuit:

> **With respect to the payment of the cash settlement amount, the parties stipulate and agree that the United States will not sign any annuity application form or uniform qualified settlement form or any equivalent form and that the United States will not pay the cash settlement amount into a qualified settlement fund or its equivalent. Plaintiffs, their attorneys, any Guardian Ad Litem, and their**

representatives, including any structured settlement annuity broker retained by them, hereby agree not to attempt to structure the cash settlement amount in any way, form, or manner, including by placing any of the cash settlement amount into any qualified settlement fund or its equivalent. However, nothing in this Paragraph [*reference*] precludes the plaintiffs from purchasing standard, non-structured settlement annuities after the plaintiffs have cashed the settlement check or from depositing any portion of the cash settlement amount into a special or supplemental needs trust, but they agree that they will not represent to any person, entity, or agency that they are purchasing structured settlement annuities and they agree they will not attempt to purchase such structured settlement annuities.

In that same document, the Torts Branch also arrogantly demeaned the District Court's authority to override any document the Torts Branch had prepared, to wit:

The terms of the required Order must be approved by the Department of Justice's Torts Branch (FTCA Staff) prior to being submitted to any reviewing Court and <u>such Order cannot be changed by the Court or parties without the prior written consent of the Torts Branch (FTCA Staff).</u> In the event any such minor or incompetent adult is not a party to this action, plaintiffs must obtain said court approval on behalf of any such minor or incompetent adult from a state court of competent jurisdiction. Plaintiffs agree to obtain such court Order(s) in a timely manner: time being of the essence. Plaintiffs further agree that the United States may void this

settlement at its option in the event such court Order(s) is/are not obtained with respect to each of person being required to sign this Stipulation in a timely manner. In the event plaintiffs fail to obtain such court Order(s), or obtain an Order that has not been approved by the Torts Branch (FTCA Staff), or obtain an Order that has been changed or modified by the plaintiffs or the court without the prior written consent of the Torts Branch (FTCA Staff), the entire Stipulation and the compromise settlement are null and void. [*Emphasis supplied.*]

(b) The Petitioners assert that the intent of the Torts Branch, in general, of this provision is:

(1) To deny the Plaintiffs the right to receive tax benefits intended by Congress for victims of physical injury or physical sickness as a result of negligence committed by a tortfeasor;

(2) To impose on the Plaintiffs an adversary to handle the personal financial aspects of a structured settlement, perpetuating a longstanding practice of cronyism within the Torts Branch and denying the Plaintiffs the right to select their own consultant;

(3) To deny the Plaintiffs the right to establish a special needs trust to preserve or establish eligibility for Supplemental Security Income (SSI) and Medicaid benefits, which would otherwise be lost if settlement proceeds ultimately paid to a disabled person and counted in a “means test” of assets and income;

(4) To deny the Plaintiffs the right to arrange a structured settlement to fund a Medicare Set-Aside Arrangement (which Ute Sistrunk desires, in this case), using a person of her own choosing; and

(5) To prevent the Plaintiffs from establishing a qualified settlement fund (QSF) to give them the means of achieving their objectives independently of the Defendant tortfeasor, as they have the right to do, not conditional on any settlement terms reached in the above-captioned action.

(c) The Federal Defendant, acting through the U.S. Attorney in this district, has already demonstrated in this case that it seeks to impose conditions that the Plaintiffs allege to be illegal, and Plaintiffs anticipate that the Federal Defendant will take additional illegal measures to counter any initiative by the Plaintiffs to avoid the imposition of these conditions. While the Torts Branch has not yet revealed its entire bag of tricks to the Plaintiff in this case, it has revealed that it intends to impose its standing system of illegal oppression on this Plaintiff, which includes practices not yet revealed in this case. Petitioners believe, based on their own knowledge and on information which they reasonably believe reliable, that their assessment of the Torts Branch program is accurate. Cases filed under the Federal Tort Claims Act across the country and in other parts of the world where the United States is the responsible party for the tort are supervised and monitored by the Torts Branch. While cases of a certain type may be delegated to other agencies, such as the Department of Defense and its individual service branches or to the U.S. Postal Service, the Torts Branch maintains oversight and has imposed a uniform set of instructions as to how structured settlements will be conducted. The Torts Branch also imposes a dollar cap on settlement authority so that cases of a certain size, such as this one, may not be settled without approval by the Torts Branch. Plaintiffs ask that any ruling issued by this Court

not be confined to affect only the narrow facts of this case, but that it be broad enough to cause the Torts Branch to cease and desist its illegal activity everywhere, in all cases.

(d) The right of a plaintiff to receive the tax benefits of a structured settlement is absolute. This right is established by Congress as public policy as stated in the legislative history of the Internal Revenue Code through the report of the Joint Committee on Taxation, "Tax Treatment of Structured Settlement Arrangements," JCX-15-99, March 16, 1999, which made it clear that what it called a "subsidy" was intended to encourage the use of a structured settlement arrangement in lieu of a lump sum payment to the recipient, to reduce the probability that such individuals need to make future claims on these government programs, and that it is not the purview of any defendant, including the United States of America, to take away that right or use it as negotiation leverage in settling a physical injury claim. The Torts Branch seeks to do just that.

(e) After settling this case in January of 2006, beginning May of 2006, the Defendant United States, through the Torts Branch, sought to impose its agent, an annuity broker not employed by the United States who is on a list of annuity brokers established by the U.S. Attorney General, for the provision of annuity brokerage services in connection with structured settlements entered into by the United States. Plaintiffs did not believe the new conditions now imposed by the United States should be accepted. The primary reasons for the rejection of overtures from the Defendant are stated as follows:

(1) The annuity broker is an agent of the Defendant and, as such, would have a conflict of interest in also serving the Plaintiffs. The American Bar Association Model Rules of Professional Conduct, Rule 1.7(a), note [7] (and its California

equivalent, California State Bar Professional Conduct Rules, Rule 3-300), prohibits representation of opposing parties in litigation, and that would extend to an agent of the Defendant seeking to handle the financial aspects of the settlement on behalf of the Plaintiffs. This conflict of interest cannot be waived if the client does not consent in writing to the terms of the transaction.

(2) The Torts Branch has institutionalized a practice of requiring victims to take less money from the United States in a structured settlement than in a lump sum settlement. This policy is, *ultra vires*, outside the Justice Department's scope of authority and in conflict with public policy established by federal statute, that the present value of a settlement offer should be reduced to offset the tax benefits of a structured settlement if periodic payments are included in the offer. Torts Branch Director Jeffery Axelrad (who has since retired), in a June 28, 2000, memorandum to the Federal Tort Claims Act staff, assistant U.S. attorneys, and agency counsel, discussed at some length "Structured Settlements in FTCA Matters." In that memorandum, Director Axelrad mentioned several of the benefits to victims of structured settlements and their periodic payments, as well as the tax benefits Congress set up in the Internal Revenue Code to encourage the use of structured settlements by victims. His memorandum then goes on to instruct (at 8-9) as follows:

> **You should, of course, be aware of probable tax consequences so that the United States may obtain value received for the anticipated tax benefits as part of any negotiated settlement. . . . Thus, even though the flow of annuity payments will include the distribution of some investment earnings by the insurance carrier, the payments appear to be exempt from taxation. This is an important negotiating point. Conversely, the availability of a tax-free lifetime series of**

> **annuity payments, for example, should not be conferred on a plaintiff without an offsetting benefit to the government: that is, an adequate *quid pro quo*. You should be aware of all of the government's interests and take them into account when you negotiate a settlement on behalf of the United States.**

The message is obvious — AUSAs, Torts Branch attorneys and agency counsel must try to capture (and thus offest) the tax benefits when agreeing to a structured settlement with tort victims. Government attorneys must settle at a lesser amount than they would if the government made a lump-sum payment. This Torts Branch practice runs directly counter to congressional policy. Congress gave the tax benefits to victims to encourage them to enter into structured settlements. It is nonsensical to suggest that Congress intended to give victims those benefits with one hand and to have another arm of government take them away with the other. It is obvious that, because of the Torts Branch practice to reduce the principal amount and the resulting periodic payment stream, fewer victims will select structured settlements. The Plaintiffs' rejection of the structured settlement insisted upon by the Defendant avoids the prospect of having the value of the settlement offer reduced due to the *ultra vires* policy of the Justice Department in conflict with public policy established by Congress through a federal statute.

(3) The Torts Branch has required annuities to provide for a reversionary interest in the United States should there be any guaranteed payments remaining at the victim's death. A second way in which the Torts Branch discourages structured settlements is by requiring a reversion to the United States. In his June 2000 memo, Director Axelrad points out the obvious — that "a reversionary trust is financially

beneficial to the government" – while leaving the necessary corollary unstated — that it is not financially beneficial for the victim. In the "New Model Stipulations For Compromise Settlement" distributed by Director Axelrad to FTCA staff on November 6, 2001, these reversions are made part of the standard DOJ structured settlement paperwork. In paragraph 3.B (at 4), the model language provides:

> **In the event of the death of a beneficiary of an annuity contract during a period of guaranteed payments, all remaining guaranteed payments shall be made payable to the United States Treasury and sent to the Torts Branch. . . .**

In paragraph 3.C (at 5), this is reinforced:

> **Upon the death of the beneficiary of said trust [the victim], the trustee shall, to the extent permitted by the terms of said trust, . . . liquidate and distribute the remaining trust estate to the United States . . . .**

This practice of insisting upon a reversionary interest in the United States is beset by a basic illogic – the United States would not get any reversionary interest if it paid in a lump sum, so why should it receive a reversionary interest in a structured settlement? But, again, the problems go deeper. The practice of insisting upon a reversionary interest discourages, rather than encourages, the use of structured settlements. In the first place, a reversion means there will be a significant chance that victims will receive even less of a principal payout to themselves or their heirs than the settlement sum negotiated. In the second place, a reversionary interest often lessens the periodic

payment, making it a less attractive option for this reason as well. The practice of the Torts Branch of requiring a reversionary interest in the United States directly conflicts with the congressional policy of encouraging victims to take structured settlements, as fewer victims will. The Plaintiffs' rejection of a structured settlement offered by the Defendant avoids the prospect of a reversionary interest by the Defendant. When the case was settled in January of 2006, there was no reference to any reversionary interest to the defendant.

(4) The Stipulations for a structured settlement issued by the Torts Branch also discourage structured settlements. By imposing particular types of structured settlement financing methodologies and investments, the Torts Branch prevents qualifying claimants from evaluating or selecting from other financing methods and investments which meet the qualifications for a structured settlement as that term is now defined in IRC § 5891 (c)(1). For example, IRC § 1396p(d) allows a victim to establish special needs trusts that provide them with certain benefits, but the Tort Branch forms do not allow it. The Torts Branch settlement forms, in restricting these options, short-circuit innovation to tailor structured settlement arrangements to particular victims' needs and require procedures that are contrary to industry standards. These practices discourage victims from adopting structured settlements, contrary to congressional policy. The rejection of the structured settlement broker designated by the Defendant avoids the unnecessary restriction against the establishment of a special needs trust and, if desired, to couple it with a structured settlement. Defendants were aware in January of 2006 when the case was settled that a structure was needed both for CMS and the benefit of the Plaintiff.

(5) The Torts Branch through its forms also eliminates rights expressly given to victims by Congress. Under 26 U.S.C. § 5891, Congress expressly allows

victims, under prescribed circumstances, to factor their periodic payments. The Torts Branch forms (in paragraph 3.b) provide the opposite – specifically, that the victims "shall not have the power to sell, assign, . . . or anticipate said annuity payments, or any part thereof, by assignment or otherwise." Moreover, Congress under 26 U.S.C. §§ 5891(c) and (d) gives factoring rights and tax relief to victims only if the requirements of 26 U.S.C. § 130 have been followed, but the DOJ forms do not comply with 26 U.S.C. § 130, as they do not establish a qualified assignment. If only to conform to 26 U.S.C. § 5891, the Torts Branch settlement forms would have to be revised to allow victims to take advantage of these "structured settlement payment rights" accorded by Congress. The rejection of a structured settlement offer by the Defendant avoids this inappropriate restriction on the right to factor future payments, which is established as public policy by federal statute.

(f) The Torts Branch has inappropriately used section 11015(a) of Public Law 107-273, the 21st Century Department of Justice Appropriations Act as its authority to ignore procurement procedures required by federal statute and promulgating rules. The conference report summary for the bill, H.R. 2215, described section 11015, "Use of Annuity Brokers in Structured Settlements," as follows:

> **This section reforms the Department of Justice's practice for using annuity brokers in structured settlements in two ways. First, it directs the Attorney General to establish a list of annuity brokers who meet minimum qualifications for providing annuity brokerage services in connection with structured settlements entered by the United States. Second, this provision permits the United States Attorney (or his designee) involved in any settlement negotiations (except those negotiated exclusively through the Civil Division of the**

> **Department of Justice) to have the exclusive authority to select an annuity broker from the list of such brokers established by the Attorney General, provided that all documents related to any settlement comply with Department of Justice requirements.** [Emphasis added.]

The Civil Division missed the point entirely in its promulgation of the "reforms" intended by the statute, as though the reforms were not directed to the Department of Justice, its Civil Division and Torts Branch. **Certainly, Congress did not intend for the Torts Branch to continue business as usual. And, it is even less likely that Congress intended to provide any authority to the Torts Branch to ignore the procurement statutes and regulations, which it has systematically violated for many years.**

(g) The whole issue of broker selection by the Department of Justice turns on the question of whether the services to be performed are professional services, for which fees are paid, or whether the selection of a broker amounts to a circumvention of the procurement process. Petitioners submit that the Torts Branch has attempted to collapse the two concepts—selecting brokers as professional consultants, while paying them exorbitant fees that are disproportionate to the value of the services performed, by awarding the brokers lucrative opportunities to sell annuities to the United States without following statutory procedures to award such business. Further, the selection process for at least the last 10 years is well documented to be rampant cronyism. Time and again, when Congress has initiated investigations of who is being awarded this lucrative business, the results confirm that a few brokers get the majority of government business.

(h) The U.S. Department of Justice is in clear violation of 41 U.S.C. § 5, pertaining to Public Contracts, by failing to advertise for proposals for purchases and contracts for supplies or services in the appointment of structured settlement consultants who are compensated by commissions of annuity sales to the United States.

This Torts Branch practice of restricting broker selection runs afoul of the procurement laws, which, consistent with the formal DOJ policy, require a fair, equal opportunity for all brokers to participate. Based on responses given in a question and answer session at the ATLA convention Atlanta in July 2002, it appears that Torts Branch Director Jeffrey Axelrad was acting under the impression that, because the United States does not pay brokers directly, the selection of brokers by the United States is not a procurement. He was mistaken. See *Century 21–AAIM Realty, Inc*., 92-1 CPD ¶ 345 (1992) (selections of relocation firms providing "no-cost" services to the government are procurements); *T.V. Travel, Inc*., 65 Comp. Gen. 109 (1985), 85-2 CPD ¶ 640 (same for travel agency services); *Gino Morena Enters*., 87-1 CPD ¶ 121 (1987) (same for concession for haircuts paid by recruits).

(i)The Justice Department was made aware of its illegal activity in procurement when it opened a public comment period on its proposed "Final Rule" to promulgate section 11015(a) of Public Law 107-273. The "Final Rule," as published in the Federal Register, March 6, 2006 (Volume 71, Number 43, pages 11158-11160, item 10) scoffed at the suggestion, echoing former Director Axelrad's flippant dismissal of the issue, as follows:

> **Some of the commentators questioned whether the Department's selection of annuity brokers violates federal procurement laws. The Department of Justice does not pay the annuity brokers it selects for**

the purpose of assisting in the settlement of a claim or suit against the United States. The annuity broker is paid a commission by the annuity company that issues an annuity contract in the event a settlement is reached that includes the purchase of an annuity. In addition, annuity brokers provide highly technical and professional services.

(j)Government regulations for the procurement of supplies or services are designed to prevent cronyism and nepotism in the awarding of government business, giving all persons an equal right to compete for government contracts, and to secure for the government the benefits of competition. *U.S. v. Brookridge Farm*, C.C.A.Colo. 1940, 111 F.2d 461. See also 1937, 39 Op.Atty.Gen. 71. Government policy pertaining to advertisements is codified at 41 U.S.C.:

§ 5. Advertisements for proposals for purchases and contracts for supplies or services for Government departments; application to Government Sales and contracts to sell and to Government corporations.

Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed $25,000, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is

available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis. . . ."

The only conceivable exception to the advertising requirement applicable to the selection of a structured settlement broker might be (4), if the services are considered to be of a technical and professional nature or, while under Government supervision, paid for on a time basis. However, neither is claimed by the U.S. Department of Justice. Therefore, there is no exception to the statutory advertisement requirement.

(k) Over the last 10 to 15 years, there has been congressional concern about DOJ practices in structured settlement situations in which the United States is the defendant. The complaint has been that government attorneys have insisted on using brokers of their own selection, rather than those of the victim's selection, as a condition to executing a structured settlement and that government attorneys have refused to work with brokers who generally are retained by victims, rather than defendants.

(l)Partly as a result of this concern, on June 30, 1997, Acting Associate Attorney General John C. Dwyer distributed a memorandum for all Assistant Attorneys General and U.S. Attorneys reaffirming Department policy and the "cardinal rule with regard to selection of brokers. The cardinal rule has been – and continues to be – that the [DOJ attorneys] should avoid favoritism in selection." Among other rules set out in that June 1997 memorandum are these:

- **Every broker should be given an opportunity to promote his, her, or its services.**

- **No lists of "approved," "preferred," or "disapproved" brokers are to be maintained.**
- **Our policy is to afford an opportunity to qualified brokers to provide services. . . .**

. . .

- **Finally, it is important that each office maintains the appearance as well as the reality of fairness in its use of brokers. . . .**

Complaints did not end with the publication of the June 1997 Dwyer memorandum. Following additional congressional inquiries and continuing concerns about DOJ broker selection practices, the Comptroller General issued a report that showed a serious concentration in brokers selected by DOJ attorneys. See GAO Rep. No. GGD-00-45, Structured Settlements: The Department of Justice's Selection and Use of Annuity Brokers (B-283058, Feb. 16, 2000) (Exhibit "I").

(m) DOJ practice did not change after this GAO review. In his June 2000 memorandum, Director Axelrad gave internal guidance to U.S. Attorneys and agency counsel that they should refuse to allow the victim to select the broker for a structured settlement in which the United States is a party. After paying lip service to the guidance given in the June 1997 Dwyer memorandum, Director Axelrad stated as follows:

We advise against using any broker who is brought to a particular settlement by the injured party's attorney. However, the fact that you will not use a broker in a particular settlement because the broker was brought to the settlement by the injured party's attorney does not preclude you from using that broker in another settlement where the broker has not been contacted by the injured party's attorney.

We suggest, however, that brokers who work primarily or exclusively on behalf of persons funding the settlement (e.g., defendants) be utilized.

(n)This informal guidance reflects standard operating procedure for government attorneys, both within and without the Torts Branch. Statistics provided by DOJ to GAO for a two-year period between 1997 and 1999 showed that 70 percent of the structured settlements involving DOJ, amounting to almost 80 percent of the dollar value, were awarded to four brokerage companies. GAO Rep. No. GGD-00-45 at 8-9. Removing the small cases of under $1 million in value that likely were not handled by the Torts Branch, the top four companies handled almost 80 percent of the cases. Statistics provided by DOJ in response to a congressional inquiry for the period between May 1, 2000, and August 10, 2001, showed no change in practice. Despite there being approximately 450 full-time brokers, almost 80 percent of the settlements during that period were brokered by only seven companies, all of whom predominantly service defendants, rather than tort victims. Letter from Assistant Attorney General Bryant, dated September 21, 2001, to Representative Wes Watkins.

(o)The “Structured Settlement Broker Selection” form itself including the “factors that influenced” the selection of the broker, shows that the process developed by the Civil Division is a sham. It was the Civil Division’s way of thumbing its nose at Congress and the GAO, saying to its FTCA staff and AUSAs, “keep on doing things the way you always have been, just be sure you fill out a form.” One has to read only a few of these completed forms to see how absurd the process of justifying a selection of a broker has become.

(p)This practice of the Torts Branch to refuse to cooperate with a victim's structured settlement broker — a practice that has been published as the operative "advice" throughout all U.S. Attorney offices in the country, as well as to agency counsel dealing with tort claims — runs directly counter to the "cardinal rule" reiterated in the June 1997 Dwyer memorandum to "avoid favoritism." It violates that policy statement's guidelines that "[e]very broker should be given an opportunity to promote his, her, or its services" (emphasis added) and that all "qualified brokers" ought to be afforded an opportunity to provide services. It was this informal Torts Branch practice and guidance in violation of Departmental policy that directly resulted in the enactment of section 11015 of the DOJ Authorization Act, even though that section does not cover the larger cases, which are handled by the Torts Branch.

(q)In addition to being against stated congressional and DOJ policy, the informal Torts Branch practice and guidance makes bad sense both legally and practically. Having only a defense-aligned broker advising on the structured settlement results in a less-than-satisfactory job for the victim almost by definition. With the broker looking out for the interests of the United States, instead of the victim, the victim is much less likely to be advised of the varying annuity investment options that could be tailored to the victim's personal circumstances. Moreover, there will be much less of an incentive to find the best price for the victim of any particular investment option. As a result, victims will less often choose a structured settlement and, even when they do, will often have reduced benefits, increasing the chances of victims having to avail themselves of public assistance in the future. Both results are contrary to congressional intent.

(r)The risks to the United States because of an insistence on using its own broker for the transaction are significant, as well. Director Axelrad in his June 2000 memorandum warns DOJ attorneys that it is "essential" that they "make no

representations, orally or in writing, as to the tax consequences of a settlement. . . . To repeat, you should not make any representations about tax consequences of a structured settlement." (Emphasis in original.) This sound advice obviously stems from the fact that, despite being attorneys, tort attorneys are not tax attorneys. Tax law is complicated, and representations made by government attorneys during negotiations which are relied upon by victims and later turn out to be false could unravel a settlement based on claims of negligent or intentional misrepresentation.

It is more than ironic, then, that, although in his memorandum (at 4-7) he repeatedly recognizes that annuity investment options are varied, multiform, and complicated — and despite recognizing that brokers, not lawyers, are the qualified professionals in the annuity business — Director Axelrad makes it Torts Branch practice to insist upon a government-selected broker to advise on and complete the structured settlement transactions, going so far as to advise "against using any broker who is brought to a particular settlement by the injured party's attorney." By engaging in this practice, DOJ arguably assumes a fiduciary capacity to tort victims and certainly makes it much more likely that a settlement will be collaterally attacked because of negligent, or simply bad, advice given the victim by the broker insisted upon by the United States. *See Lyons v. Med. Malpractice Ins. Ass'n*, 286 A.D.2d 711, 730 N.Y.S.2d 345 (2d Dept. 2001) (misstatement of present value of structured settlement by defendant's insurance company gives victim cause of action for fraudulent, intentional, and negligent misrepresentation); *Macomber v. Travelers Property and Cas. Corp*., 804 A.2nd 180 (Conn. 2002) (victim states causes of action against annuity issuer for breach of contract, fraud, negligent misrepresentation, conspiracy, unjust enrichment, and unfair trade practices flowing from structured settlement negotiations). After all, it is the victim that effectively pays the broker insisted upon by DOJ.

Section 11015(a) of Public Law 107-273, the 21st Century Department of Justice Appropriations Act, and the "Final Rule" promulgated by the U.S. Department of Justice, "Minimum Qualifications for Annuity Brokers in Connection with Structured Settlements Entered into by the United States," does not apply to the selection of an annuity broker by Plaintiffs in this case should they desire to negotiate periodic payments as a settlement term with a qualified settlement fund established by this court under the provisions of 26 U.S.C. § 468B and 26 C.F.R. § 1.468B-1, which would be assigned to a third-party under the provisions of 26 U.S.C. § 130 and Revenue Procedure 93-34, 1993-2 C.B. 470, inasmuch as such structured settlement would not be entered into by the United States.

The Department of Justice policy of reducing an offer of a cash settlement to a lesser amount if a plaintiff seeks periodic payments to be excluded from the payee's gross income as arising from a personal physical injury or physical sickness, under the provisions of 26 U.S.C. § 104(a)(2), with the intent that the payee's tax benefits should be offset by the reduced immediate cost to the United States, constitutes *ultra vires* policy making on the part of the Department of Justice, as such policy is not within the purview of the Executive Branch and beyond its scope of authority when it contravenes public policy created by federal statute. The policy created *ultra vires* by the Department of Justice is found to violate public policy, as established by Congress in the Joint Committee on Taxation, "Tax Treatment of Structured Settlement Arrangements," JCX-15-99, March 16, 1999, cited above, because the tax benefit that results from a structured settlement is intended to be an incentive for the plaintiff to opt for periodic payments, to provide compensation for the physical injury or physical sickness in addition to the amount received from or paid on behalf of the tortfeasor. This public policy statement makes no exception when the tortfeasor is the United States.

Therefore, the *ultra vires* policy created by the Department of Justice is asserted to be illegal.

The Department of Justice policy of denying an injury victim the right to establish a special needs trust under the provisions of 42 U.S.C. § 1396p(d)(4)(A), if otherwise qualified, for the purpose of qualifying for or maintaining eligibility to receive public assistance benefits from the Social Security Administration as Supplemental Security Income (SSI) or as federally funded Medicaid (or equivalent) through the programs of the individual states, is *ultra vires* and, because it contravenes public policy established by statute, it is asserted by Petitioners to be illegal.

5.

The issues raised here are important from the standpoint of knowing the background and, thus, the motivation of the Torts Branch, particularly Roger D. Einerson, the assistant director, in seeking to impose the unconscionable conditions of settlement on Plaintiffs. The Plaintiffs intend to apply to this court, by separate motion, for the establishment of a qualified settlement fund as a vehicle to receive all settlement proceeds, to be allocated and distributed under the court's continuing jurisdiction. All tax benefits of the Plaintiffs are preserved through the QSF, including a structured settlement, which does not require the involvement or even the cooperation of the Federal Defendant.

WHEREFORE, Petitioners pray for an order proposed as Exhibit "A."

Dated this 24th day of August, 2006 in Pleasanton, California

Respectfully submitted,

/s/

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UTE SISTRUNK,
Plaintiff,

v.

UNITED STATES OF AMERICA, UNITED STATES POSTAL SERVICE & DAVID W. TYLER, DOES 1-20
Defendants
_____/

CONTINENTAL CASUALTY COMPANY
Plaintiff,

v.

UNITED STATES OF AMERICA, UNITED STATES POSTAL SERVICE DAVID W. TYLER, DOES 1-20
_____/

No: C 02-4891 VRW (ARB)
Related to No: C 02-5292 VRW (ARB)

E-filing Case

ORDER IMPOSING RESTRICTION ON STIPULATION FOR COMPROMISED SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

(EXHIBIT "A" TO PETITION)

The Court, having reviewed the Petition of UTE SISTRUNK AND CONTINENTAL CASUALTY COMPANY, jointly, by and through their attorneys ("Petitioners"), seeking the issuance of an order limiting the conditions of settlement that Defendant United

States of America seeks to impose, which Petitioners allege are in violation of public policy and, therefore, are illegal, hereby states, finds, orders, adjudges, and decrees as follows:

1.

Petitioners are Plaintiffs in an action with respect to claims based in tort, under the Federal Tort Claims Settlement Act, arising from alleged negligence that resulted in personal physical injury to Ute Sistrunk, on or about March 28, 2000, filed as a lawsuit in this court, as captioned above (the "underlying lawsuit"). The parties have reached agreement in principal, with respect to the total amount that Defendant will pay in exchange for its release from the tort liability and dismissal of this action, as reflected in the Order of Dismissal of Petitioner's joint claim against the Defendant. However, there are additional terms which Defendant seeks to impose or is expected to impose on the Plaintiffs, which Plaintiffs believe are not in their best interest, and particularly not in the best interest of Ute Sistrunk, the injured person, and which Plaintiffs believe are contrary to public policy and, therefore, illegal. Plaintiffs have sought the court's intervention in the unresolved issues, which are extraneous to extinguishing totally the Defendant's liability in exchange for payment of the agreed settlement sum. Upon execution of a Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677 and payment of the settlement sum to the Sistrunk Segregated Settlement Account, the Defendant would be released from all claims and the causes of action against it dismissed with prejudice.

2.

The court finds and adjudges that certain conditions that the Defendant United States of America, through the United States Department of Justice, seeks to impose on

the settlement terms are overreaching, unjustified, constitute *ultra vires* policy making, and are in violation of public policy, which causes such conditions to be illegal. Further, the court finds and adjudges that the Defendant has not shown cause or justification that the United States of America has an interest in or authority to interfere with the Plaintiffs' right to designate the payee to receive settlement proceeds from this lawsuit or to seek the establishment of a qualified settlement fund to receive the settlement proceeds while preserving the Plaintiffs' ability to receive certain tax and public assistance benefits without the involvement of the U.S. Department of Justice or its agents.

3.

The court finds and adjudges that the right of a plaintiff to receive the tax benefits of a structured settlement is absolute, that this right is established by Congress as public policy as stated in the legislative history of the Internal Revenue Code through the report of the Joint Committee on Taxation, "Tax Treatment of Structured Settlement Arrangements," JCX-15-99, March 16, 1999, which made it clear that what it called a "subsidy" was intended to encourage the use of a structured settlement arrangement in lieu of a lump sum payment to the recipient, to reduce the probability that such individuals need to make future claims on these government programs, and that it is not the purview of any defendant, including the United States of America, to take away that right or use it as negotiation leverage in settling a physical injury claim.

4.

The court finds and adjudges that section 11015(a) of Public Law 107-273, the 21st Century Department of Justice Appropriations Act, and the "Final Rule" promulgated by the U.S. Department of Justice, "Minimum Qualifications for Annuity Brokers in Connection with Structured Settlements Entered into by the United States," does not apply to the selection of an annuity broker by Plaintiffs in this case should they

desire to negotiate periodic payments as a settlement term with a qualified settlement fund established by this court under the provisions of 26 U.S.C. § 468B and 26 C.F.R. § 1.468B-1, which would be assigned to a third-party under the provisions of 26 U.S.C. § 130 and Revenue Procedure 93-34, 1993-2 C.B. 470, inasmuch as such structured settlement would not be entered into by the United States.

5.

The court finds and adjudges that the Department of Justice policy of reducing an offer of a cash settlement to a lesser amount if a plaintiff seeks periodic payments to be excluded from the payee's gross income as arising from a personal physical injury or physical sickness, under the provisions of 26 U.S.C. § 104(a)(2), with the intent that the payee's tax benefits should be offset by the reduced immediate cost to the United States, constitutes *ultra vires* policy making on the part of the Department of Justice, as such policy is not within the purview of the Executive Branch and beyond its scope of authority when it contravenes public policy created by federal statute. The policy created *ultra vires* by the Department of Justice is found to violate public policy, as established by Congress in the Joint Committee on Taxation, "Tax Treatment of Structured Settlement Arrangements," JCX-15-99, March 16, 1999, cited above, because the tax benefit that results from a structured settlement is intended to be an incentive for the plaintiff to opt for periodic payments, to provide compensation for the physical injury or physical sickness in addition to the amount received from or paid on behalf of the tortfeasor. This public policy statement makes no exception when the tortfeasor is the United States. Therefore, the *ultra vires* policy created by the Department of Justice is found to be illegal.

6.

The court finds and adjudges that the Department of Justice policy of denying an injury victim the right to establish a special needs trust under the provisions of 42 U.S.C.

§ 1396p(d)(4)(A), if otherwise qualified, for the purpose of qualifying for or maintaining eligibility to receive public assistance benefits from the Social Security Administration as Supplemental Security Income (SSI) or as federally funded Medicaid (or equivalent) through the programs of the individual states, is *ultra vires* and, because it contravenes public policy established by statute, it is found to be illegal.

7.

The Attorney General of the United States of America has the highest duty to uphold and obey the law, including himself and the Department of Justice that he heads. This court believes the actions of those responsible within the Torts Branch of the Civil Division to be particularly egregious, not only toward these Plaintiffs in the above-captioned action, but in their conduct, in general, as servants of the people.

IT IS HEREBY ORDERED that the terms contained in any Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677:

(a) Shall be payable to and only to the payee to be designated by the Plaintiffs;

(b) Shall require the federal tax identification number of only the payee to be designated by the Plaintiffs, leaving the responsibility of reporting further distribution, as may be required by law, to the payee;

(c) Shall not impose or place any restrictions on or interfere with the Plaintiffs' designation of Payee to receive the settlement proceeds;

(d) Shall not impose or place any restrictions on or interfere with the Payee's ability to use or dispose of the property (the settlement proceeds);

(e) Shall not impose or place any restrictions on or interfere with the Plaintiffs' right to seek the creation of a qualified settlement fund, to be established by a governmental authority under the provisions of 26 U.S.C. § 468B and its corresponding

Treasury Regulations, 26 C.F.R. § 1.468B-1, for the purpose of receiving the settlement proceeds and resolving or satisfying the claims brought in this lawsuit, after Defendant United States of America has been released and dismissed with prejudice in the above-captioned action; nor shall the intent of any Plaintiff to receive the promise of periodic payments from a qualified settlement fund, which would receive settlement proceeds from the above-captioned action, be considered by the United States in considering the size of a settlement offer;

(f) Shall not impose or place any restrictions on or interfere with the Plaintiffs' right to engage the services of an annuity broker to assist in the funding of any periodic payment obligation created by a qualified settlement fund, inasmuch as the periodic payment obligation would be created after the negotiated release and dismissal of the United States of America from the above-captioned action, not involving whatsoever the United States of America in the transaction, including the signing of any annuity application form or qualified assignment form; nor, shall there be any requirement that the annuity broker selected by the Plaintiffs be on the list of annuity brokers established by the U.S. Attorney General; and

(g) Shall not impose or place any restrictions on or interfere with any Plaintiffs' right to establish a special needs trust under the authority of 42 U.S.C. § 1396p(d)(4)(A), using settlement proceeds to fund such entity, nor shall the intent of any Plaintiff to establish a special needs trust and to fund it with settlement proceeds from the above-captioned action be considered by the United States in considering the size of a settlement offer.

IT IS ORDERED, FURTHER, that the Attorney General of the United States, or his designee, direct that all policies found herein to be *ultra vires* or in violation of public policy, or both, be rescinded immediately, that an internal investigation be conducted,

and that those found to be responsible be appropriately disciplined, in accordance with established agency procedure. A report of findings and disciplinary actions taken will be made to this court not later than 90 days after the issuance of this order.

IT IS ORDERED, FURTHER, that the "Final Rule" to promulgate section 11015(a) of Public Law 107-273, as published in the Federal Register, March 6, 2006 (Volume 71, Number 43, pages 11158-11160, item 10), titled "Minimum Qualifications for Annuity Brokers in Connection with Structured Settlements Entered into by the United States," 28 C.F.R. § 50.24, is declared illegal insofar at it violates federal procurement statutes, specifically 41 U.S.C. § 5, and promulgating regulations by circumventing the advertisement and bidding process requirements and using commissions from the illegal annuity procurement to pay the annuity brokers. Section 11015(a) makes no exception to the procurement process for annuity purchases. Annuity brokers engaged by the United States within the provisions of section 11015(a) are declared to be service providers and shall be paid only from appropriated funds as service providers, who may be selected without competitive bidding under exception (4) of 41 U.S.C. § 5, for services either (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis. Annuity brokers selected under the provisions of section 11015(a) may not be paid by placing annuity business with them, which is in circumvention of the procurement laws. The selection and engagement of annuity brokers by plaintiffs is hereby declared to be not within the meaning of section 11015(a), and annuity purchases arranged by these brokers are not subject to procurement laws, as long as the purchase is not made by the United States. A structured settlement purchased by a designated settlement fund or a qualified settlement fund, pursuant to

26 U.S.C. § 468B and 26 C.F.R. § 1.468B, is not considered a purchase made by the United States, notwithstanding that the United States may be a transferor to the designated settlement fund or the qualified settlement fund.

IT IS ORDERED, FURTHER, that, upon execution of a Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677, consistent with the terms of this order, and payment of the settlement sum to the Sistrunk Segregated Settlement Account, the Federal Defendant shall be released by the Plaintiffs from all claims and the causes of action against it dismissed with prejudice.

Dated this _____ day of _____, _____.

_____

United States District Judge