

CAUSE NO. 2019-33415

ABEL AND NANCY VERA, et al.
Plaintiffs,

vs.

**FIGURE FOUR PARTNERS, LTD., PSWA, INC.,
and REBEL CONTRACTORS, INC.**
Defendants.

§ **IN THE DISTRICT COURT OF**
§
§
§ **HARRIS COUNTY, TEXAS**
§
§
§
§ **234th JUDICIAL DISTRICT**

**PLAINTIFFS' MOTION TO APPROVE THE ESTABLISHMENT OF THE ELM
GROVE SETTLEMENT FUND AND MOTION TO APPOINT MASTER-IN-
CHANCERY/SPECIAL MASTER**

TO THE HONORABLE COURT:

Plaintiffs ("Plaintiffs") hereby move this Court for an Order (i) approving the establishment of the Elm Grove Settlement Fund (the "Fund") created through the trust agreement (the "Trust Agreement") attached hereto as Exhibit "A," and retaining continuing jurisdiction and supervision over the Fund. In support of this Motion, Plaintiffs respectfully state as follows:

1. Plaintiffs are individual claimants represented by The Webster Law Firm and Spurlock & Associates, P.C. (collectively, "Plaintiffs' Counsel") who are seeking damages on account of certain acts and events in litigation pending against Defendants, Perry Homes LLC, Figure Four Partners, Ltd., PWSA, Inc., LJA Engineering, Inc., Rebel Contractors, Inc., Double Oak Construction, Inc., Texasite, LLC, and Concourse Development, LLC (hereinafter "Defendants") and Plaintiffs' Counsel".
2. Defendants are alleged to be liable for Plaintiffs' injuries relating from flooding events on May 7, 2019 and/or September 19, 2019.
3. Defendants deny any and all liability to the Plaintiffs. In an effort to resolve these outstanding disputes, Plaintiffs' Counsel and Defendants have entered into a confidential

settlement to resolve all claims, asserted or unasserted, arising out of the May 7, 2019 and/or September 19, 2019 flooding events. These claims are subject to a Confidential Master Settlement Agreement (“MSA”).

4. Approval of the establishment of the Fund will benefit the current settling Plaintiffs and Defendants by assuring finality to the litigation upon fulfillment of the conditions of the MSA. Defendants have informed counsel for the Plaintiffs that Defendants will not oppose this Motion to approve the establishment of the Fund.

5. The allocation of the aggregate settlement amount among Plaintiffs, which is the responsibility of a neutral third-party Master-in-Chancery (“Special Master”) appointed by this Court, and to any entities asserting a claim for subrogation or reimbursement, has yet to occur. Pursuant to Tex. R. Civ. P. 171, the Parties hereby move this Court to appoint Daniel D. Horowitz, III as the Master-in-Chancery. It is in the best interest of all parties for the Court to approve the establishment of the Fund as a vehicle to hold the funds to be used to resolve or satisfy these claims upon the allocation of the settlement funds. The establishment of the Fund as a “Qualified Settlement Fund” (“QSF”) under the Code and Regulations, subject to the Court’s continuing jurisdiction, is vital to the satisfaction of these objectives of the Parties’ settlement. Section 1.468B-1(c)(1) of the Regulations expressly requires that a QSF be “established pursuant to an order of, or is approved by, the United States, any state (including the District of Columbia) territory, possession, or political subdivision thereof, or any agency or instrumentality (including a court of law) and is subject to the continuing jurisdiction of that governmental authority.”

6. In accordance with the MSA, Defendants will pay the settlement consideration to the Fund. That payment, and the earnings thereon, will be held by the Fund until disbursed in accordance with the terms of the MSA for payments to Plaintiffs or their designees, to attorneys for fees and costs, to lien holders, to governmental entities or private companies having an interest in the settlement proceeds, and to federal and state taxing authorities for tax liabilities of

the fund. The settlement consideration, and the earnings thereon, shall remain subject to the jurisdiction of the Court until termination of the Fund.

7. Plaintiffs' Counsel hereby request that the Court approve the appointment of Spirit of Texas Bank as the custodian of the Fund (the "Custodian") and approve the appointment of ARCHER Systems, LLC, 1775 St. James Place, Suite 200, Houston, TX 77056, as the administrator of the Fund within the meaning of section 1.468B-2(k)(3) of the Regulations ("Administrator"), to administer the Fund.

8. Until such time that Plaintiffs are entitled to settlement monies under the MSA, no settlement monies shall be set apart for any Plaintiff, or otherwise made available so that he or she may draw upon or otherwise control said settlement monies.

9. The settlement monies shall be the sole property of the Fund. No portion of such monies shall be made available to Plaintiffs except as specifically set forth in the MSA. Until such time as monies are distributed, Plaintiffs shall not possess any rights to demand or receive any portion of the monies or the escrowed monies or to mortgage, pledge, or encumber the same in any manner.

10. No distributions shall be made from the Fund without joint written direction of all Plaintiffs' Counsel and all Defendants and in accordance with the MSA and with the applicable Treasury regulations.

11. The Plaintiffs request that no bond be required, provided that all monies received by the Fund, which includes all principal and interest earned thereon, be deposited in an account or accounts held in custody by the Custodian, a financial institution doing business in Texas, for the benefit of and titled in the legal name of the Fund. The monies so deposited shall be invested by the Custodian, at the direction of the Administrator, in any or all of the following: (a) debt securities or obligations issued by the United States Treasury, Agencies of the United States, or United States Government Sponsored Enterprises (maturities not to exceed two (2) years at time of purchase), or mutual funds invested solely in such instruments (weighted average life not to exceed two (2) years); (b) certificates of deposit that are fully insured by the Federal Deposit

Insurance Corporation (“FDIC”) through use of the Certificate of Deposit Account Registry Service (“CDAR”), pursuant to a CDARS Deposit Placement Agreement with the Custodian (provided, however, that such Agreement shall be entered only with the consent of Defendants, after Defendants have been given the opportunity to review the Agreement); and (c) in an interest bearing account at the Custodian subject to FDIC insurance, provided that the balance in such account shall at no time exceed the \$250,000 limit of FDIC insurance covering the account, and which shall be a zero balance account used solely for the purpose of making distributions from the Fund. Such funds should be invested so that the following investment policy is implemented as appropriate: (1) safety of principal, (2) zero bank balance sheet exposure, through use of custodial/trust accounts and accounts fully insured by FDIC, and zero sweep disbursement accounts (to avoid the risk of bank deposit forfeiture). In no instance will securities held pursuant to this agreement be lent or hypothecated. The Custodian shall be responsible for following the investment requirements of this paragraph, pursuant to the instructions of the Administrator. Upon receipt of directions to distribute funds, the Administrator may direct the Custodian to liquidate appropriate Fund investments and place the funds in an FDIC-insured demand deposit account established with the Custodian consistent with subparagraphs 10(c) above, which shall be a zero-balance account used solely for the purpose of making distributions from the Fund.

12. The Custodian shall cause to be prepared and delivered Fund Statements (“Statements”) on a monthly and annual basis to interested parties, including counsel for the Plaintiffs, Defendants, and the Administrator. The Statements shall include, without limitation, a statement of receipts, investment earnings, and disbursements. The Custodian shall provide the monthly Statements as soon as available, but in no event later than 10 business days following the end of the month to which those statements relate. The Custodian shall provide the annual Statements as soon as available, but in no event later than 45 days following the end of each calendar year.

I. The Motion filed with this Court complies with Federal law permitting the creation of Qualified Settlement Funds.

13. Qualified Settlement Funds (“QSFs”) were created by Congress to enable Plaintiffs and Defendants to determine how and when settlement funds are deducted, as well as to introduce a valuable settlement tool whereby Plaintiffs can address critical settlement-related issues without slowing down the settlement process, and while releasing Defendants from alleged tort (or other) liability. QSFs are, therefore, both useful settlement tools and provide unique tax benefits to Plaintiffs and Defendants, alike.

14. The Federal tax rules concerning QSFs are to be found in the Treasury Regulations accompanying Internal Revenue Code § 468B (Treasury Regulations § 1.468B-1 *et seq.*, which became effective on January 1, 1993). Those Regulations set forth three requirements to constitute a QSF (court approval, the proper type of claim, and segregation of the settlement amount from the other assets of the Defendant), as follows:

“A fund, account, or trust satisfies the requirements of this paragraph (c) if – (1) It is established pursuant to an order of, or be approved by, the United States, any state (including the District of Columbia), territory, possession, or political subdivision thereof, or any agency or instrumentality (including a court of law) of any of the foregoing and is subject to the continuing jurisdiction of that governmental authority; (2) It is established to resolve or satisfy one or more contested or uncontested claims that have resulted or may result from an event (or related series of events) that has occurred and that has given rise to at least one claim asserting liability – (I) Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (hereinafter referred to as CERCLA), as amended, 42 U.S.C. 9601 *et seq.*; or (II) Arising out of a tort, breach of contract, or violation of law, or (III) Designated by the Commissioner in a revenue ruling or revenue procedure; and (3) The fund, account, or trust is a trust under applicable state law, or its assets are otherwise segregated from other assets of the transferor (and related parties).” Treas. Reg. § 1.468B-1(c).

15. The Fund, if approved by this Court, will satisfy all three elements of that definition. It would be established under this Court’s order, to resolve one or more claims arising in tort, and the settlement assets would be held by the QSF Administrator, rather than by Defendants.

II. A QSF provides the necessary breathing space to resolve all liens for injury-related payments made by both the private companies and governmental agencies.

16. QSFs are useful tools to ensure proper client counseling can occur before, during and even *after* settlement. QSFs uniquely introduce a degree of breathing space **after** settlement that is valuable by: (1) allocating the settlement proceeds among the claimants; (2) verifying and negotiating liens and/or subrogation claims; (3) determining the appropriate role and underwriting of a structured settlement annuity;¹ (4) evaluating the need to preserve governmental entitlement benefits (e.g. the need for the establishment of a special needs trust); and (5) enabling a host of other decisions to be made without the pressure associated with the litigation itself. This breathing space is made available because, while temporarily held by the QSF, the assets are not received for federal income tax purposes by the claimants.

17. Utilizing a QSF in this case would facilitate the resolution of Plaintiffs' outstanding FEMA liens. For instance, upon verifying and resolving FEMA's interests, or any other applicable private liens, if any, in each of the Plaintiffs' claims, the Administrator may distribute the net recovery to each Plaintiff for his or her respective claims. Until such time that these conditions and other settlement conditions are met, no settlement proceeds will be set apart for any individual Plaintiff, or otherwise made available so that he or she may draw upon or otherwise control said settlement proceeds.

WHEREFORE, Plaintiffs respectfully request that the Court make an Order approving the establishment of the Fund as a Qualified Settlement Fund within the meaning of Treas. Reg. Section 1.468B-1 and retaining jurisdiction thereof.

¹ The Internal Revenue Service has ruled that qualified settlement funds may enter into structured settlements, thereby assuring the exclusion from gross income for periodic payments. Rev. Proc. 93-34, 1993-2 C.B. 470.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that on July 19, 2021, I sent a copy of Plaintiffs' Motion to Approve the Establishment of the Elm Grove Settlement Fund and Motion to Appoint Master-in-Chancery/Special Master to all counsel and sent a revised version to all counsel on July 20, 2021. On July 28, 2021, I followed up, via email, to all counsel regarding their positions on said Motions. To date, I have not heard back from any counsel, verbally or in writing, regarding their positions on Plaintiffs' Motions.

/s/ Omar R. Chawdhary

Omar R. Chawdhary

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on the 2nd day of August, 2021 in accordance with the Texas Rules of Civil Procedure.

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