

Royal F. Oakes (080480),
roakes@mail.hinshawlaw.com
Michael A. S. Newman (205299),
mnewman@mail.hinshawlaw.com
HINSHAW & CULBERTSON LLP
633 West Fifth Street, 47th Floor
Los Angeles, California 90071
Telephone: (213) 680-2800
Facsimile: (213) 614-7399

Attorneys for Defendants
Metropolitan Life Insurance Company and
New York Life Insurance Company

[Additional counsel listed on signature block]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DWIGHT J. FREENEY,
an individual;

Plaintiff,

v.

EVA D. WEINBERG aka Eva Bock,
an individual;
RICHARD WEINBERG,
an individual;
METROPOLITAN LIFE
INSURANCE COMPANY
a New York Corporation;
MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY dba
MassMutual,
a Massachusetts mutual life
insurance company;
NEW YORK LIFE INSURANCE
COMPANY, dba
a New York mutual life insurance
company;

Defendants.

Case No. 2:14-cv-05245-MMZ-RZ

**SETTLING DEFENDANTS' NOTICE
OF MOTION AND MOTION FOR
DETERMINATION OF GOOD
FAITH SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES.**

Date: May 11, 2015

Time: 10:00 a.m.

Place: Courtroom 780
255 East Temple Street
Los Angeles, CA 90012

Judge: Hon. Margaret M. Morrow

Complaint Filed: July 7, 2014

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2
3 PLEASE TAKE NOTICE that on May 11, 2015 at 10:00 a.m., or as
4 soon thereafter as the matter may be heard in Courtroom 780 at 255 East Temple
5 Street, Los Angeles, CA 90012, defendants Richard Weinberg, Metropolitan Life
6 Insurance Co., Massachusetts Mutual Life Insurance Co. and New York Life
7 Insurance Co. ("Settling Defendants") will, and hereby do, move for an order for
8 determination of good faith settlement under California Code of Civil Procedure
9 Sections 877 and 877.6 (the "Motion").

10 Plaintiff Dwight J. Freeney and Settling Defendants recently reached a
11 settlement. This Motion is made in accordance with Local Rule 7-3 in that the
12 settlement is conditioned upon a good faith settlement determination from this Court
13 pursuant to Sections 877 and 877.6, so that any contribution or indemnity claims
14 against Settling Defendants will legally be barred. Settling Defendants are each
15 paying an amount that is appropriate, given the possibility that each would have
16 been found liable to Plaintiff, and there was no collusion, fraud, or other tortious
17 conduct aimed to injure Eva D. Weinberg, the incarcerated defendant who has not
18 settled with Plaintiff. This motion is made following the conference of counsel
19 pursuant to L.R. 7-3 which took place via letter on March 5, 2015 and via telephone
20 on March 6, 2015.

21 This Motion is based on this Notice of Motion and Motion, the
22 accompanying Memorandum of Points and Authorities, the Declaration of
23 Michael A.S. Newman and all documents attached thereto, including the Settlement
24 Agreement and Release on which this Motion is based, the pleadings and materials
25 on file in this matter, all matters on which the Court may take judicial notice, and
26 such further argument and evidence as may be presented at or before the hearing.
27
28

1 Dated: March 10, 2015

2 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

3
4 By /s/Andre J. Cronthall

5 ANDRE J. CRONTHALL
6 MOE KESHAVARZI
7 Attorneys for Defendant
8 MASSACHUSETTS MUTUAL LIFE
9 INSURANCE COMPANY

10 Dated: March 10, 2015

11 HINSHAW & CULBERTSON LLP

12
13 By /s/Royal F. Oakes

14 ROYAL F. OAKES
15 MICHAEL S. NEWMAN
16 Attorneys for Defendants
17 METROPOLITAN LIFE INSURANCE
18 COMPANY and NEW YORK LIFE
19 INSURANCE COMPANY
20 633 West Fifth Street, 47th Floor
21 Los Angeles, California 90071
22 Telephone: (213) 680-2800
23 Facsimile (213) 614-7399
24 Email: roakes@mail.hinshawlaw.com
25 mnewman@mail.hinshawlaw.com
26
27
28

1 Dated: March 10, 2015

2 WINGET SPADAFORA & SCHWARTZBERG LLP

3
4 By /s/Jibraun B. Riaz

5 JIBRAUN B. RIAZ

6 TIMOTHY W. FREDRICKS

7 Attorneys for Defendant

8 RICHARD A. WEINBERG

9 1900 Avenue of the Stars, Suite 450

10 Los Angeles, California 90067

11 Telephone: (310) 836-4800

12 Facsimile: (310) 836-4801

13 Email: riaz.j@wssllp.com

14 fredricks.t@wssllp.com

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Richard Weinberg (“Richard”), and defendants Metropolitan Life Insurance Co., Massachusetts Mutual Life Insurance Co. and New York Life Insurance Co. (collectively, “Insurer Defendants”) jointly bring this Motion for determination of good faith settlement pursuant to California Code of Civil Procedure Sections 877 and 877.6. Richard and Insurer Defendants (collectively, “Settling Defendants”) and Plaintiff Dwight J. Freney (“Plaintiff” or “Mr. Freney”) have entered into the Settlement Agreement and Release attached to the Declaration of Michael A.S. Newman (“Newman Declaration”) as Exhibit A.

This settlement is expressly conditioned upon a good faith settlement determination by this Court because one defendant, Eva D. Weinberg, is incarcerated in Connecticut and has not settled with Plaintiff. Settling Defendants bring this Motion for the express purpose of barring any later claims against Settling Defendants. For the reasons set forth below, Settling Defendants respectfully submit that they are entitled to a good faith settlement determination from this Court.

II. TERMS OF THE SETTLEMENT

Plaintiff and Settling Defendants have reached a settlement of all claims asserted by Plaintiff against Settling Defendants. (Newman Decl. ¶ 2) Richard has agreed to pay Plaintiff \$350,000 and Insurer Defendants have each agreed to pay Plaintiff \$45,000 as consideration for Plaintiff entering into a written settlement agreement. Among other things, the settlement agreement provides for a full and complete release of Settling Defendants from all of Plaintiff’s claims related to the allegations in the lawsuit, and for a dismissal of Plaintiff’s lawsuit with

1 prejudice. However, the agreement is conditioned on a determination by this Court
2 that the settlement was made in good faith. (Newman Decl. ¶ 2, Exh. A).

3 4 **III. LEGAL STANDARD**

5 Settling defendants may seek a good faith determination of their
6 settlement. California Code of Civil Procedure Section 877 provides that where a
7 release with prejudice “is given in good faith before verdict or judgment to one or
8 more of a number of tortfeasors claimed to be liable for the same tort . . . , [i]t shall
9 discharge the party to whom it is given from all liability for any contribution to any
10 other parties.” Cal. Code Civ. Proc. § 877. “Any party to an action in which it is
11 alleged that two or more parties are joint tortfeasors . . . shall be entitled to a hearing
12 on the issue of the good faith of a settlement entered into by the plaintiff or other
13 claimant and one or more alleged tortfeasors” *Id.* at § 877.6(a)(1). A
14 determination that the settlement is in good faith bars any other joint tortfeasor from
15 asserting claims “for equitable comparative contribution, or partial or comparative
16 indemnity, based on comparative negligence or comparative fault.” *Id.* at
17 § 877.6(c). Taken together, Sections 877 and 877.6 provide a “*defensive* procedure
18 by which a joint tortfeasor may extricate itself from a lawsuit and bar actions for
19 equitable indemnity by the remaining joint tortfeasors.” *Heppler v. J.M. Peters Co.*,
20 73 Cal.App.4th 1265, 1284 (1999) (citation omitted).¹ Section 877 reflects a strong
21 public policy in favor of settlement. *Commercial Union Ins. Co.*, 640 F.2d at 212.

22
23
24
25 ¹These California statutes apply to cases settled in federal court in which the
26 substantive law of California applies, and they permit settling defendants to obtain a
27 judicial determination of good faith in federal court. *See generally Federal Sav. &*
28 *Loan Ins. Corp. v. Butler*, 904 F.2d 505 (9th Cir. 1990); *Commercial Union Ins. Co.*
v. Ford Motor Co., 640 F.2d 210 (9th Cir. 1981).

1 Generally, to be in good faith, the settlement “must not be grossly
2 disproportionate to what a reasonable person, at the time of the settlement, would
3 estimate the settling defendant’s liability to be.” Tech-Bilt, Inc. v. Woodward-
4 Clyde & Assoc., 38 Cal. 3d 488, 499 (1985) (citation and internal quotation marks
5 omitted). Bad faith is not established simply by “showing that a settling defendant
6 paid less than his theoretical proportionate or fair share.” Id. (citation omitted).
7 Rather, any party objecting to the settlement must demonstrate that “the settlement
8 is so far ‘out of the ballpark’ . . . as to be inconsistent with the equitable objectives
9 of the statute.” Id. at 499-500. This evaluation must be made in light of the
10 information available at the time of the settlement. Id. at 499.

11
12 In Tech-Bilt, the California Supreme Court enumerated several factors
13 in evaluating good faith within the meaning of Section 877.6: (1) a rough
14 approximation of plaintiff’s total recovery and the settlor’s proportionate liability;
15 (2) the amount paid in settlement; (3) the allocation of settlement proceeds among
16 the various plaintiffs; (4) a recognition that a settlor should pay less in settlement
17 than he would if he were found liable at trial; (5) the financial conditions and
18 insurance policy limits of the settling defendants; and (6) the existence of collusion,
19 fraud, or other tortious conduct aimed to injure the interests of the non-settling
20 defendants. Id. at 499.

IV. SETTLING DEFENDANTS' MOTION SHOULD BE GRANTED

The Settlement Agreement and Release between Plaintiff and Settling Defendants was made in good-faith, is fair and reasonable, and satisfies the relevant Tech-Bilt factors.²

A. The Amounts Being Paid by Settling Defendants are Proper.

Insurer Defendants will each pay \$45,000, which is an appropriate amount considering the low likelihood that each would have been found liable, while defendant Richard will pay \$350,000, an amount which signifies the higher likelihood that he would have been found liable. These amounts are proper.

1. The Amount Being Paid By Insurer Defendants Is Appropriate Given the Low Likelihood That They Would Have Been Found Liable to Plaintiff.

As to the first, second and fourth Tech-Bilt factors, the amount the Insurer Defendants have agreed to pay is sufficient, especially when compared to the low likelihood that Insurer Defendants would have been found liable to Plaintiff. In fact, Insurer Defendants not only had a very high likelihood of prevailing on the merits of Plaintiff's lawsuit, they had a good chance of prevailing at the pleading stage. In light of Insurer Defendants' strong defenses, the settlement amounts paid by Insurer Defendants are not "grossly disproportionate" or "out of the ballpark" with respect to their potential, limited exposure. As discussed in Insurer Defendants' various Motions to Dismiss, Insurer Defendants' had limited exposure in this litigation, and would most likely have prevailed based on the following facts and for the following reasons:

² Tech-Bilt factor three is irrelevant because there is only one plaintiff. Factor five is also irrelevant, as the financial condition and insurance policy limits of Settling Defendants did not reduce the amount they each agreed to pay.

1 Plaintiff purchased three life insurance policies in 2010. (Complaint ¶¶
2 49, 54). He claims that he was deceived into buying the policies by his “financial
3 manager and investment advisor” Eva Weinberg (“Eva”) and her brother Richard,
4 who was acting as Mr. Freeney’s “insurance advisor.” (Complaint ¶¶ 30, 32, 33, 35,
5 49, 54). According to the Complaint, Eva and Richard selected the policies and
6 recommended that Mr. Freeney purchase them not because doing so was in Mr.
7 Freeney’s best interests, but in order to receive commissions from the sale of the
8 policies which they split between themselves. (Complaint ¶¶ 50-51). He claims that
9 after one year Richard and Eva allowed the policies to lapse, rendering them
10 worthless. (Complaint ¶¶ 33, 62). Mr. Freeney sued Eva and Richard, alleging
11 several claims all arising out of this fraudulent scheme.

12
13 The Complaint does *not* allege any wrongdoing by Insurer Defendants
14 who issued the policies. Mr. Freeney does *not* allege that Insurer Defendants knew
15 about the alleged scheme to defraud him or even suspected it. He does *not* allege
16 that they helped orchestrate the scheme or that they in any way aided Richard and
17 Eva in executing their plan. Mr. Freeney also does *not* allege that Insurer
18 Defendants provided him with insurance or investment advice, that they selected or
19 recommended the policies, that the premiums charged were somehow egregious or
20 too high in relation to the coverage provided or that Insurer Defendants knew that
21 Richard and Eva intended to allow the policies to lapse after one year. In fact, Mr.
22 Freeney does *not* allege a single misrepresentation – or a representation or omission
23 of any kind for that matter – by Insurer Defendants.

24
25 Nonetheless Mr. Freeney named Insurer Defendants as parties. Mr.
26 Freeney’s *sole* purported basis for doing so is the allegation “on information and
27 belief” that sometime after June 9, 2010 – *after* Richard and Eva had already
28 hatched their fraudulent scheme, *after* they had selected and recommended the

1 policies, *after* Mr. Freeney had accepted their recommendation and *after* he had
2 signed and submitted the insurance applications – Insurer Defendants appointed
3 Richard to be their agent. These agency allegations are Mr. Freeney's *only* basis for
4 adding Insurer Defendants to this suit. These conclusory agency allegations are
5 insufficient to establish vicarious liability.

6
7 To establish agency Plaintiff must allege, among other things, that
8 Richard held the power to alter legal relations between Insurer Defendants and Mr.
9 Freeney, and that Insurer Defendants had the right to, and controlled Richard's
10 conduct. The Complaint does not even come close to alleging this. In fact, read as
11 a whole, the Complaint more plausibly suggests that Richard was Mr. Freeney's
12 agent, not Insurer Defendants' agent.

13
14 The Complaint also fails to state a claim because Plaintiff has not
15 alleged facts sufficient to hold Insurer Defendants vicariously liable for Richard's
16 conduct. To hold a principal liable for the torts of its agent, a plaintiff must allege
17 that the principal directed or authorized the agent to perform the tortious acts, or
18 later learned and ratified such conduct. The Complaint contains no such
19 allegations.

20
21 Plaintiff has also failed to allege fraud with particularity. He does not
22 allege the who, where, what and how of the fraud. He refers to alleged
23 misstatements having been made by Eva and/or Richard during the span of several
24 months both before and after the critical June 9, 2010, date. But he does not identify
25 who made the statements (the alleged agent or his sister), when they were made or
26 what was said.

1 Taken together, these are strong arguments that would have likely
2 enabled Insurer Defendants to prevail, and potentially prevail as early as the
3 pleading stage. Therefore, Insurer Defendants' settlement amounts were not
4 "grossly disproportionate" or "out of the ballpark" with respect to their limited
5 potential exposure.

6
7 2. Richard's Settlement Amount is Appropriate Because There Was a
8 Higher Chance That He Would Have Been Found Liable Compared
9 With Insurer Defendants, and Eva Weinberg is Still a Defendant In this
10 Case.

11 Richard agreed to pay \$350,000 to Plaintiff, which reflects the higher
12 likelihood that Richard would have been found liable, as compared with Insurer
13 Defendants' small chance of being found liable. Plaintiff alleges that Richard was
14 his insurance advisor and engaged in a scheme with Eva Weinberg to defraud
15 Plaintiff. (Complaint ¶¶ 30, 32, 35). According to the Complaint, Richard played a
16 central role in the fraud, including helping to select the insurance policies,
17 recommending that Plaintiff purchase the policies, and allowing the policies to
18 lapse. Richard's potential liability was therefore far higher than Insurer Defendants,
19 which is reflected in the far higher amount Richard is paying to settle this case.
20 Richard's \$350,000 settlement is not "grossly disproportionate" or "out of the
21 ballpark" with respect to his exposure. In addition, Eva Weinberg, Plaintiff's
22 financial manager and investment advisor, is still a defendant in this case, and is
23 someone Plaintiff may seek to recover additional money from in the future.

24
25 **B. This Settlement Is Not the Product of Collusive Behavior or Fraud**
26 **Between Plaintiff and Settling Defendants.**

27 There was no collusive, fraudulent, or other tortious conduct by
28 Plaintiff and Settling Defendants in connection with the negotiation and construction

1 of the settlement agreement. Tech-Bilt, 38 Cal.3d at 499. This settlement was not
2 designed or intended to injure or prejudice the only non-settling party, Eva D.
3 Weinberg. (Newman Decl. ¶ 4). Eva D. Weinberg is not part of this settlement
4 because she is currently incarcerated in Connecticut. The record in this case reveals
5 that there was no collusion or fraud between the parties in this litigation.

6
7 **V. CONCLUSION**

8 For all of the foregoing reasons, Settling Defendants respectfully
9 request that this Court grant this Motion and issue an order finding that the
10 settlement between Plaintiff and Settling Defendants is a good faith settlement under
11 California Code of Civil Procedure Sections 877 and 877.6.

12
13 Dated: March 10, 2015

14 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

15
16 By

/s/Andre J. Cronthall

17 ANDRE J. CRONTHALL

• MOE KESHAVARZI

Attorneys for Defendant

18 MASSACHUSETTS MUTUAL LIFE
19 INSURANCE COMPANY
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10 METROPOLITAN LIFE INSURANCE

11 COMPANY and NEW YORK LIFE

12 INSURANCE COMPANY

13 633 West Fifth Street, 47th Floor

14 Los Angeles, California 90071

15 Telephone: (213) 680-2800

16 Facsimile (213) 614-7399

17 Email: roakes@mail.hinshawlaw.com

18 mnewman@mail.hinshawlaw.com

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20 WINGET SPADAFORA & SCHWARTZBERG LLP

21 By /s/Jibraun B. Riaz

22 JIBRAUN B. RIAZ

23 TIMOTHY W. FREDRICKS

24 Attorneys for Defendant

25 RICHARD A. WEINBERG

26 1900 Avenue of the Stars, Suite 450

27 Los Angeles, California 90067

28 Telephone: (310) 836-4800

Facsimile: (310) 836-4801

Email: riaz.j@wssllp.com

fredricks.t@wssllp.com