October 12, 2012

Ingersoll Rand

Benefits Administration Committee

Attention: Jen Torres

800 – E Beaty Street

Davidson, N.C. 28036

 IN **RE: INGERSOLL RAND/THERMO KING PENSION PLAN**

**DORIS KROGH (SSN#470-46-2118) - Claim for Waiver of Pension Overpayment**

To the Honorable Members of the Ingersoll Rand Benefits Administration Committee:

Doris Krogh, by and through her attorney David A. Bonello and the Upper Midwest Pension Rights Project, and pursuant to Section 503 of the *Employee Retirement Income Security Act* (“ERISA”) and applicable Department of Labor Regulations, does hereby submit this Claim for waiver of overpayments allegedly made to Ms. Krogh by the *Ingersoll Rand/Thermo King Pension Plan*. For the reasons set forth below, Doris Krogh hereby requests that the *Ingersoll Rand/Thermo King Pension Plan* waive and abandon its demand that Krogh repay certain benefits previously paid.

Procedural History and Factual Background

Doris Krogh has been a participant in the *Ingersoll Rand/Thermo King Pension Plan* (hereinafter “the Plan”)for approximately 22 years. She worked for Thermo King from February 13, 1978 to June 30, 2001. Ms. Krogh was forced to resign her position in June 2001 at age 60 due to the stress and strain on her body that occurred as a result of repeated heavy lifting and other strenuous activities that she routinely experienced on the job.

On July 1, 2001, she began to receive a pension benefit from the Plan. Ms. Krogh received $830.86 per month in benefits from the Plan. Eleven (11) years later, Doris Krogh received a letter from the Plan (dated August 23, 2012) which informed her that the Plan had over-paid her monthly benefits. As a result, her pension was going to be reduced by $216.56 per month. In addition, as a result of the Plan’s calculation error, Ms. Krogh would also be required to re-pay to the Plan the excess money the Plan alleges she received.

The August 23, 2012 letter states (in pertinent part):

 “An audit of the Ingersoll Rand/Thermo King Pension Plan indicates that the Plan has

overpaid the amount of your pension benefit. Our records indicate that when you

commenced your benefits July 1, 2001, you elected the Single Life Annuity form of

payment. This payment included a supplement of $216.56 payable to you up to age 62, which would reduce your benefit to $612.30. Your benefit was not reduced to this amount in May 2003, and has resulted in an overpayment to you. You have been overpaid $213.56 for 113 months. The total amount overpaid to you is $24,697.28. The Benefits Administration Committee has agreed to reduce the amount of your overpayment by 25% to account for the income taxes (federal and state) that you may have paid on the over-paid amount throughout the years, adjusting the amount overpaid to $18,522.56.

Effective October 1, 2012 your ongoing pension benefit will be reduced to $612.30 (the correct amount that you are entitled to receive under the terms of the Plan and your retirement elections). In addition, with respect to the past monthly pension payments that you were overpaid, we will reduce your benefit by $308.71 to $309.59 beginning November 1, 2012 for 60 months.” (Letter attached as Exhibit “A”)

Doris Krogh was shocked when she received this letter. Ms. Krogh’s husband is a disabled retiree suffering from a variety of debilitating aliments – including congestive heart failure, kidney failure, diabetes, and dementia. As such, she and her husband have been budgeting their income and expenses for the past eleven (11) years in anticipation of receiving the $830.86 per month in pension benefits from the *Ingersoll Rand/Thermo King Pension Plan*. The reduction in Doris’ pension benefits will adversely affect their retirement. [See *Declaration of Doris* Krogh – attached as Exhibit “2”; and *Declaration of John* Krogh – attached as Exhibit “3”] It is not equitable for Doris and her husband to shoulder the entire burden of an overpayment that was caused entirely by Plan error – *not* because of any action or inaction on the part of Doris Krogh.

Argument

The *Ingersoll Rand/Thermo King Pension Plan* is *not* legally required to recoup the overpayment. In fact, Courts presented with this issue have waived recoupment when the overpayment was due to plan error and when recoupment would visit a hardship upon the innocent participant. These elements are both present in this case.

1. The Restitution Sought by the Plan is Inappropriate Because Equitable Considerations Weigh Heavily in Favor of Doris Krogh

The *Employee Retirement Income Security Act* (“ERISA”) does not support the Plan’s right to recoupment of the overpayments it made to Doris Krogh. In fact, ERISA provides no statutory right of recoupment. *Pilot Life Insurance Company v. Dedeaux,* 481 U.S. 41, 56 (1987)*.* Recoupment is an equitable remedy more appropriately called restitution.

The August 23, 2012 letter sent to Doris advising her of the pension overpayment and the Plan’s decision to recoup the overpayment by further reducing her pension benefit did not list any Plan provisions or rules authorizing this action. Furthermore, a review of the Plan Document does not indicate that the Plan provides specifically for the right to recoup overpayments made to a participant that are entirely the result of Plan error. Therefore, if the Plan reduces Krogh’s pension benefit in order to recoup the overpayment, it will be availing itself of the common law remedy of restitution. *Phillips v. Maritime Ass’n-ILA Local Pension Fund,* 194 F. Supp. 2d 549, 555 (E.D. Tex. 2001). However, pension plans do not have unrestrained discretion to avail themselves of the equitable remedy of restitution by reducing pension payments to participants. *Bobo v. 1950 Pension Plan,* 548 F. Supp. 623 (W.D.N.Y. 1982); *Phillips*, 194 F. Supp. 2dat 549. Therefore, the issue here is whether the *Ingersoll Rand/Thermo King Pension Plan* is entitled to the equitable remedy of restitution in this instance.

Federal Courts evaluate equitable restitution claims according to traditional equitable considerations. *Phillips*, 194 F. Supp. 2dat 555. The court in *Dandurand v. Unum Life Insurance Company,* 150 F. Supp. 2d 178 (D. Me. 2001) developed a test to determine and evaluate whether restitution was appropriate. In *Dandurand*, the plan overpaid the plaintiff participant for four (4) years before it noticed its miscalculation and resulting overpayments to the participant. Upon becoming aware of the problem, the plan sought recoupment of the overpayments from the participant. The court held that recoupment was not appropriate after weighing such factors as (A) the relative culpability of the parties, and (B) whether the overpaid party had notice of the overpayment. *Id.* at 186-87.

1. Culpability of the Parties

The first factor – and most important one – courts consider in equitable restitution cases is the relative fault of the parties. Included in this consideration is the length of time it took for the pension plan to discover the erroneous pension miscalculation. *Dandurand*, 150 F. Supp. 2dat 186. In *Dandurand*, the Court considered whether the beneficiary (Dandurand) was at fault, and found there was no fault on his part. *Id.* at 186*.* In refusing to allow the plan to recoup overpayments made to participant Dandurand, the Court stated that it “does not believe that it would be equitable to make Dandurand bear the weight of an error that (the Plan) could have prevented by closer supervision, better training, or a consistent interpretation of policy.” *Id.*

When applying an equitable doctrine for purposes of recoupment, it is critical to consider the circumstances surrounding the overpayments. *Phillips* at 555*.* Courts have held that culpability of a party for the resulting overpayments is indeed an appropriate and essential equitable consideration. *Id.*

Courts are reluctant to impose the extreme remedy of recoupment upon a plan participant when an overpayment has occurred, absent some showing that the participant herself engaged in conduct that precipitated the overpayment. *See* *id.* at 555*.*  Based on the facts and circumstances of this case, the first factor weighs heavily in favor of the participant, Doris Krogh.

Similar to the participant in *Dandurand*, Ms. Krogh was not at fault for the overpayment. She fulfilled her obligations to the Plan by providing complete, accurate, and truthful information to the Plan so that the Plan could correctly calculate her benefit. According to the August 23, 2012 letter sent to Krogh by the Plan, the overpayment was the result of the Plan’s failure to stop paying a supplement. Ms. Krogh had no involvement in calculating this supplement, and is not intricately familiar with the operation of the Plan and the application of this supplement. These are facts which are known only to those that administer the Plan.

Additionally, and as more fully set forth below,the failure of the Plan to discover this overpayment for eleven (11) years constitutes a breach of its fiduciary duty to exercise the appropriate care, skill, prudence, and diligence in administering the Pension Plan. 29 U.S.C. §1104(a)(1)(B). Ms. Krogh reasonably relied on the Plan Administrators to distribute the Plan’s pension benefits accurately. Their failure to discover a mistaken calculation for eleven (11) years is a breach of their fiduciary duty owed to Ms. Krogh.

1. Notice of Overpayment

The second factor to be considered in equitable restitution cases is whether the overpaid party had notice that an overpayment was occurring. *Dandurand*, 150 F. Supp. 2dat 187*.* As set forth above, Ms. Krogh was completely unaware, and had no reason to know, that the pension benefit she was receiving for over eleven years had been incorrectly calculated. (See *Declaration of Doris Krogh,* Exhibit “2”)

It is the Plan administrators – with their actuaries and other expert personnel – and not Doris Krogh - who are responsible for calculating her monthly pension. Ms. Krogh justifiably relied on the Plan Administrator’s skill and expertise in calculating the correct amount of her monthly pension benefit. Furthermore, Krogh continued to receive the same amount for over 11 years. There was never an increase or decrease in her monthly benefit, which had there been, may have given Krogh notice that a miscalculation had occurred.

Just as it was “reasonable for [Dandurand] to believe [the Plan administrator] conducted its accounting on a periodic basis and that it would correct payment errors within a reasonable time,” Ms. Krogh had no reason to believe the Plan Administrators would incorrectly calculate her benefit and fail to discover this mistake for 11 years. *Id.* at 187. Allowing this miscalculation to persist undetected for over eleven years is not a reasonable amount of time.

II. By Causing the Overpayments, the Fund Has Breached Its Fiduciary Duty to Doris Krogh

The *Ingersoll Rand/Thermo King Pension Plan* owes a fiduciary duty to Doris Krogh to exercise reasonable care in calculating the retirement pension benefits she is entitled to receive. [*See* ERISA §404(a)(i) and; 29 U.S.C. §1104(a)(1)]. An ERISA fiduciary is anyone who exercises discretionary authority over the plan’s management, anyone who exercises authority over the management of plan assets, and anyone having discretionary authority or responsibility in the plan’s administration. [*Credit Managers’ Ass‘n v. Kennesaw Life Insurance Co.,* 809 F.2d 617, 625 (9th Cir. 1987)]*.* ERISA requires a fiduciary to discharge his duties with respect to a plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing plan benefits to participants and beneficiaries. (See *Bobo v. 1950 Pension Plan,* 548 F. Supp. 623 (W.D.N.Y. 1982).

The fiduciary duty of care required by plan fiduciaries under ERISA is rooted in negligence principles and is an affirmative duty. *Wright v. Nimmons,* 641 F. Supp. 1391, 1402 (S.D. Tex. 1986); *Phillips v. Maritime Association-ILA Local Pension Plan,* 194 F. Supp. 2d 549, 555. In *Phillips*, the Court found that the plan administrator had breached her fiduciary duty to four divorced elderly women by overpaying benefits due to a plan’s own mistaken calculations regarding their Qualified Domestic Relations Orders (“QDRO”s). The *Phillips* Court, after considering the plan administrator’s fiduciary breach, and the balance of equities, decided that the ERISA plan could correct its mistaken calculations for *future* payments to the four beneficiaries – i.e., start paying them the lower amount that it should have been paying all along. *Phillips,.* 194 F. Supp. 2dat 556. But the Court decided that it would be unfair to allow restitution of the overpayments made *before* the error was discovered, so it disallowed any future recoupment, and in fact ordered any recoupment thus far to be refunded to the beneficiaries. *Id.* at 556-558. The Court said it “does not believe it would be equitable for the Plaintiffs [beneficiaries] to bear the weight of an error that [the plan administrator] could have prevented by upholding her duty as plan administrator. The overpayments were the result of more than just a mistake; they were the result of [the plan administrator’s] breach of fiduciary duty owed to the Plaintiffs.” *Id.* at 557.

The Court in *Dandurand v. Unum Life Insurance Company of America,* 150 F. Supp.2d 178, determined that equity did not favor restitution of pension benefit overpayments, made pursuant to an ERISA plan, given that the benefits were erroneously calculated by four of the plan administrator’s employees over a four-year period and the error was not discovered during periodic reviews of the participant’s files. The Court held that it was inequitable to make the participant bear the full weight of an error the plan administrator could have prevented by closer supervision, better training, or a consistent interpretation of the plan. Furthermore, restitution would not advance reasonable societal expectations related to person or property, relative hardships favored the participant, and restitution would not safeguard the corpus of funds for plan members and beneficiaries. *Id.* at 179.

ERISA imposes high standards of fiduciary duty upon administrators of an ERISA plan. [*See* 29 U.S.C. §1104(a)(1); *Kuper v. Iovenko,* 66 F.3d 1447 (6th Cir. 1995)]. ERISA’s fiduciary duty encompasses three components. [*Berlin v. Michigan Bell Telephone Co.,* 858 F.2d 1154, 1162 (6th Cir. 1988)]*.* The first is a “duty of loyalty” which requires that “all decisions regarding an ERISA plan must be made with an eye single to the interests of the participants and beneficiaries.” *Id.* [quoting *Donovan v. Bierwirth*,680 F.2d 263, 271 (2d Cir. 1982); *accord* 29 U.S.C. §1104(a)(1) (requiring a plan fiduciary to “discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries”)].

Second, ERISA imposes a “prudent person” fiduciary obligation, which is codified in the requirement that a plan fiduciary exercise his duties “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.” 29 U.S.C. §1104(a)(1)(B); *accord* *Berlin*, 858 F.2dat 1162*.* The prudent person standard, in combination with the duty of loyalty, “imposes an unwavering duty on an ERISA Trustee to make decisions with single-minded devotion to a plan’s participants and beneficiaries, and in so doing, to act as a prudent person would act in a similar condition.” *Berlin Id.* at 1162[quoting *Morse v. Stanley,* 732 F.2d 1139, 1145 (2d Cir. 1984)].

Even the United States Supreme Court in *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, at 152-153, opined on the fiduciary duty of pension plan administrators, by stating “Congress intended . . . to incorporate the fiduciary standards of trust law into ERISA, and it is black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits.”

Doris Krogh relied upon the individuals charged with the administration of the *Ingersall Rand/Thermo King Pension Plan* to properly calculate the correct amount of her benefits. As explained *infra*, such reliance on behalf of Ms. Krogh was entirely reasonable. By causing an overpayment to occur for over eleven years, the Plan breached its fiduciary duty. It is inequitable to impose the hardship of recoupment entirely on a 71-year-old retiree and her severely ill husband.

The overpayment occurred in this instance as a result of the breach of fiduciary duty on the part of the Plan. The Plan failed in its affirmative duty to exercise the care imposed upon it of a “reasonably prudent person” as mandated by ERISA. “The fiduciary duty owed by ERISA administrators and trustees is founded in negligence principles and requires individuals/entities to discharge their duties so as, at a minimum, to cause no harm to the beneficiary as a result of a failure to exercise reasonable care.” *Phillips*, 149 F. Supp. 2dat 556; *accord Wright,* 641 F. Supp.at 1402.

Yet, as a result of the erroneous benefit calculations made by the Plan, resulting in the Plan’s breach of fiduciary duty, and the Plan’s unilateral demand that Ms. Krogh repay the entire overpayment, the Plan has acted in a manner that is injurious to one of its beneficiaries – completely at odds with the mandate to “cause no harm to the beneficiary as a result of a failure to exercise reasonable care” – and wholly inconsistent with the duty of care outlined by both the courts in *Phillips* and *Dandurand,* as well as the intent of Congress as set forth under Section 1104(a) of ERISA.

Doris Krogh has been dependent on the retirement pension from the Plan that she had been promised and that she has been provided with for the past 11 years. Furthermore, Krogh has changed her position in reliance on the representations made by the Plan regarding the amount of retirement pension Krogh was entitled to receive. Ms. Krogh had no reason to know that the amount of benefits she received for over eleven years was incorrect.

Finally, ERISA requires pension plans with more than 100 participants to undergo a yearly audit performed by a Certified Public Accountant. ERISA §103(a)(3)(A). An overpayment of 6 years’ duration could not happen absent negligence on the part of the plan administrator or the CPAs hired by the plan administrator. Plan administrators are required to exercise prudence in hiring service providers such as attorneys, accountants, and actuaries considering not just the cost of services but also the quality thereof, keeping the best interest of plan participants in mind. *Bussian v. RJR Nabisco, Inc*., 223 F. 3d 286, 289 (5th Cir. 2000)*.* The plan administrator likely also breached its fiduciary duty in the selection of those persons administering and auditing the plan.

1. The Fund has Waived Its Right to Recoupment and is Equitably Estopped from Recouping the Overpayment

The *Ingersoll Rand/Thermo King Pension Plan* waived its right to recoup the overpayments, given that it paid a pension to Doris Krogh for *eleven years*, despite constructive knowledge that she was ineligible to receive the entire pension amount paid to her by the Plan. In this case, the Plan is also equitably estopped from recouping the overpayments, given the Plan’s false representation of the correct amount of Krogh’s pension; the Plan’s implied expectation that Ms. Krogh would take action with the assumption that she was being paid the correct amount in benefits and thus the money rightfully was hers to keep, spend, and use in planning her retirement; and the Plan’s constructive knowledge that she was in fact not eligible to receive the entire amount of the pension because of a supplement that was supposed to end upon Krogh attaining age 62.

Waiver is “the voluntary and intentional relinquishment of a known right” which is “determined from all of the facts and circumstances surrounding a case.” *Alan Corp v. International Surplus Lines Insurance Co.,* 823 F. Supp. 33, 42 (D. Mass. 1993).Several federal courts have found that a pension plan has waived its right to recover overpayments by making those overpayments despite constructive knowledge that the participant was ineligible to receive the payments. In *Burger v. Life Ins. Co. of America,* 103 F. Supp. 2d 1348, 1348-49 (N.D. Ga. 2000),an insurer was held to have waived its right to recover past overpayments (to offset part-time income) when, for *three* years, it continued paying full benefits despite its knowledge that the insured was working part time. In the case of *Rhorer v. Raytheon Engineers and Constructors, Inc.,* 181 F.3d 634,an insurer was aware for several months that a participant’s circumstances rendered him ineligible for benefits under its plan, but continued to accept premiums during that time. The Court held that summary judgment for the plan administrator was inappropriate, since “a reasonable jury could conclude that[the insurer] knowingly waived its right to enforce” the terms of the policy. *Id* at 645*.*

Following the decisions of the court cases cited above, the *Ingersoll Rand/Thermo King Pension Plan* is equitably estopped from imposing the remedy of recoupment. Federal Courts have recognized equitable estoppel to be a viable theory in ERISA cases. See *Wells v. U.S. Steel & Carnegie Pension Fund, Inc.,* 950 F.2d 1244, 1250 (6th Cir. 1991); *City of Shelbyville v. Commonwealth of Kentucky,* 706 S.W. 2d 426, 429 (Ky. App. 1986). To establish an equitable estoppel claim, a plan participant must show(1) the Plan engaged in conduct which amounts to a false representation or concealment of material facts or at least which is calculated to convey the impression the circumstances are in a particular state that is inconsistent with the Plan’s subsequent position; (2) that the Plan intended or expected that such conduct be acted upon or influence the other party to act; (3) the Plan had knowledge, constructive or actual, of the true facts; (4) the plan participant was unaware of the true facts; and (5) the plaintiff (participant) reasonably or justifiably relied on the representation to his detriment. *Wells,* 950 F.2d 1244 at 1250*.*

Here, the *Ingersoll Rand/Thermo King Pension Plan* is equitably estopped from recoupment because (1) it falsely represented to Krogh (albeit unintentionally) her eligibility for benefits in the amount of $830.86 per month, by paying this amount consistently, each month, for over eleven years; (2) impliedly expected that Krogh would take action with the assumption that the money was her own to have, spend, and use in planning her retirement; and (3) the Plan had constructive knowledge that Krogh was not eligible to receive the amount of $830.86 for the past eleven years.

Doris Krogh’s situation is similar to that of the elderly women in the *Phillips* case, where a plan had reduced monthly payments to recoup overpayments, due to the plan’s own mistake. *Phillips,* 149 F. Supp. 2dat 549*.* As the *Phillips* court noted,

“Based on their rational interpretation of the representations made by [the plan administrator] . . . Plaintiffs had a change in position. These elderly women depended on the dollar amounts not only stated in the QDROs and by [the plan administrator], but actually distributed to them for years, when planning the rest of their lives. They neither knew nor had reason to know that the monthly benefits were incorrect. Plaintiffs suffered, and continue to suffer as a result of [the plan’s] recoupment efforts.” *Id.* at 556.

Doris Krogh has similarly changed her position in reliance on the income she received from the Plan for the past eleven years. She budgeted accordingly with the reasonable belief that she would continue to receive this income. In demanding that Doris Krogh repay the overpayment, the Plan is now equitably estopped from taking a position contrary to its conduct over the past eleven years.

1. The Equitable Doctrine of Laches Prevents the Plan from Recoupment

The equitable doctrine of laches in this case bars recoupment of the overpayments made to Krogh for the past eleven years. Laches is an equitable doctrine, and it is invoked to defeat a recovery on account of one party’s inexcusable delay after possession of knowledge of the facts, if his adversary has materially and adversely changed his position during that delay in reliance on such non-action. Laches thus requires showing an unreasonable delay by one party which prejudiced the other party. Courts have held that pecuniary loss is a very real factor to be considered in determining whether prejudice to the participant exists. [See *Gruco v. United States Steel,* 495 F.2d 1252 (3d Cir. 1974)]

The Court in *Thorn v. U.S. Steel and Carnegie Steel Pension Fund, CV-P-1829-S (M.D. Ala. 1983)* held that, under trust law principles, recovery of an overpayment by a trustee will not be allowed where the beneficiary, in reliance on the correctness of the amounts, changes her position so that it would be inequitable to compel her to make restitution.

Doris Krogh received a consistent, steady amount in pension benefits each month, for eleven years. As a result, she relied on this pension benefit – and reasonably believed it to be calculated correctly. In doing so, she budgeted for her monthly living expenses in order to live a reasonably normal life in retirement. The Plan allowed the overpayment to occur for eleven years before taking any action. This delay is unreasonable. For the Plan to pursue recoupment after eleven years of pension payments would prejudice Ms. Krogh and greatly disrupt her retirement. As such, recoupment would not be equitable based on the facts and circumstances in this case.

Conclusion

Doris Krogh recognizes the difficult and unfortunate situation that is presented as a result of the Plan mis-calculating his pension benefit for six years. She also understands and accepts the fact that – now that the Plan has discovered its calculation error – her benefit must be reduced in the future to the proper amount she is entitled to receive pursuant to the Plan rules - $612.30. She is not asking that the Plan pay her *more* than she is entitled to receive.

However, it would be inequitable to make Doris Krogh bear the weight of an error that the Plan could have prevented by closer supervision, better training, or a consistent interpretation of policy. For the reasons set-forth above, Ms. Krogh respectfully requests that the Ingersoll Rand Benefits Administration Committee carefully review the particular circumstances in this case, consider the equities and hardship that would occur if the Plan were to further reduce her pension benefit, and grant her request for a waiver of the recoupment.

Respectfully submitted:

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