February 14, 2013

Board of Trustees

c/o Mary Pierce

Boilermaker-Blacksmith National Pension Trust

754 Minnesota Avenue

Kansas City KS 66101-2766

***Via fax – 913-281-5514***

***Via Overnight Mail***

***Re: MEMORANDUM IN SUPPORT OF APPEAL ON BEHALF OF '''''''''''' '''''''''***

To The Board of Trustees,

This Memorandum is submitted on behalf of '''''''''''''' '''''''', in support of appeal with respect to the issue of an alleged overpayment of pension by the Boilermaker-Blacksmith National Pension Trust (hereinafter, “the Plan”). On Mr. ''''''''''''' behalf, I hereby request that the alleged overpayment to Mr. '''''''' be waived. Accordingly, please note that this request is a claim for waiver subject to ERISA claim procedures. This claim is based upon financial hardship to Mr. '''''''''' and other legal and equitable factors as outlined below.

**Factual Background**

 Mr. ''''''''' had been working for American Shipbuilders for 18 years at his Contribution Date of 7/1/1979 and had a total pension credit of 22.25 years at his annuity start date. He began receiving his Boilermaker-Blacksmith pension at age 72. He has been receiving his pension, without notice of error, for 20 years. Mr. '''''''' will be 92 years old on 4-15-13.

 On July 26, 2012, Mr. ''''''''' received notice that his original pension amount of $348.52 was incorrect and would be reduced to $300.98 effective August 1, 2012. In addition, the Plan is recouping $10,744.40 overpaid over the last 20 years by suspending the full amount of his pension from October 1, 2012 until August 1, 2015.

Mr. ''''''''' did nothing to cause any alleged overpayment of benefits. He relied on the plan administrator’s expertise to properly calculate and pay him the correct benefit amount. Mr. '''''''''' and his wife live on a very modest income of pension and Social Security.

**Argument in Support of Waiver of Overpayment**

Case law clearly supports the conclusion that recouping the alleged overpaid amount from Mr. '''''''' would be grossly inequitable. As the U.S. District Court in *Kapp v. Sedgwick CMS* noted, in denying the recoupment of an overpayment to a plan: “The United States Court of Appeals for the Sixth Circuit has stated that, even where a benefits plan unambiguously provides the plan fiduciary a legal right to recoup an overpayment, “equitable principles may limit an ERISA fiduciary’s legal right” to do so. *Kapp v. Sedgwick CMS, AT & T Benefit Umbrella Plan 1*, 2013 WL 26051, 3 (S.D. Ohio, Jan. 2, 2013), (*internal citations omitted*). *See also, Phillips v. Maritime Ass’n – I.L.A. Local Pension Plan*, 194 F. Supp. 2d 549, 555 (E.D. Tex. 2001) (When applying an equitable doctrine for the purposes of recoupment, it is critical to consider the circumstances surrounding the overpayments).

The plan is not entitled to recoupment in the case of Mr. ''''''''' for the reasons listed below and explained in detail.

1. ***Equitable Principles Bar Recovery of Overpayments Made to an ERISA plan beneficiary***

The relief sought by the plan is inappropriate under equitable considerations listed under the U.S. District Court’s six-part test in the *Kapp* case. *Kapp v. Sedgwick CMS, AT & T Benefit Umbrella Plan 1*, 2013 WL 26051, 3 (S.D. Ohio, Jan. 2, 2013). In *Kapp*, the employer was attempting to recover an overpayment of disability benefits made to a retiree. *Id*. Based on a six-part analysis, the Court held that the employer was equitably barred from recovering the mistaken overpayments. *Id*. The Court considered six factors in the case of overpayment recoupment: 1. The amount of time which has passed since the overpayment was made; 2. The effect that the recoupment would have on that income; 3. The nature of the mistake by the administrator; 4. The amount of the overpayment; 5. The beneficiary’s total income; and 6. The beneficiary’s use of the money at issue. *Id*, 4 (*internal citations omitted*).

First, the *Kapp* Court found that seeking to recover payments mistakenly made over more than eight years weighed heavily against recoupment in the equitable analysis. *Id*. In the case of Mr. ''''''''', the alleged overpayment has occurred for more than 20 years.

Second, the *Kapp Court* found that the Plaintiff in the case relied on the correctness of the amount of his payments, having made innumerable financial decisions based thereon. *Id*. The Kapp Court stated, “ … to require repayment after eight years of what Plaintiff-and Defendants-believed to be correct LTD payments would likely have a severe impact [on] Plaintiff and his family. This impact would likely be far more severe than that on the Trust.” *Id*. The same is true in Mr. ''''''''''''' case. Mr. ''''''''' has relied on this payment amount for daily living expenses for 20+ years. Mr. '''''''' already does not meet his expenses on his very modest budget. There is no room for luxury in Mr. ''''''''''''' budget. He has a small savings that he must rely on for monthly expenses, car and home repairs. Without this pension, the gap in his budget will be even greater. Furthermore, he is 91 years of age, and is unable to return to work. His wife is also unable to return to work. The discontinuance of his pension during a recoupment period will create an extremely difficult financial hardship. In addition, the $10,744.40 overpayment accumulation, while creating extreme financial hardship to Mr. ''''''''', is an extremely small percentage of the total assets of the pension fund.

The third factor to be considered under *Kapp* is the nature of the mistake by the administrator. In *Kapp*, the overpayment was a result of an oversight by Defendant where the pension was not offset by Plaintiff’s social security disability payment, despite notice by Plaintiff more than once. In Mr. '''''''''''''' case, the incorrect pension amount was the result of an incorrect date and percentage being used, both part of a complex calculation due to the fact that Mr. ''''''''' retired after his Normal Retirement Age. Mr. ''''''''' would not be able to ascertain this issue or correct it and had no responsibility for this error. The fact that the Boilermaker pension fund thought this was the correct amount for 20+ years, and that the complex error was not detectable or comprehensible to Mr. '''''''''' weighs against recoupment.

The fourth factor under *Kapp* is the amount of overpayment being recouped. The *Kapp* Court held that a large accumulation of payments over time weighs against recovery and that the accumulation of eight years of overpayments would place a nearly unbearable financial burden on the Plaintiff. *Id*. Mr. '''''''''''''' alleged overpayments have been accumulating for 20+ years. The discontinuance of his pension to recoup the overpayment creates an unbearable financial burden. Mr. '''''''''' already cannot meet his monthly expenses, and a reduction of $300/month will further exacerbate this problem.

The fifth factor, beneficiary’s total income, and the sixth factor, the beneficiary’s use of the money at issue, also must be considered. In *Kapp*, the Plaintiff beneficiary had made numerous financial decisions based on the supposed correctness of his benefit amount. The *Kapp* Court held that this weighed against recoupment, as repayment would likely have a severe impact on his family. *Id*. In the case at hand, requiring Mr. '''''''' to repay the alleged overpayment would also have a severe impact on him and his wife. Mr. ''''''''''''' basic living expenses already exceed his income. Mr. '''''''' and his wife cannot make ends meet with this pension, which he has received for 20+ years. Mr. '''''''''' and his wife do not lead a lavish lifestyle. Rather, they use their income to meet the basic expenses of life - health insurance premiums, medications, utilities, insurance, and groceries. Even with the pension, they are unable to meet their expenses. This further weighs against recoupment.

The factors in Mr. '''''''''''''' case fall squarely within the analysis of the *Kapp* Court. *Id*. Discontinuance of Mr. '''''''''''''' pension would be a severe cut to his income, and would render upon him an extreme financial hardship. To recoup $10,744.40 which has accumulated over a 20+ years time period due to a complicated calculation error, unbeknownst to Mr. ''''''''', creates a nearly unbearable financial burden on Mr. '''''''''. Here, as in the *Kapp* case, equity must bar recoupment of the mistaken overpayments. *Id*.

1. ***Plan’s Breach of Fiduciary Duty***

The plan administrators breached their fiduciary duty to Mr. '''''''''' when they incorrectly calculated and subsequently sent him incorrect monthly benefit amounts every month for more than 20 years before discovering their own error. Under ERISA, fiduciaries are required to discharge their duties “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims”. *29 U.S.C. § 1104(a)(1)*.

Case law also indicates a fiduciary breach by the plan administrator. In *Phillips v. Maritime Ass’n*, the Court found that the plan administrator had breached her fiduciary duty to four divorced elderly women, by overpaying benefits due to the plan’s own mistaken calculations regarding their QDROs. The Court said “The fiduciary duty of care involved in ERISA is rooted in negligence principles and is an affirmative duty. … Therefore, the fiduciary should exert at least that duty of care that a reasonably prudent person would exert in his own affairs under like circumstances. In short, the fiduciary must exercise his position of trust so as, at the very minimum, not to harm the beneficiary as a result of his failure to exercise reasonable care.” *Phillips*, 194 F. Supp. 2d at 555-56, (*citing* *Wright v. Nimmons*, 641 F. Supp. 1391, 1402 (S.D. Tex. 1986)). 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 beneficiaries, i.e., start paying them the lower amount that it should have been paying them all along. *Id*. at 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 ordered any recoupment thus far to be refunded to the beneficiaries. *Id*. at 556-58. The Court said it “does not believe it would be equitable for the Plaintiffs to bear the weight of an error that [the plan administrator] could have prevented by upholding her duty as plan administrator.” Id. at 557.

Likewise, it would not be equitable for Mr. ''''''''' to bear the weight of the error that the plan administrators could have prevented by upholding their duty as plan administrators, and failed to do so for more than twenty years.

**Conclusion**

It is unconscionable to attempt to recoup money from a retiree that has been receiving this pension for twenty years. Further, it is inconceivable that the Plan would recoup twenty years of overpayments from a 91-year-old retiree who has relied on this money to attempt to meet ordinary monthly living expenses. For the reasons discussed above, I hereby request that the plan waive its recoupment of the alleged overpayment of Mr. '''''''''''''' benefit.

If you would like to discuss this matter, I may be reached at 513-458-5530. Please direct your written response to me at the address listed in the letterhead. Thank you for your attention to this matter.

Mid-America Pension Rights Project

Jean Spring

Attorney at Law

***Helping with Pension and Retirement Benefit Problems in***

***Kentucky, Michigan, Ohio, Pennsylvania, and Tennessee***

***Helping with Pension and Retirement Benefit Problems in***

***Kentucky, Michigan, Ohio, Pennsylvania, and Tennessee***