

HELPING INDIVIDUALS UNDERSTAND AND EXERCISE THEIR PENSION RIGHTS

NOTICE OF DISPUTED CLAIM AND
NOTICE OF REPRESENTATION

August 29, 2018

Via Federal Express

Marlene Ford, Manager, Pension Department
IAM National Pension Fund
1300 Connecticut Avenue NW
Washington, DC 20036

RE: Our Client: [REDACTED] (individually and as representative of the estate of [REDACTED])
Pension Award No.: [REDACTED]

Dear Ms. Ford:

The South Central Pension Rights Project ("SCPRP") is a grant funded, non-profit legal assistance program that helps individuals understand and exercise their pension rights. [REDACTED] ("Mrs. [REDACTED]"), individually and as the representative of the estate of [REDACTED] ("Mr. [REDACTED]"), has engaged our office to provide counsel regarding her benefit under the IAM Pension Fund/National Pension Plan (the "Pension Plan") and the purported overpayment (including interest) of: (i) \$119,043.46 from the Pension Plan to Mr. [REDACTED], and (ii) \$7,231.00 from the Pension Plan to Mrs. [REDACTED] (referred to herein, individually and collectively, as the "Overpayment Claim"). Your office contacted Mrs. [REDACTED] by a letter dated August 1, 2018 (copy enclosed, and referred to herein as the "August 1st Letter") in an attempt to collect this purported Overpayment Claim from Mrs. [REDACTED].

You are hereby notified that Mrs. [REDACTED] is represented by my office regarding this matter. You are directed to send all future communications/correspondence to my office regarding this matter. You are not to contact Mrs. [REDACTED], either individually or in her capacity as representative of Mr. [REDACTED] estate, for any purposes.

Mrs. [REDACTED], individually and as the representative of the estate of Mr. [REDACTED], disputes the validity of the Overpayment Claim as set forth in the August 1st Letter and hereby demands verification. Additionally, Mrs. [REDACTED] objects to any reduction in her monthly annuity payment prior to the resolution of this matter and the exhaustion of her administrative remedies. This office is in the process of preparing a formal dispute of the Overpayment Claim which we will submit in accordance with the claims procedures set forth under the Employee Retirement Income Security Act of 1974, as

amended ("ERISA), and the regulations promulgated thereunder. You are hereby placed on notice of this pending claim.

Additionally, we dispute the language in the August 1st Letter stating that Mrs. [REDACTED] has only one administrative appeal, that being to the Board of Trustees, before she is required to bring an action in Federal Court under Section 502(a) of ERISA. Section 503 of ERISA requires that a Plan have claims procedures in place that meet the requirements set forth under 29 CFR 2560.503-1 of the Department of Labor Regulations. The claims procedures regulations require a plan to afford a plan participant or beneficiary two levels of administrative claim submission/appeal. Thus, providing Mrs. [REDACTED] with only one administrative level of claim submission/appeal (to the Board of Trustees) would be a violation of Section 503 of ERISA.

So the we can advise Mrs. [REDACTED] of her options in this matter and properly prepare our claim regarding this matter, we request that you provide us with the following:

1. The Pension Plan document (including amendments) and Summary Plan Description (including any material modifications) that were in effect at Mr. [REDACTED]'s last hour of service;
2. A copy of the Pension Plan's claims procedures;
3. Specification of the exact Pension Plan provision/language authorizing the Plan and/or Plan Administrator to reduce Mrs. [REDACTED]'s monthly annuity payment within 30 days of providing Mrs. [REDACTED] with the August 1st Letter and prior to the resolution of the matter and Mrs. [REDACTED] exhaustion of her administrative remedies;
4. Specification of the exact Pension Plan provision/language authorizing the Plan and/or Plan Administrator to charge interest when attempting to recoup a Plan overpayment; and
5. The complete Pension Plan file for Mr. [REDACTED], including, without limitation:
 - a. copies of any and all Pension Plan benefit estimates provided to Mr. [REDACTED];
 - b. copies of any and all Pension Plan distribution forms provided to Mr. [REDACTED];
 - c. copies of any and all Pension Plan distribution forms executed by Mr. [REDACTED];
 - d. complete calculations on how Mr. [REDACTED]'s purported "corrected" monthly annuity amount under the Pension Plan was calculated;
 - e. complete calculations on how the purported Overpayment Claim amounts were derived; and
 - f. any and all other materials on which the Plan and/or Plan Administrator relied in determining: (i) Mr. [REDACTED]'s purported "corrected" monthly

annuity amount under the Pension Plan; and/or (ii) that an overpayment has been made to Mr. [REDACTED] and/or Mrs. [REDACTED] by the Pension Plan.

Our office appreciates your attention to this matter, and we look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Martin Bolt', followed by a large, stylized initial 'A'.

Martin Bolt
Attorney

Enclosure(s): As Stated

Cc: Mrs. [REDACTED] Via Electronic Mail and U.S. Mail

Roger Curme, Attorney, South Central Pension Rights Project



IAM NATIONAL
PENSION FUND

August 1, 2018

[REDACTED]
[REDACTED]
[REDACTED]
RE: National Pension Plan
[REDACTED], Participant
Pension Award No. [REDACTED]

Dear Ms. [REDACTED]:

You are currently receiving benefits from the IAM National Pension Fund due to the death of your late husband, Mr. [REDACTED]. In 2000, Mr. [REDACTED] was identified as a Participant who had attained age 70 1/2, had reached his Required Distribution Date and was entitled to commence benefits as of April 1, 2001. However, as of April 1, 2001 Mr. [REDACTED] was still working in Disqualifying Employment and elected to delay commencement of his benefits until July 1, 2007.

Upon Mr. [REDACTED]'s retirement in 2007, he submitted an application for retirement. His benefit was calculated to include an actuarial adjustment for delayed commencement beyond the April 1, 2001 Required Distribution Date. His benefit was awarded on December 1, 2007 with an September 1, 2007 Pension Effective Date in the amount of \$1375 per month paid in the form of the 50% Spouse Pension.

During a recent audit of Mr. [REDACTED]'s file, an error was noted in the calculation of his benefit. It was determined that the actuarial adjustment factor for post age 70 1/2 benefit commencement was incorrectly applied. As a result of the incorrect application of the adjustment, we find that you have been overpaid.

The amount of Mr. [REDACTED]'s monthly benefit paid as a 50% Spouse Pension has changed from \$1375 to \$647 per month.

Therefore, the amount of your benefit has changed from \$688 to \$324 and your monthly payment will be corrected beginning September 1, 2018. Mr. [REDACTED] was overpaid \$82,264 between September 2007 through January 2017 plus interest of \$36,779.46 for a total of \$119,043.46 ($\$82,264 + \$36,779.46 = \$119,043.46$).

You also have been overpaid for the months of February 2017 through August 2018 such that a reimbursement is due the IAM National Pension Fund in the amount of \$6,916 plus interest of \$405.70 for a total of \$7,321.00 ($\$6,916 + \$405.70 = \$7,321.00$). The total reimbursement due the Fund for overpayments made to you and Mr. [REDACTED] is \$126,364.46.

The overpayment amount for Mr. [REDACTED] has been calculated as follows:

August 1, 2018

Old amount: \$1375
New amount: \$ 647
Difference: \$ 728

Overpayment: \$82,264 [\$728 per mo. x 113 mos. (number of months from 9/2007 to 1/31/2017)]

The overpayment for your portion of Mr. [REDACTED]'s benefit amount has been calculated as follows:

Old amount: \$688
New amount: \$324
Difference: \$364

Overpayment: \$6,916 [\$364 per mo. x 19 mos. (number of months from 2/2017 to 8/2018)]

Please pay the total overpayment and interest in the amount of \$126,364.46 within 30 days of the date of this letter. If the full reimbursement is not received by August 31, 2018, the Fund will offset the overpayment and interest against your future benefits payable until the entire amount of the overpayment and interest has been recovered. The amount to be offset from each monthly payment is equal to 100% of your next scheduled payment and 25% from each monthly payment thereafter. If you wish to discuss the option of a repayment plan, please contact us at the number below.

If you disagree with this determination, you have the right to appeal to the Board of Trustees. An appeal must be in writing and must specify the reasons for the appeal. In support of an appeal, you may also submit any information that you consider relevant to your claim. You also have the right to receive, upon request to the Fund Office and free of charge, copies of documents relevant to your claim. You must appeal within 180 days of the date of receipt of this letter, or this determination will be final and binding on all parties. Following an adverse benefit determination on appeal, you have the right to bring a civil action under Section 502(a) of ERISA. If you choose to bring a lawsuit, you must do so within 3 years of the date on which the Appeals Committee denied your appeal. In addition, any lawsuit against the Fund must be commenced in the United States District Court for the District of Columbia. Although you are not required to file an appeal, you must exhaust your administrative remedies by filing an appeal before you can file suit under ERISA.

If you have any questions, please feel free to contact me at 1-800-424-9608 ext. 720

Sincerely,

Marlene Ford
Manager
Pension Department

CERTIFIED MAIL: [REDACTED]



IAM NATIONAL
PENSION FUND

October 10, 2018

Martin Bolt
South Central Pension Rights Project
Post Office Box 41256
Austin, TX 78704

RE: Request for Information on Behalf of [REDACTED]

Dear Mr. Bolt:

You sent a letter dated August 29, 2018 to the IAM National Pension Fund (the "Fund") on behalf of [REDACTED] in response to the Fund's August 1, 2018 letter to Mrs. [REDACTED] to collect overpayments. Your letter, which was directed to Marlene Ford, Manager of the Fund's Pension Department, has been referred to the Fund's Legal Services Department.

In your first request, you asked for "The Pension Plan document (including amendments) and Summary Plan Description (including any material modifications) that were in effect at Mr. [REDACTED] last hour of service." The Fund's Plan Document and Summary Plan Description in effect in 2007 are enclosed. We are reviewing your remaining requests and will provide responses to those requests.

In the meantime, please do not hesitate to contact me with any questions.

Sincerely,

David P. Cohn
Assistant General Counsel

cc: Raymond Goad, General Counsel
Marlene Ford, Manager, Pension Department



Post Office Box 41256
Austin, TX 78704
Toll free: 800-443-2528 ext. 236
FAX: 512-477-6576
www.southcentralpension.org

HELPING INDIVIDUALS UNDERSTAND AND EXERCISE THEIR PENSION RIGHTS

FOURTH REQUEST FOR INFORMATION AND DATA

December 17, 2018

Via Federal Express

David P. Cohn, Assistant General Counsel
IAM National Pension Fund
1300 Connecticut Avenue NW, Ste. 300
Washington, DC 20036-1711

RE: Our Client: [REDACTED] (individually and as representative of the estate of
[REDACTED])
Pension Award No.: [REDACTED]

Dear Mr. Cohn:

As you are aware, [REDACTED] ("Mrs. [REDACTED]"), individually and as the representative of the estate of [REDACTED] ("Mr. [REDACTED]"), has engaged the South Central Pension Rights Project ("SCPRP") to provide counsel regarding her benefit under the IAM Pension Fund National Pension Plan (the "Pension Plan") and the purported overpayment (including interest) of: (i) \$119,043.46 from the Pension Plan to Mr. [REDACTED], and (ii) \$7,231.00 from the Pension Plan to Mrs. [REDACTED] (referred to herein, individually and collectively, as the "Overpayment Claim").

Facts

My office previously sent to Marlene Ford at the IAM National Pension Fund a letter dated August 29, 2018 by Federal Express (copy enclosed and referred to herein as the "August 29th Letter") requesting certain documents, information, and data. My office sent a second letter to Ms. Ford on October 5, 2018 by United States Postal Service certified mail #70160910000093468815 (cover letter enclosed and referred to herein as the "October 5th Letter"). By letter to me dated October 10, 2018 (cover letter enclosed and referred to herein as the "October 10th Letter"), you provided my office with Items #1 and #2 requested in the August 29th Letter (i.e. the plan document and Summary Plan Description). You also indicated in the October 10th Letter that you were reviewing the remaining requests of the August 29th Letter and would provide responses to those requests. By United States Postal Service certified mail #70180360000220395280, my office sent you a follow-up letter dated November 7, 2018 (copy enclosed and referred to herein as the "November 7th Letter") again requesting the data/calculations. United States Postal Service

records indicate that the November 7th Letter was received by your office on November 13, 2018.

Further, on November 28, 2018, I left you a voice mail regarding this matter. I left you an additional voicemail on December 3, 2018. When you returned my call on the afternoon of Monday, December 3, 2018, you indicated a response letter to my office was being drafted and that there was one person remaining who had to review the letter and that the letter should be ready the following week. I indicated that I would telephone you that following week to follow-up on the status of the response letter. I have subsequently left voice mails to you on Wednesday, December 12, 2018, and Friday, December 14, 2018. I have not received any response to my voicemails of December 12th and 14th. Additionally, after the passage of approximately 2 weeks since our call of December 3rd, I have still not received the promised response letter.

Legal Basis for Deemed Exhaustion of Plan Administrative Remedies

At this point, the Pension Plan is in violation of its obligations regarding claims procedures as set forth in Section 503 of the Employee Retirement Income Security Act of 1974 (as amended, "ERISA") and the regulations promulgated thereunder. Specifically, pursuant to regulation 29 CFR 2560.503-1(b)(3), a plan is prohibited from administering its claim procedures ". . . in a way that unduly inhibits or hampers the initiation or processing of claims for benefits." Additionally, pursuant to regulation 29 CFR 2560.503-1(h)(2)(iii), a plan will not be deemed to have provided a claimant with a reasonably opportunity for a full and fair review of an adverse benefit determination unless the claimant is provided, upon request, and free of charge, reasonable access to, and copies of all documents, records, and other information relevant to the claim. By the Pension Plan's failure to provide the documents and information requested in the August 29th Letter, the October 5th Letter, and the November 7th Letter, the Pension Plan has violated its legal obligations under ERISA by not only failing to provide the documents as required under 29 CFR 2560.503-1(h)(2)(iii), but has administered its claim process "in a way that unduly inhibits or hampers the initiation or processing of claims for benefits", contrary to the requirement of 29 CFR 2560.503-1(b)(3).

The regulations under Section 503 of ERISA also provide a remedy in the event a plan fails to administer its claims procedures in a manner consistent with the claims procedure regulations of ERISA, specifically:

" . . . in the case of the failure of a plan to establish or follow claims procedures consistent with the requirements of this section, a claimant shall be deemed to have exhausted the administrative remedies available under the plan and shall be entitled to pursue any available remedies under section 502(a) of the Act on the basis that the plan has failed to provide a reasonable claims procedure that would yield a decision on the merits of the claim." (29 CFR 2560.503-1(l)(1))

At this time, because the Pension Plan has failed to follow claims procedures in a manner consistent with the requirements of Section 503 of ERISA, Mrs. [REDACTED], individually and as the representative of the estate of Mr. [REDACTED], pursuant to 29 CFR 2560.503-1(l)(1), is entitled to deem to have exhausted the administrative remedies available to her under the Pension Plan and shall be entitled to pursue any available remedies under section 502(a) of the ERISA, including filing suit in United States federal court.

Breach of Fiduciary Duties

The Pension Plan's fiduciaries have a duty under ERISA Section 404(a)(1)(D) to ensure that the Pension Plan is operated in accordance with the documents and instruments governing the Pension Plan, including the Pension Plan's claims procedures, to the extent such documents and instruments are consistent with ERISA. Thus, the failure in this matter to operate the Pension Plan in accordance with ERISA's required claims procedures is a violation of that fiduciary duty by the Pension Plan's fiduciaries.

Requested Plan Action in Lieu of Federal Court Action

As stated above, because of the failure of the Plan Administrator to comply with the Pension Plan's claim procedures, Mrs. [REDACTED], individually and as the representative of the estate of Mr. [REDACTED] is entitled, pursuant to the regulations promulgated under ERISA Section 503, to deem her administrative remedies exhausted and file suit in United States federal court. However, prior to such action, on Mrs. [REDACTED] behalf, for the fourth time, my office requests that you provide us with the following:

1. Specification of the exact Pension Plan provision/language authorizing the Plan and/or Plan Administrator to reduce Mrs. [REDACTED]'s monthly annuity payment prior to the resolution of the matter and Mrs. [REDACTED]'s exhaustion of her administrative remedies;
2. Specification of the exact Pension Plan provision/language authorizing the Plan and/or Plan Administrator to charge interest when attempting to recoup a Plan overpayment; and
3. The complete Pension Plan file for Mr. [REDACTED] including, without limitation:
 - a. copies of any and all Pension Plan benefit estimates provided to Mr. [REDACTED];
 - b. copies of any and all Pension Plan distribution forms provided to Mr. [REDACTED];
 - c. copies of any and all Pension Plan distribution forms executed by Mr. [REDACTED];
 - d. complete calculations on how Mr. [REDACTED]'s purported "corrected" monthly annuity amount under the Pension Plan was calculated;
 - e. complete calculations on how the purported Overpayment Claim amounts were derived; and

- f. any and all other materials on which the Plan and/or Plan Administrator relied in determining: (i) Mr. [REDACTED]'s purported "corrected" monthly annuity amount under the Pension Plan; and/or (ii) that an overpayment has been made to Mr. [REDACTED] and/or Mrs. [REDACTED] by the Pension Plan.

My office needs the calculations in order to properly prepare a formal appeal of the Overpayment Claim. At this point, due to the Pension Plan's delay in providing the requested data and information which is needed to prepare Mrs. [REDACTED]'s appeal, I anticipate that my office will request, and expect that the Pension Plan to grant, an extension of the 180-day period in which an appeal is required to be filed by Mrs. [REDACTED] in response to the purported overpayment claim as set forth in the Pension Plan's letter to Mrs. [REDACTED] dated August 1, 2018. Additionally, in the event that Mrs. [REDACTED] is not successful in her claim/appeal, I expect the Pension Plan to waive any interest on the purported overpayment claim for the period in which the Pension Plan delayed in providing my office with the necessary information needed in order to properly and promptly submit a claim/appeal to the Pension Plan.

If my office does not promptly receive the requested data and information, in addition to my client's legal right to file suit in federal court, my office will contact the Department of Labor regarding this matter and the Pension Plan's failure to operate in accordance with ERISA and the related Pension Plan fiduciaries' breach of their fiduciary duties.

I ask that you please forward any ongoing communication in this matter to me at the address in the letterhead. If you have any questions, please do not hesitate to call my office. Thank you for your assistance in this matter.

Sincerely,



Martin Bolt
Attorney

Enclosure(s): As stated

cc: [REDACTED] Via Electronic Mail and U.S. Mail

Mr. Roger Curme, Attorney, SCPRP



December 19, 2018

Via Overnight Delivery

Martin Bolt
South Central Pension Rights Project
2101 S Interstate 35
Austin, TX 78741

Re: IAM National Pension Fund ("Fund")
[REDACTED]

Dear Mr. Bolt:

The South Central Pension Rights Project sent a letter dated August 29, 2018 to the Fund on behalf of [REDACTED] in response to the Fund's August 1, 2018 letter to Mrs. [REDACTED] to recoup overpayments. The Fund responded on October 10, 2018 by providing the Plan Document and Summary Plan Description that were in effect at the time of Mr. [REDACTED]'s last hour or service in response to the first request in your August 29, 2018 letter and indicated that we were reviewing your additional requests.

Following are the requests that you made in an additional letter dated October 5, 2018 (in bold) and the Fund's responses to those requests.

1. **The Pension Plan document (including amendments) and Summary Plan Description (including any material modifications) that were in effect at Mr. [REDACTED]'s last hour of service.**

As noted above, the Fund provided these documents on October 10, 2018.

2. **A copy of the Pension Plan's claims procedures**

The Fund's Summary Plan Description provided in response to Request 1 includes the Fund's claims procedures.

3. **Specification of the exact Pension Plan provision/language authorizing the Plan and/or Plan Administrator to reduce Mrs. [REDACTED]'s monthly annuity payment within 30 days of providing Mrs. [REDACTED] with the August 1st Letter and prior to the resolution of the matter and Mrs. [REDACTED]'s exhaustion of her administrative remedies.**

Section 8.2(b) of the Plan provides in relevant part as follows:

If the Fund pays benefits to which a Participant, Spouse, alternate payee or Beneficiary ("Payee") is not entitled, including benefits in an amount greater than the benefits to which Payee is entitled ("Overpayment"), regardless of the reason for the Overpayment, the Fund has the right to recover such Overpayments plus interest, costs and attorneys' fees. The Fund may recover Overpayments by offsetting future benefits otherwise payable by the Fund to a Participant or to any person who is entitled to benefits with respect to that Participant, including but not limited to a Spouse, alternate payee or Beneficiary. The Fund may offset any benefit payable under the Plan, including but not limited to joint and survivor benefits.

4. Specification of the exact Pension Plan provision/language authorizing the Plan and /or Plan Administrator to charge interest when attempting to recoup a Plan overpayment

Please see Section 8.2(b) provided in response to Request 3.

5. The complete Pension Plan file for Mr. [REDACTED], including, without limitation:

- a. copies of any and all Pension Plan benefit estimates provided to Mr. [REDACTED]
- b. copies of any and all Pension Plan distribution forms provided to Mr. [REDACTED]
- c. copies of any and all Pension Plan distribution forms executed by Mr. [REDACTED]
- d. complete calculations on how Mr. [REDACTED]'s purported "corrected" monthly annuity amount under the Pension Plan was calculated
- e. complete calculations on how the purported Overpayment Claim amounts were derived

Enclosed please find copies of documents from Mr. [REDACTED]'s file in response to Requests 5.a, b and c. In response to Requests 5.d. and e., following is an explanation of Mr. and Mrs. [REDACTED]'s benefit calculations.

Mr. [REDACTED] reached his Required Distribution Date on April 1, 2001 after attaining age 70½ in the year 2000. Mr. [REDACTED] was not eligible for a pension as of December 31, 2000 as he had accrued only four years of Vesting Service. Mr. [REDACTED] became eligible for a pension effective January 1, 2002 after accruing five years of Vesting Service through December 31, 2001. As he was still working in Covered Employment, he could choose to begin receiving his pension at that time or begin his pension at a later date. In April 2002, Mr. [REDACTED] declined the opportunity to begin receiving his benefit. The Fund received Mr. [REDACTED]'s pension application on August 9, 2007 and processed it

for a Normal Pension with the 50% Spouse Pension and an effective date of September 1, 2007 (Pension Effective Date).

According to Fund records, Mr. [REDACTED] worked in Covered Employment for [REDACTED] Auto Group, Inc. from October 1996 through September 9, 2001 and for [REDACTED] Chevrolet Olds, Inc. from September 10, 2001 through April 12, 2007. During that time, Mr. [REDACTED] earned a total of 10 years and 5 months of Future Service Credit and 11 years of Vesting Service under the Plan.

Plan benefits are calculated using a Participant's Credited Service and his or her Employer's negotiated contribution rate for each year during which Credited Service is earned. Based on the applicable information for Mr. [REDACTED], his Normal Pension benefit was initially calculated to equal \$714.37 per month. Please see the Calculation Report dated December 1, 2007 for additional detail.

Because Mr. [REDACTED] was age 77 years and 8 months on his Pension Effective Date and his Required Distribution Date was April 1, 2001, two actuarial adjustments were then applied to his benefit. First, Mr. [REDACTED]'s monthly benefit was increased by \$17.86 to account for his late retirement under Section 411 of the Internal Revenue Code, increasing his benefit to \$732.23 ($\$714.37 + \17.86). Please see the Manual LRA Worksheet for additional detail. In addition, as Mr. [REDACTED] delayed receipt of his benefit after his Required Distribution Date, his adjusted Normal Pension benefit of \$732.23 was increased by 127.83% to \$1,668.24 ($(\$732.23 \times 1.2783) + \732.23). Please see the Table of Factors for additional detail.

Because Mr. [REDACTED] elected the 50% Spouse Pension, his benefit was reduced based on the age difference between himself and his wife. As Mr. [REDACTED] was 19 years older than Mrs. [REDACTED], his benefit is equal to 82.4% of \$1,668.24 or \$1,375.00 ($\$1,668.24 \times .824$, rounded up to the next dollar).

When Mr. [REDACTED] died in January 2017, the surviving spouse portion of the 50% Spouse Pension was payable to Mrs. [REDACTED] for her lifetime. Effective February 1, 2017, the Fund began paying her a monthly benefit in the amount of \$688.00, equal to one-half of Mr. [REDACTED]'s monthly pension benefit ($\$1,375.00 \div 2$, rounded up to the next dollar).

During a review of pension award files in the Benefit Fund Office in 2017, it was discovered that the Fund needed to recalculate Mr. [REDACTED] benefit. The \$17.86 for late retirement described above should not have been included in his benefit because it was duplicative of the actuarial adjustment that he received for that same year for beginning to receive his benefits after age 70-1/2.

In addition, regarding the actuarial adjustment, (i) instead of applying an adjustment to Mr. [REDACTED]'s entire benefit, it should have been applied only to each year after his Required Distribution Date and (ii) it should have been applied to Mr. [REDACTED]'s benefit only if it exceeded the value of any benefit earned in the year of the adjustment. The following chart and explanation shows the corrected calculation of Mr. [REDACTED]'s benefit.

This calculation begins with Mr. [REDACTED]'s accrued benefit as of December 31, 2000, the year in which he attained age 70-1/2, which was \$232.66. The Prior Year Accrued Benefit in (A) represents the benefit payable at the beginning of that period based on benefit accruals. The Current Period Accrual in (B) is the benefit Mr. [REDACTED] accrued during that period.

There is an actuarial adjustment factor for each month that Mr. [REDACTED]'s Pension Effective Date was delayed beyond his Required Beginning Date. The Current Period Actuarial Factor in (C) is the monthly factor applicable to the end of that period and the Prior Year Actuarial Factor in (D) is the monthly factor applicable to the end of the prior period (entry from prior period in (C)). The Annual Actuarial Adjustment Percentage in (E) is calculated by dividing the Current Period Actuarial Factor in (C) by the Prior Year Actuarial Factor in (D) then subtracting 100 from the result.

The Annual Actuarial Adjustment in (F) for each period is calculated by multiplying the Accumulated Benefit Payable in (H) from the prior year by the Annual Actuarial Increase Percentage in (E). For each period, the greater of that period's (i) Current Period Accrual in (B) and (ii) Annual Actuarial Adjustment in (F) is that period's Maximum Accrual in (G). The Accumulated Benefit Payable in (H) at the end of the period is the sum of the Maximum Accrual in (G) and the prior period's Accumulated Benefit Payable in (H).

This calculation is repeated for each period through Mr. [REDACTED]'s Pension Effective Date.

	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
End of Accrual Period	Prior Year Accrued Benefit	Current Period Accrual	Current Period Actuarial Factor	Prior Year Actuarial Factor	Annual Actuarial Adjustment Percentage (C)/(D)	Annual Actuarial Adjustment (H) x (E)	Maximum Accrual (greater of (B) or (F))	Accum. Benefit Payable
04/01/01	\$232.66							\$232.66
12/31/01	\$299.24	\$66.58	110.88%	0.00%	10.88%	\$25.31	\$66.58	\$299.24
12/31/02	\$368.73	\$69.49	127.25%	110.88%	14.76%	\$44.18	\$69.49	\$368.73
12/31/03	\$441.17	\$72.44	146.50%	127.25%	15.13%	\$55.78	\$72.44	\$441.17
12/31/04	\$516.53	\$75.36	169.50%	146.50%	15.70%	\$69.26	\$75.36	\$516.53
12/31/05	\$594.83	\$78.30	197.25%	169.50%	16.37%	\$84.56	\$84.56	\$601.09
12/31/06	\$677.99	\$83.16	230.75%	197.25%	16.98%	\$102.09	\$102.09	\$703.18
04/30/07	\$714.37	\$36.38	243.08%	230.75%	5.34%	\$37.57	\$37.57	\$740.75
09/01/07	\$714.37	\$0.00	257.42%	243.08%	5.90%	\$43.70	\$43.70	\$784.45
Normal Pension Amount as of September 1, 2007								\$784.45

Mr. [REDACTED]'s benefit of \$784.45 is then adjusted to \$647.00 to account for the 50% Spouse Pension factor of 82.4% (\$784.45 x .824, rounded up to the next dollar).

Based on that amount, the Fund determined that Mr. [REDACTED] had been overpaid \$728.00 (\$1,375.00 - \$647.00) per month for 113 months from September 1, 2007 through January 2017. As a result, the Fund overpaid him by \$82,264.00 (\$728.00 x 113). Following the recalculation of Mr. [REDACTED]'s benefit, the surviving spouse payment made to Mrs. [REDACTED] was calculated to be \$324.00 (\$647.00 ÷ 2, rounded up to the next dollar). As a result, the Fund overpaid Mrs. [REDACTED] \$364.00 (\$688.00 - \$324.00) per month for 19 months (February 2017 through August 2018) for a total of \$6,916.00 (\$364.00 x 19).

The Fund's Overpayment Policy provides that

Interest shall be assessed on Overpayments from the date of the overpayment. The interest rate is the greater of: (1) the Fund's custodial bank prime rate of interest plus 2% determined as of each January; or (2) the Fund's actuarial assumed interest rate per month, calculated from the date the overpayment was made until the repayment is received.

The Fund determined that the total interest due on the overpayments is \$37,185.16 based upon the Fund's actuarial assumed rate of return of 7.5% annually (0.625% per month).

The total of the overpayments plus interest due is \$126,365.16 (\$82,264.00 + \$6,916.00 + \$37,185.16)).

6. Any and all other materials on which the Plan and/or Plan Administrator relied in determining: (i) Mr. [REDACTED]'s purported "corrected" monthly annuity amount under the Pension Plan; and/or (ii) that an overpayment has been made to Mr. [REDACTED] and/or Mrs. [REDACTED] by the Pension Plan.

There are no additional materials that are responsive to this request.

I trust that this responds to your requests. Please let me know if you have any additional questions.

Sincerely,



David P. Cohn
Assistant General Counsel

cc: Raymond Goad, General Counsel
Angela Curseen, Interim Director of Operations
[REDACTED] Participant

MEMORANDUM

Date: December 28, 2018

To: File

From: Martin Bolt

Subject: EPCRS – Overpayment Recoupment from Surviving Spouse

ISSUE

This memo addresses the applicability of Section 2.04(1) of Appendix B of Rev. Proc. 2018-52¹ (the Employee Plans Compliance Resolution System or “EPCRS”) regarding the apparent prohibition of recoupment by a defined benefit plan of Overpayments from a surviving spouse’s portion of a joint-and-survivor annuity due to an excess benefit under Section 415 of the Internal Revenue Code to other types of Overpayment corrections made by a defined benefit plan pursuant to Section 6.06(3) of the EPCRS.

LAW

- The definition of “Overpayment” in the EPCRS provides that “Overpayments must be corrected in accordance with Section 6.06(3) [of the EPCRS] for defined benefit plans”
- Section 6.06(3) of the EPCRS provides that “[a]n Overpayment from a defined benefit plan is corrected in accordance with rules similar to the Return of Overpayment and Adjustment of Future Payments correction methods described in Section 2.04(1) of Appendix B or any other appropriate correction method.” Section 6.06(3) also provides, if another correction method is used, that the method “. . . must satisfy the correction principles under section 6.02 and any other rules applicable rules in this revenue procedure.”
- Section 6.02(2)(a) of the EPCRS provides, in determining whether a correction method is reasonable and appropriate, that “[t]he correction method should, to the extent possible, resemble one already provided for in the Code, regulations, or other guidance of general applicability.”

¹ Rev. Proc. 2018-52 replaces Rev. Proc. 2016-51 effective as of 01/01/2019. For the relevant section of Rev. Proc. 2018-52 discussed in this memo, there are no changes from Rev. Proc. 2016-51.

- Section .01(2) of Appendix A of the EPCRS provides that the correction methods permitted in Appendix A and Appendix B are safe harbors deemed to be reasonable and appropriate methods of correcting a failure.
- Section .01(3) of Appendix A of the EPCRS states that “[a]s provided in section 6.02(2), there may be more than one reasonable and appropriate correction of a failure. Any correction method used that is not described in Appendix A or Appendix B would need to satisfy the correction principles of section 6.02.”
- Section 2.04(1) of Appendix B of the EPCRS provides for recoupment of Overpayments for failures relating to a § 415(b) excess. With respect to recoupment of Overpayment from joint and survivor annuity payments failures relating to a § 415(b) excess, Section 2.04(1)(a)(ii)(B) of Appendix B of the EPCRS specifically addresses this situation. Section 2.04(1)(a)(ii)(B) states, in part:

“ . . . the reduction of future annuity payments to reflect § 415(b) reduces the amount of benefits payable during the lives of *both the employee and spouse*, but any *reduction to recoup Overpayments made to the employee does not reduce the amount of the spouse's survivor benefit*. Thus, the spouse's benefit will be based on the previous specified percentage (for example, 75%) of the maximum permitted under § 415(b), instead of the reduced annual periodic amount payable to the employee.” (emphasis added)

Therefore, the joint and survivor annuity of both employee and spouse are to be reduced to the correct payment amount (i.e., the correct § 415(b) amount); however, while the language indicates that the Overpayment employee may be recouped from the payment to the employee, the language explicitly prohibits reducing the surviving spouse’s benefit for purposes of recouping the prior Overpayments.

- Section 2.05 of Appendix B of the EPCRS provides that correction of Overpayments other than § 415(b) and (c) failures “ . . . *may* be corrected in accordance with this Section 2.05.” Section 2.05 of Appendix B then provides that “[a]n Overpayment from a defined benefit plan is corrected in accordance with the rules of Section 2.04(1) [of Appendix B].”

ANALYSIS

Section 2.05 of Appendix B of the EPCRS provides that a defined benefit plan *may* use Section 2.05 to correct Overpayments other than § 415(b) and (c) failures. Also, Section .01(2) and (3) of Appendix A of the EPCRS clearly note that the correction methods in Appendix B are only safe-harbors and that other reasonable correction methods may be used by a plan if the correction method would satisfy the correction principles of section 6.02 of the EPCRS. Further, Section 6.06(3) of the EPCRS which governs the correction of Overpayments also provides, if another correction method is used, that the method “ . . . must satisfy the correction principles under section 6.02 and any other rules applicable

rules in this revenue procedure.” Thus, Section 2.05 of Appendix B of the EPCRS and in turn, the application Section 2.04(1) of Appendix B and the provisions of Section 2.04(1)(a)(ii)(B) pertaining to recoupment of an Overpayment from a joint and survivor annuity are not mandatory, assuming that another reasonable and appropriate correction method meeting the correction principles of Section 6.02 can be provided.

With respect to any “non-safe harbor” correction method, the correction principles of Section 6.02 of the EPCRS, specifically Section 6.02(2)(a) of the EPCRS, provide that “[t]he correction method should, to the extent possible, resemble one already provided for in the Code, regulations, or other guidance of general applicability.” Since there does not seem to be any other dispositive guidance in the Internal Revenue Code, regulations, or other guidance on the treatment of recoupment of an Overpayment from a surviving spouse’s portion of a joint and survivor annuity other than Section 2.04(1)(a)(ii)(B) of Appendix B, it could reasonably be argued that there are no alternative Overpayment correction methods that would conform to Section 6.02 of EPCRS other than Section 2.04(1)(a)(ii)(B) of Appendix B itself. Thus, making Section 2.04(1)(a)(ii)(B) of Appendix B the *de facto* correction method for recoupment of an Overpayment with respect to a surviving spouse’s portion of a joint and survivor annuity.

If we assume that Section 2.05 of Appendix B of the EPCRS applies (either as a safe-harbor or because of the lack of any reasonable and appropriate correction method), so that an employer must correct an Overpayment (other than a § 415(b) failure) from a defined benefit plan by applying Section 2.04(1) of Appendix B to such Overpayment, this would, in turn, result in the application of Section 2.04(1)(a)(ii)(B) to such Overpayment. In applying Section 2.04(1)(a)(ii)(B) to such non-415 Overpayment, the defined benefit plan would be entitled to reduce the annuity payments on a going-forward basis to the correct amount for payments to both the employee and the surviving spouse. Additionally, a defined benefit plan would be entitled to reduce the employee’s payments to recoup the Overpayment; however, Section 2.04(1)(a)(ii)(B) would prohibit reducing the surviving spouse’s annuity payments to recoupment of the Overpayment.

While it may be argued that, with respect to a defined benefit plan’s correction of a non-415 Overpayment, Section 2.04(1)(a)(ii)(B) of Appendix B of the EPCRS must be applied to the correction (i.e., that the defined benefit plan is prohibited from recouping an Overpayment from the surviving spouse’s portion of a joint and survivor annuity), the EPCRS only governs the interaction between the Internal Revenue Service and the applicable plan with respect to correcting failures and maintaining the plan’s tax-qualified status. Research has not found any cases where a court, in determining liability for an Overpayment in a case between a plan and surviving spouse, has applied the provisions of Section 2.04(1)(a)(ii)(B) of Appendix B of the EPCRS in determining whether a defined benefit plan was entitled to recoupment of an Overpayment from the surviving spouse’s portion of a joint and survivor annuity.

SCPRP

SOUTH CENTRAL PENSION RIGHTS PROJECT

Post Office Box 41256
Austin, TX 78704
Toll free: 1-800-443-2528
FAX: 512-477-6576
www.southcentralpension.org

HELPING INDIVIDUALS UNDERSTAND AND EXERCISE THEIR PENSION RIGHTS

January 25, 2019

Via Federal Express
And Electronic Mail (DCohn@IAMNPF.org)

David P. Cohn, Assistant General Counsel
IAM National Pension Fund
1300 Connecticut Avenue NW, Ste. 300
Washington, DC 20036-1711

RE: Our Client: XXXXX XXXXXX (individually and as representative of the estate of XXXXX XXXXXX)
Plan: IAM Pension Fund National Pension Plan
Plan Overpayment Claim
Pension Award No.: CECFWEKCF

The South Central Pension Rights Project ("SCPRP") is a grant funded, non-profit legal assistance program that helps individuals understand and exercise their pension rights. Mrs. XXXXXX XXXXXX ("Mrs. XXXXXX"), individually and as the representative of the estate of XXXXXX XXXXXX ("Mr. XXXXXX"), has engaged our office to provide counsel regarding Mr. XXXXXX's retirement benefit under the IAM Pension Fund National Pension Plan (the "Plan") and the purported overpayment (including interest) of: (i) \$119,043.46 from the Plan to Mr. XXXXXX, and (ii) \$7,231.00 from the Pension Plan to Mrs. XXXXXX (referred to herein, individually and collectively, as the "Overpayment Claim"). A copy of Mrs. XXXXXX's authorization is enclosed. All references to Mrs. XXXXXX and claims made by Mrs. XXXXXX herein shall also mean to include, as applicable and as the context requires, the estate of Mr. XXXXXX, of which Mrs. XXXXXX is the Executrix.

On Mrs. XXXXXX's behalf, the SCPRP hereby submits the claims set forth herein to the Plan and request that the Plan grant all claims and relief requested herein. Please note that Mrs. XXXXXX's claims, as set forth in this letter, are claims subject to the applicable claims procedures provided for under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

I. Facts

As indicated by Plan records, Mr. XXXXXX worked in Covered Employment under the Plan for XXXXXXXXXXXXXXXX from October 1996 through September 9, 2001, and for XXXXXXXXXXXXXXXX from September 10, 2001 through April 12, 2007. Mr.

XXXXXX accrued a total of 10 years and 5 months of Future Service Credit and 11 years of Vesting Service under the Plan. However, because Mr. XXXXXX had only accrued 4 years of Vesting Service under the Plan as of December 31, 2000, Mr. XXXXXX was not eligible for a pension benefit under the Plan when he reached the Plan's Required Distribution Date on April 1, 2001 after attaining age 70 ½. After Mr. XXXXXX accrued 5 years of Vesting Service under the Plan and became eligible to begin receiving his pension on January 1, 2002, Mr. XXXXXX was still working for XXXXXXXX; thus, Mr. XXXXXX was still in Covered Employment under the Plan and not required to commence his pension benefit under the Plan at that time. Mr. XXXXXX elected not to apply for his pension benefit until August 2007 and payment of which commenced effective September 1, 2007. Mr. XXXXXX was 77 years and 8 months of age on his Pension Effective Date.

At the time Mr. XXXXXX commenced his pension benefit under the Plan, he elected to receive his benefit in the form of a 50% Spouse Pension with Mrs. XXXXXX named as the spousal survivor annuitant. At the time Mr. XXXXXX began receiving his pension benefit under the Plan effective September 2007, after adjustments to his pension benefit due to Mr. XXXXXX's delayed retirement, the Plan valued Mr. XXXXXX's 50% Spouse Pension as providing Mr. XXXXXX with a monthly annuity of \$1,375 per month for the remainder of his life and, upon his death, a reduced spousal survivor annuity to Mrs. XXXXXX in the amount of \$688 per month for the remainder of her life. By a letter from the Plan dated December 14, 2007 (copy enclosed), Mr. XXXXXX was notified in writing that the valuation of his 50% Spouse Pension was \$1,375 per month. Mr. XXXXXX's monthly annuity in the amount of \$1,375 per month continued until his death in January 2017, and Mrs. XXXXXX subsequently began receiving her survivor annuity in the amount of \$688 per month in February 2017.

A. August 1st Letter from Plan

Subsequently, after a period of approximately 11 years of payments from the Plan and after the death of Mr. XXXXXX, Mrs. XXXXXX received a letter from the Plan dated August 1, 2018 (copy enclosed, and referred to herein as the "August 1st Letter") advising Mrs. XXXXXX that the Plan had purportedly overpaid Mr. and Mrs. XXXXXX a cumulative total of \$126,264.46, which included a charge for interest totaling \$37,184.46 at that time. Specifically, the August 1st Letter stated that Mr. XXXXXX was overpaid \$728 per month for a period of 113 months that resulted in monthly overpayments totaling \$82,264 (\$728 x 113 month = \$82,264) and that interest was owed on said overpayments in the amount of \$36,779.46, for a total of \$119,043.46 (\$82,264 + \$36,779.46 interest = \$119,043.46) attributable to the overpayments to Mr. XXXXXX. Additionally, the August 1st letter stated that, with respect to Mrs. XXXXXX, she was overpaid \$364 per month for a period of 19 months that resulted in monthly overpayments totaling \$6,916 (\$364 x 19 months = \$6,916) and that interest was owed on said overpayments in the amount of \$405 (apparently rounded down from \$405.70), for a total of \$7,321 (\$6,916 + \$405 interest = \$7,321) attributable to the overpayments to Mrs. XXXXXX.

With respect to how the purported overpayments occurred, the August 1st Letter attributes these purported overpayments being due to an error by the Plan in incorrectly applying the actuarial adjustment factor related to Mr. XXXXXX's post age 70 1/2 commencement of his Plan pension benefit. However, in a subsequent letter to my office from David Cohn ("Mr. Cohn"), Assistant General Counsel for the IAM National Pension Fund, dated December 19, 2018 (copy enclosed without related enclosures, and referred to herein as the "December 19th Letter"), it was indicated that the purported incorrect calculation of Mr. XXXXXX's Plan pension benefit was, in fact, due to two separate errors by the Plan. The December 19th Letter describes the first error as being an incorrectly applied increase in Mr. XXXXXX's monthly Normal Pension benefit (i.e., to Mr. XXXXXX's Normal Pension benefit before adjustment for payment in the form of the 50% Spouse Pension) in the amount of \$17.86 per month with respect to Section 411 of the Internal Revenue Code (the "Code" or "IRC") in order to account for Mr. XXXXXX's delayed retirement. The December 19th Letter describes the second error as being an error in applying the actuarial adjustment factor to Mr. XXXXXX's Normal Pension benefit related to his delayed retirement. Specifically, the December 19th Letter states that the Plan erred in applying the actuarial adjustment factor in that, "... (i) instead of applying an adjustment to Mr. XXXXXX's entire benefit, it should have been applied only to each year after his Required Distribution Date and (ii) it should have been applied to Mr. XXXXXX's benefit only if it exceeded the value of any benefit earned in the year of adjustment."

By the August 1st Letter, the Plan demanded that Mrs. XXXXXX pay the total amount of the purported overpayment plus interest, \$126,346.46 within 30 days of the date of the letter (not the date of actual receipt of the letter by Mrs. XXXXXX, but the date on the letter); thus, the August 1st Letter indicated that Mrs. XXXXXX had until August 31, 2018 to make payment in full. The August 1st Letter further indicated that, if Mrs. XXXXXX did not remit payment in full by August 31, 2018, the Plan would offset the amount of overpayments plus interest from her future benefits payable under the Plan until the entire amount of the overpayments and interest had been recovered. In this event, the August 1st Letter indicated that 100% of Mrs. XXXXXX's next scheduled payment and 25% from each subsequent payment thereafter would be used to offset the purported overpayments and interest.

B. August 29th Letter from SCPRP

By a letter from my office dated August 29, 2018 (copy enclosed without related enclosures, and referred to herein as the "August 29th Letter"), my office sent the Plan a formal letter disputing the purported overpayments, requesting various documents and information related to the purported payments, and informing the Plan that Mrs. XXXXXX objected to any reduction in her monthly annuity payments prior to the resolution of the matter and the exhaustion of her administrative remedies under the Plan. Despite the August 29th Letter request on behalf of Mrs. XXXXXX that the Plan not reduce Mrs. XXXXXX's monthly annuity payments until the matter had been resolved and her Plan

administrative remedies exhausted, by letter to Mrs. XXXXXX from the Plan dated October 29, 2018 (copy enclosed), the Plan advised Mrs. XXXXXX that the reduction of her monthly annuity payments had begun effective with her October 2018 monthly annuity payment.

With regards to the requests for relevant documents and information contained in the August 29th Letter from my office to the Plan, the letter was sent by my office by Federal Express Mail on August 29th, 2018 for next day delivery. The August 29th Letter was also provided electronically by my office via e-mail to Marlene Ford, Manager of the Pension Department for the IAM National Benefit Funds. The receipt of the August 29th Letter by the Plan was acknowledged on August 30, 2018 via an e-mail to my office (copy enclosed) from Ms. Ford. In Ms. Ford's acknowledgement e-mail to my office, she indicated that the fund would respond to my request within 30 days. The August 29th Letter specifically requested, among other items, the Plan document (including amendments) and Summary Plan Description (including any material modifications) that were in effect at Mr. XXXXXX's last hour of service.

C. October 5th Letter from SCPRP/October 10th Letter from Plan

Under Section 104 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and the related Department of Labor regulations, a plan has the legal obligation to provide the Plan document and Summary Plan Description within 30 days of receipt of a written request. In spite of this requirement under ERISA, as of October 5, 2018 (more than 30 days after the receipt of the August 29th Letter), my office still had not received the Plan documents, the Summary Plan Description, or any of the other documents and information any of the documents or information requested in the August 29th Letter. Thus, the Plan was in violation of Section 104 of ERISA at that time. Consequently, my office submitted a second request later dated October 5, 2018 (copy enclosed without related enclosures, and referred to herein as the "October 5th Letter") by certified mail to the Plan notifying the Plan that it was in violation of Section 104 of ERISA and again requesting the same information and documents as requested in the August 29th Letter. Subsequently, Mr. Cohn provided the Plan documents, Summary Plan Description, and Summary of Material Modifications in a letter to my office dated October 10, 2018 (copy enclosed without related enclosures, and referred to herein as the "October 10th Letter"). The October 10th Letter was received by my office on October 15, 2018.

D. November 7th Letter from SCPRP

In the October 10th Letter, Mr. Cohn indicated that the Plan was reviewing the other requests contained in the August 29th Letter from my office and that the Plan would provide responses to those requests. As of November 7, 2018, my office had not received any additional responses from the Plan transmitting any of the remaining information or documents that had been requested. Consequently, my office submitted a third request letter to the Plan by United States Certified Mail (copy enclosed without related enclosures,

and referred to herein as the “November 7th Letter”) which was, according to United States Postal Service records was received by the Plan on November 13, 2018.

E. December 17th Letter from SCPRP/December 19th Letter from Plan

When the November 7th Letter was not responded to by December 17, 2017, my office sent yet a fourth request letter (copy enclosed without related enclosures, and referred to herein as the “December 17th Letter) which, in part, detailed my phone communications and attempted phone communications with Mr. Cohn subsequent to my office sending the Plan the November 7th Letter. Specifically, the December 17th letter, on page 2, stated the following:

“Further, on November 28, 2018, I left you a voice mail regarding this matter. I left you an additional voicemail on December 3, 2018. When you returned my call on the afternoon of Monday, December 3, 2008, you indicated a response letter to my office was being drafted and that there was one person remaining who had to review the letter and that the letter should be ready the following week. I indicated that I would telephone you that following week to follow-up on the status of the response letter. I have subsequently left voice mails to you on Wednesday, December 12, 2018, and Friday, December 14, 2018. I have not received any response to my voicemails of December 12th and 14th. Additionally, after the passage of approximately 2 weeks since our call of December 3rd, I have still not received the promised response letter.”

Additionally, the December 17th Letter (on page 2), asserted my office’s position that the Plan, by its failure to provide the documents and information requested in the August 29th Letter, the October 5th Letter, and the November 7th Letter, had violated the Plan’s legal obligations under ERISA by not only failing to provide the documents as required under 29 CFR 2560.503-1(h)(2)(iii), but by administering the Plan’s claim process “in a way that unduly inhibits or hampers the initiation or processing of claims for benefits”, contrary to the requirement of 29 CFR 2560.503-1(b)(3). Further, on page 3 of the December 17th Letter, my office asserted the position that the Plan’s fiduciaries have a duty under ERISA Section 404(a)(1)(D) to ensure that the Plan is operated in accordance with the documents and instruments governing the Plan, including the Plan’s claims procedures, and that the failure in this matter to operate the Plan in accordance with ERISA’s required claims procedures (by not providing or timely providing the requested documents and information) was (and is) a violation of the fiduciary duty(ies) imposed under ERISA on the Plan’s fiduciaries.

The December 17th Letter from my office also pointed out that, in the event that Mrs. XXXXXX is not successful in her claim/appeal, my office expected the Plan to waive any interest on the purported Overpayment Claim for the period in which the Plan delayed in providing my office with the necessary information needed in order to properly and promptly submit a claim to the Plan. As a final matter, the December 17th Letter stated, on

page 4, that if the requested documents and information were not promptly received by my office that, in addition to Mrs. XXXXXX's legal right to file suit in federal court due to the Plan's failure to properly comply with claims procedures, my office would contact the Department of Labor regarding the matter and the Plan's failure to operate in accordance with ERISA and the related Plan fiduciaries' breach of their fiduciary duties. Only at this point was the December 19th Letter (discussed above) received from the Plan transmitting the remaining requested information and documents (i.e., all other documents and information requested other than the Plan document, Summary Plan Description, and Summary of Material Modifications which were provided in the October 10th Letter after the required 30-day response period for those documents, as discussed above).

II. Claim for Restoration of Original Benefits

Mrs. XXXXXX makes and asserts the claim that the entire 50% Spouse Pension provided to Mr. and Mrs. XXXXXX in 2007 (i.e., both the portion that was paid to Mr. XXXXXX as the participant annuitant and the portion paid to Mrs. XXXXXX per the surviving spouse annuity portion) be retroactively restored to the full amount of the 50% Spouse Pension benefit as originally calculated in 2007, such restoration would therefore result in no overpayments having been made to Mr. and Mrs. XXXXXX. In the alternative, if the claim set forth in the preceding sentence requesting restoration of the full 2007 valuation of the 50% Spouse Pension is denied by the Plan, Mrs. XXXXXX makes and asserts the claim that her surviving spouse annuity portion of the 50% Spouse Pension awarded in 2007 be retroactively restored to the full amount of the surviving spouse annuity as originally calculated in 2007.

The retroactive restoration of the 50% Spouse Pension to the full amount of the 50% Spouse Pension benefit as originally calculated in 2007 is appropriate given the facts of this matter. Specifically, given the complexity of the calculations and actuarial knowledge required, neither Mr. or Mrs. XXXXXX had any way of determining that there were any purported overpayments. Mr. and Mrs. XXXXXX relied on the accuracy of the amounts communicated and actually paid in 2007 in making their financial decisions then and subsequently. Mr. and Mrs. XXXXXX were deprived of the ability to making alternate financial decisions had they been properly informed of Mr. XXXXXX's benefit. Additionally, a significant amount of time, approximately 11 years, has passed since the initial Plan error(s) was made and the Plan annuity distribution began. Further, as discussed elsewhere in this letter, the Plan fiduciaries have breached a number of their fiduciary duties in this matter with respect to the operation of the Plan and the duties owed to Plan participants and beneficiaries

Additionally, the reduction in Mrs. XXXXXX's monthly surviving spouse annuity amount and recoupment of the purported Overpayment by offset of Mrs. XXXXXX's monthly surviving spouse annuity has caused, and will continue to cause, Mrs. XXXXXX financial distress (as well as emotional distress). Mrs. XXXXXX financially relies on the amount of her original (unadjusted) monthly surviving spouse annuity from the Plan. Given the significant reduction (over 50%) in Mrs. XXXXXX's monthly surviving spouse annuity from the Plan in order to correct the Plan's original annuity valuation error, Mrs.

XXXXXX has had a significant burden placed on her monthly income. Then compounding this over 50% initial reduction to Mrs. XXXXXX's monthly surviving spouse annuity from the Plan by reducing her annuity by a further 25% per month until the Plan recoups the \$126,264.46 of purported overpayments that were caused by Plan error will only exacerbate the financial hardship (and emotional hardship) that the Plan has, and is, causing Mrs. XXXXXX and, quite frankly, is egregious conduct by the Plan, the Plan Administrator, and the Plan's fiduciaries. Thus, the retroactive restoration of the 50% Spouse Pension to the full amount of the 50% Spouse Pension benefit as originally calculated in 2007 is appropriate in this matter.

III. Request for Waiver/Termination of Recoupment Efforts

In the alternative, if the Plan does not grant the claim/relief requested above to retroactively restored Mr. and/or Mrs. XXXXXX's 50% Spouse Pension benefits to the full value as originally calculated in 2007 (and which restoration would result in no overpayments in whole or part having been made to Mr. and Mrs. XXXXXX) and, if it is assumed for the sake of argument that the Plan is entitled to seek recoupment of any part of the Overpayment Claim from Mrs. XXXXXX, given the facts of this matter and the issues discussed below, Mrs. XXXXXX claims and requests that the Plan's Overpayment Claim be waived and/or terminated.

A. Plan Administrator's Discretion in Correcting Plan Errors

As an initial matter, the Plan Administrator's is not required to seek recoupment from a Plan participant or beneficiary. This is supported under federal case law, and guidance from both the Department of Labor and the Internal Revenue Service, neither of which require a plan to attempt to recover overpayments from a participant or beneficiary, particularly in a case such as the present one where the repayment would cause hardship. The Department of Labor's *Advisory Opinion 77-08* specifically authorizes a plan administrator or trustee to consider the facts and circumstances (including the cost to the plan and the hardship of a participant or beneficiary) when deciding whether or not to recoup an overpayment from a participant. *Advisory Opinion 77-08* states that ". . . depending on the facts and circumstances involved, the hardship to the participant or beneficiary resulting from such recovery or the cost to the Fund of collection efforts may be such that it would be prudent, within the meaning of section 404(a)(1)(B), for the Fund not to seek recovery from the participant or beneficiary of an overpayment made to him." *Adv. Op. 77-08* at 4 (emphasis added). Thus, the Department of Labor has clearly indicated that recovery of an overpayment from a participant or beneficiary is not mandatory.

Additionally, in 2015, the I.R.S. issued *Revenue Procedure 2015-27* which modified Section 6.06(3) of the EPCRS to explicitly state with respect to the correction of an Overpayment from a defined benefit plan that ". . . an appropriate correction method may include . . . having the employer or other person contribute the amount of the Overpayment . . . to the plan in lieu of seeking recoupment from plan participants and beneficiaries." *Rev. Proc. 2015-27* at 10 (emphasis added). In so modifying Section 6.06(3) of EPCRS, the I.R.S. stated that the intent was to ". . . clarify that there is flexibility

in correcting an Overpayment . . .” including having the employer or another person contribute the amount of the Overpayment to the plan in lieu of seeking recoupment from plan participants and beneficiaries. *Rev. Proc. 2015-27* at 2 (emphasis added). Thus, again, the I.R.S. has indicated that recovery of an overpayment from a participant or beneficiary is not mandatory, particularly in a case such as the present one where the overpayment is the result of a benefit calculation error by the Plan.

Further, the Federal courts have consistently found that a plan’s attempt at recoupment of an overpayment from a plan participant may be denied (on equitable grounds) when the overpayment is due to plan error and recoupment would result in hardship. See *Dandurand v. Unum Life Ins. Co. of America*, 150 F. Supp. 2d 178 (D. Me. 2001). Similarly, in *Wells v. U.S. Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244 (6th Cir. 1991) the Court of Appeals for the Sixth Circuit directed the district court, on remand, to consider the “*principles of equity or trust law*” when considering if retirees would suffer hardship if forced to pay back benefits which they had received and depended upon. *Wells*, 950 F.2d at 1251. In reaching this conclusion, the court noted its concern over the possible inequitable impact recoupment might have on the individual retirees, even though the plan language permitted recoupment. *Id.* In similar cases, courts have held that the plan’s remedy is to recoup the overpayment from the plan fiduciaries that caused or failed to discover the overpayment. *Phillips v. Maritime Assn – I.L.A. Local Pension Plan*, 194 F. Supp. 2d 549, 557 (E.D. Tex. 2001).

B. Request for Waiver Due to Facts/Hardship

In applying the guidance from the Department of Labor and the Internal Revenue Service set forth above, as well as case law, **Mrs. XXXXXX requests that the Plan Administrator use its discretion and NOT seek recoupment of the Overpayment Claim in this matter because of the facts and circumstances in this matter (including the Plan’s responsibility for the error) and the financial hardship that the recoupment has caused, and will continue to cause, Mrs. XXXXXX, as discussed below.**

Specifically, the facts and circumstances that favor waiver of the recoupment of the Overpayment Claim by the Plan are as follows: Mr. and Mrs. XXXXXX were not responsible for the purported calculation error (the Plan, Plan fiduciaries, and third party vendor(s) were responsible). Given the complexity of the calculations and actuarial knowledge required, neither Mr. or Mrs. XXXXXX had any way of determining that there were any purported overpayments. Mr. and Mrs. XXXXXX relied on the accuracy of the amounts communicated and actually paid in 2007 in making their financial decisions then and subsequently. Mr. and Mrs. XXXXXX were deprived of the ability to making alternate financial decisions had they been properly informed of Mr. XXXXXX’s benefit. Additionally, a significant amount of time, approximately 11 years, has passed since the initial Plan error(s) was made and the Plan annuity distribution began. Further, as discussed elsewhere in this letter, the Plan fiduciaries have breached a number of their fiduciary duties in this matter with respect to the operation of the Plan and the duties owed to Plan participants and beneficiaries. In fact, given that other Plan participants have been affected by the same Plans error(s) that led to the purported overpayments and the significant amounts involved in the purported overpayments, the Plan fiduciaries’ breaches of the

duties owed to the Plan participants and beneficiaries reach the level of, at a minimum, recklessness that is tantamount to constructive fraud in the misrepresentations made to Plan participants and beneficiaries.

Additionally, the recoupment of the Overpayment by offset of Mrs. XXXXXX's monthly surviving spouse annuity has caused, and will continue to cause, Mrs. XXXXXX financial distress (as well as emotional distress). Mrs. XXXXXX relies on the amount of her original (unadjusted) monthly surviving spouse annuity from the Plan. Given the already significant reduction (over 50%) in Mrs. XXXXXX's monthly surviving Spouse annuity from the Plan in order to correct the Plan's original annuity valuation error, Mrs. XXXXXX has already had a significant burden placed on her monthly income. Then, compounding this over 50% initial reduction to Mrs. XXXXXX's monthly surviving Spouse annuity from the Plan, by reducing her annuity by a further 25% per month until the Plan recoups the \$126,264.46 of purported overpayments that were caused by Plan error will only exacerbate the financial hardship (and emotional hardship) that the Plan has, and is, causing Mrs. XXXXXX and, quite frankly, is egregious conduct by the Plan, the Plan Administrator, and the Plan's fiduciaries.

C. Plan Fiduciaries Liable for Overpayment

In the event that the Plan and the Plan fiduciaries do not waive and cease recoupment of the Overpayment Claim as requested above, then, in the event that Mrs. XXXXXX has to seek relief from the Plan's recoupment of the Overpayment Claim in federal court under the applicable provisions of ERISA, Mrs. XXXXXX would assert that the direct cause of any purported overpayments is due to errors by the Plan and the Plan Administrator and related breaches of fiduciary duties by the Plan fiduciaries which would result in the Plan fiduciaries being found liable for the purported overpayments. Additionally, Mrs. XXXXXX would and does assert that the recoupment, particularly in light of the breaches of fiduciary duties by the Plan fiduciaries in this matter, is inequitable and would be found by a court to be barred under the law of equity.

ERISA imposes a "prudent person" standard of care on plan fiduciaries and provides that the fiduciary shall discharge its duties with care, skill, prudence and diligence. *ERISA Sec. 404(a)(1)*. The fiduciary duty of care involved in ERISA is rooted in the principles of negligence and is an affirmative duty. *Phillips v. Maritime Assn – I.L.A. Local Pension Plan.*, 194 F. Supp. 2d 549, 555 (E.D. Tex. 2001), quoting *Wright V. Nimmons*, 641 F. Supp. 1391, 1402 (S.D. Tex. 1986). The fiduciary must exercise its position of trust so as to, at the very minimum, not harm the participant or beneficiary as a result of the plan fiduciary's failure to exercise reasonable care. *Phillips*, 194 F. Supp. 2d at 556. Breach of fiduciary duty in failing to exercise reasonable care has served as the bases to deny restitution to the plan. See e.g., *Phillips*, 194 F. Supp. 2d at 557; *Gallagher v. Park West Bank & Trust*, 11 F. Supp. 2d 136 (D. Mass. 1998). Additionally, courts have indicated that in a case such as the present matter that the plan fiduciaries should be the party from whom a plan should seek recovery. *Phillips*, 194 F. Supp. 2d 549, 557. Thus, it is our contention, as discussed below, that the Plan's fiduciaries have not discharged their duties with reasonable care or in accordance with the "prudent person" standard set forth in ERISA Section 404(a)(1)(B), have breached their fiduciary duties in this matter, have caused Mrs.

XXXXXX harm as a result, and are, therefore, the appropriate parties from whom the Plan should be seeking recoupment in the present purported overpayment matter.

The Plan Administrator had sophisticated knowledge of the operation of the Plan and was responsible for making complex calculations under the Plan. If the Plan Administrator had been reasonably prudent, the Plan Administrator would have insured that the error(s) that resulted in the miscalculation of the benefits (if any) under the Plan and overpayment of benefits to Mr. and Mrs. XXXXXX (as well as other similarly situated Plan participants and surviving spouses against whom the Plan is seeking recoupment) would not have occurred. Thus, the failure of the Plan by allowing this overpayment error (and the other overpayment errors to other similarly situated Plan participants and surviving spouses against whom the Plan is seeking recoupment) to occur constitutes a breach of the Plan fiduciary's duties as set forth under ERISA Section 404(a)(1)(B) to exercise appropriate care, skill, prudence and diligence in administering the Plan. Mr. and Mrs. XXXXXX reasonably, and to their detriment, relied on the Plan Administrator to distribute Mr. XXXXXX's Plan's pension benefits accurately. The failure of the Plan's fiduciaries to discover the mistaken benefit calculations (if any) at the time Mr. XXXXXX's distribution began in 2007 and subsequently for a significant period of time is, once again, a breach of their fiduciary duty owed to Mr. and Mrs. XXXXXX. It would also be inequitable to require Mrs. XXXXXX to bear the weight of an error that the Plan Administrator could have prevented by closer supervision, better training, or consistent interpretation of the Plan.

As previously stated, it is our contention that the Plan's fiduciaries have breached their fiduciary duties in this matter and, thus, are responsible for repaying the Plan for the consequences of their oversight (see *Phillips, 194 F. Supp. 2d 549, 557 (E.D. Tex. 2001)*), for which they are personally liable under Section 409 of ERISA; specifically, it is our position that the responsible Plan fiduciaries are **personally liable** for repaying the Plan the amount of the purported overpayment to Mr. XXXXXX which resulted only as a consequence of the breach(es) of fiduciary duties by the Plan fiduciaries.

Additionally, the Plan fiduciaries have a duty under ERISA to act solely in the best interests of the plan participants and beneficiaries. *ERISA Sec. 404(a)(1)*. Further, under Section 405 of ERISA, a plan fiduciary has a duty to neither knowingly participate in or conceal a breach of fiduciary duties by another plan fiduciary (*ERISA Sec. 405(a)(1)*) and must make reasonable efforts under the circumstances to remedy the fiduciary breach (*ERISA Sec. 405(a)(3)*). The Plan fiduciaries who are participating in permitting the offset of the purported Overpayment Claim from Mrs. XXXXXX instead of admitting their own culpability and/or the culpability of other responsible Plan fiduciaries and seeking restorative payments from the responsible Plan fiduciaries in this matter, are serving their own best interests and/or the best interests of their fellow Plan fiduciaries who are liable for making any restorative payments to the Plan and, thus, violating the provisions of Section 404(a)(1) of ERISA. Further, the actions by Plan fiduciaries participating in permitting the offset of the purported Overpayment Claim from Mrs. XXXXXX, instead of from the responsible Plan fiduciaries, are (a) tantamount to knowingly participating in and/or concealing the breach of fiduciary duties that resulted in the purported

overpayments and, thus, a violation of Section 405(a)(1) of ERISA and (b) not a reasonable effort to remedy the fiduciary breaches and, thus, a violation of Section 405(a)(3) of ERISA. Violation of Section 405 of ERISA will result in co-fiduciary liability being applied to Plan fiduciaries participating in the recoupment efforts against Mrs. XXXXXX even if such Plan fiduciaries were not initially responsible/liable for the fiduciary breach(es) that resulted in the purported overpayment to Mr. and Mrs. XXXXXX.

IV. Claims Regarding Overpayment

In the event that the Plan and/or the Plan Administrator deny, in any part, Mrs. XXXXXX's claims set forth above and, as a result, the Plan still asserts any part of the Overpayment Claim against Mrs. XXXXXX, she makes and asserts the claims set forth below regarding the proper method of recovery of the Overpayment Claim by the Plan and the proper application of interest to the Overpayment Claim.

A. No Recovery from the Estate of Mr. XXXXXX

As a preliminary matter regarding the Overpayment Claim, specifically the purported monthly annuity overpayments made by the Plan to Mr. XXXXXX, while the August 1st Letter from the Plan did not assert a claim against the estate of Mr. XXXXXX, Mrs. XXXXXX, as Executrix of the estate of Mr. XXXXXX, asserts that the Plan and the Plan fiduciaries no longer have any state or federal remedy, whether legal or equitable, against the estate of Mr. XXXXXX with respect to the portion of the Overpayment Claim that relates to monthly annuity overpayments made by the Plan to Mr. XXXXXX.

All funds paid to Mr. XXXXXX by the Plan have been dissipated. Therefore, no funds of Mr. XXXXXX's monthly annuity pension benefit payments from the Plan remain specific, identifiable, and traceable. With respect to the issue of whether a plan can, as an equitable remedy, recoup an overpayment where the assets are not specific, identifiable, and traceable, the United States Supreme Court has ruled that a plan cannot recoup overpayments in such instance. Specifically, in *Montanile v. Board of Trustees of the National Elevator Industries Health Benefit Plan*, 136 S. Ct. 651 (2016), the Supreme Court of the United States stated "[w]e hold that, when a participant dissipates the whole settlement on nontraceable items, the fiduciary cannot bring a suit to attach the participant's general assets under [ERISA] §502(a)(3) because the suit is not one for 'appropriate equitable relief.'" *Montanile*, 136 S. Ct. at 655. Therefore, the Plan and the Plan's fiduciaries no longer have an equitable remedy under ERISA (or state law due to ERISA's preemption of applicable state laws) against the estate of Mr. XXXXXX since Mr. XXXXXX dissipated all such funds and no such funds remain specific, identifiable, and traceable. Thus, because Section 502(a)(3) of ERISA provides that equitable remedies are the only remedies available to plan fiduciaries to enforce the provisions of ERISA or the terms of a plan, the Plan and the Plan fiduciaries no longer have any state or federal remedy, whether legal or equitable, against the estate of Mr. XXXXXX with respect to recoupment of the purported monthly annuity overpayments made by the Plan to Mr. XXXXXX.

B. Improper Spousal Annuity Offset

As discussed above, the August 29th Letter stated that if Mrs. XXXXXX did not pay the Overpayment Claim in full by August 31, 2018, the Plan would offset the Overpayment Claim against Mrs. XXXXXX's future monthly annuity payments until the Overpayment Claim had been recovered. Also as discussed above, the Plan began offsetting the purported Overpayment Claim beginning with Mrs. XXXXXX's October 2018 payment. It is our position that, based on the relevant language in the Employee Plans Compliance Resolution System or "EPCRS" described in Internal Revenue Service ("I.R.S.") Revenue Ruling 2018-52, that the Plan offset of Mr. XXXXXX's portion of the Overpayment Claim against Mrs. XXXXXX's survivor annuity benefit is not a permissible correction method and is, in itself, a qualification failure of the Plan's tax-qualified status. The specific provisions/language of the EPCRS (particularly, Section 2.04(1) of Appendix B, Section 6.06(3), and Section 6.02 of the EPCRS) that, in our opinion, prohibit the Plan offset of Mr. XXXXXX's portion of the Overpayment Claim against Mrs. XXXXXX's survivor annuity benefit are discussed more fully below. A full copy of Section 2.04(1) of Appendix B, Section 6.06(3), and Section 6.02 of the EPCRS as found in Rev. Proc. 2018-52 are set forth in an attachment to this letter.

It is our understanding, based on a letter dated January 8, 2019 from the Plan's outside counsel, Anne Mayerson of the firm Bredhoff & Kaiser, P.L.L.C., to Chris McAllister, an attorney for the Western States Pension Assistance Program regarding a matter substantially similar to Mrs. XXXXXX's (redacted copy enclosed, and referred to herein as the "Mayerson Letter"), that it is the apparent position of the Plan, with respect to the Plan correcting the tax-qualification errors related to the Overpayment Claim and similar Plan overpayments, that (i) the Plan is not required to correct the such tax-qualification errors under the EPCRS, (ii) if the Plan does use the EPCRS to correct the such tax-qualification errors, the Plan is not required to apply any particular correction method, and (iii) that Section 2.04(1) of Appendix B of the EPCRS which, in our opinion, prohibits the Plan offset of Mr. XXXXXX's portion of the Overpayment Claim against Mrs. XXXXXX's survivor annuity benefit, is not applicable. The Plan's apparent positions as set forth in the Mayerson Letter will be addressed below.

1. EPCRS Overpayments

The two most fundamental rules to be a tax-qualified plan under section 401(a) of the IRC are (i) the terms of the plan must satisfy Section 401(a) of the IRC, and (ii) the plan must be operated in accordance with the plan document. The EPCRS sets forth rules governing the circumstances in which a tax-qualified plan can correct a failure to operate the plan in accordance with the governing plan document (called an "operational failure").

The EPCRS defines an "Overpayment" broadly; specifically, Section 5.01(3)(c) of the EPCRS states that "[t]he term 'Overpayment' means a Qualification Failure due to a payment being made to a participant or beneficiary that exceeds the amount payable to the participant or beneficiary under the terms of the plan or that exceeds a limitation provided in the Code or regulations." Thus, a plan overpayment is, by definition, an operational

failure that violates a plan's tax-qualified status unless properly corrected by the plan. The overpayments from the Plan to Mr. and Mrs. XXXXXX that gave rise to the Overpayment Claim are clearly "Overpayments" as defined in the EPCRS and constitute a Plan operational failure(s) that must be properly corrected to maintain the Plan's tax-qualified status under Section 401(a) of the IRC.

2. Correction outside of EPCRS

As an initial matter regarding whether the Plan is required to correct the operational failure(s) related to the Overpayment Claim and similar Plan overpayments under the EPCRS, the Plan is not required to correct any failure under the EPCRS. However, if the Plan does not correct the overpayment operational errors under the EPCRS, the Plan is exposed to the risk that the I.R.S. may find that such a correction made outside the EPCRS was not a proper correction of the overpayment operational failure and disqualify the Plan, terminating the Plan's tax-qualified status under the Code. The revocation of the Plan's tax-qualified status would result in severe negative tax consequences to the Plan participants, contributing employers, and the Plan's Trust. Due to the severe nature of the penalties that would be imposed on the Plan if the overpayment operational failures are improperly corrected outside the EPCRS (i.e., without I.R.S. approval), it must be assumed that the Plan would only do this if it did not believe the proposed correction would be approved by the I.R.S. on review or that the Plan was taking "corrective" action which impermissibly placed the interest of the Plan's sponsor, contributing sponsors, and the Plan's fiduciaries above the interest of the Plan and the Plan's participant and beneficiaries which would be a violation of ERISA Section 404(a)(1).

3. EPCRS - No Offset Against Surviving Spouse Annuity

If the Plan corrects the operational failure(s) related to the Overpayment Claim and similar Plan overpayments under the EPCRS, it is our position and claim that the Plan may not offset the overpayments to Mr. XXXXXX (and the interest thereon) against Mrs. XXXXXX's surviving spouse annuity. We point to Section 2.04(1)(a)(ii) of Appendix B of the EPCRS in support of this claim, specifically, Section 2.04(1)(a)(ii)(B) of Appendix B.

Section 2.04(1)(ii) of Appendix B of the EPCRS contains an "Adjustment of Future Payments Correction Method" that is provided as a "safe-harbor" correction for recoupment of Overpayments in excess of IRC Section 415(b) limits from benefits being distributed in periodic payments (i.e., annuities) whereby:

“[f]uture payments to the recipient are reduced so that they do not exceed the § 415(b) maximum limit and an additional reduction is made to recoup the Overpayment (over a period not longer than the remaining payment period) so that the actuarial present value of the additional reduction is equal to the Overpayment plus interest at the interest rate used by the plan to determine actuarial equivalence”.

Specifically, with respect to recoupment of an Overpayment related to a payment in excess of IRC § 415(b) limits from joint and survivor annuity payments, Section 2.04(1)(a)(ii)(B) of Appendix B of the EPCRS specifically addresses this situation. Section 2.04(1)(a)(ii)(B) states, in part:

“ . . . the reduction of future annuity payments to reflect § 415(b) reduces the amount of benefits payable during the lives of both the employee and spouse, *but any reduction to recoup Overpayments made to the employee does not reduce the amount of the spouse's survivor benefit*. Thus, the spouse's benefit will be based on the previous specified percentage (for example, 75%) of the maximum permitted under § 415(b), instead of the reduced annual periodic amount payable to the employee.” (emphasis added)

Therefore, under Section 2.04(1)(a)(ii)(B) of Appendix B of the EPCRS, the joint and survivor annuity of both employee and spouse are to be reduced to the correct payment amount (i.e., the correct IRC Section 415(b) amount); however, while the language indicates that an Overpayment made to an employee/participant may be recouped from the annuity payments to the employee, the language explicitly prohibits reducing the surviving spouse's benefit for purposes of recouping any Overpayments made to the employee/participant.

4. Applicability of Section 2.04(1)(a)(ii)(B) of Appendix B to Non-415 Overpayments

The Mayerson Letter, in the first paragraph of page 2 of that letter, asserts that Section 2.04(1)(a)(ii)(B) of Appendix B of the EPCRS is only applicable to overpayments that are a result of a IRC Section 415 failure (i.e., excess payments violating IRC Section 415(b) of the IRC) and is therefore not applicable to the overpayments made to Mr. and Mrs. XXXXXX since the overpayments were not the result of an excess payment under Section 415(b) of the IRC. That assertion is incorrect.

While Section 2.04(1)(a)(ii)(B) of Appendix B of the EPCRS is, on its face, limited to IRC Section 415(b) excess payments, Section 2.05 of Appendix B of the EPCRS provides that correction of Overpayments *other than § 415(b) and (c) failures* “. . . may be corrected in accordance with this Section 2.05.” Section 2.05 of Appendix B then provides that “[a]n Overpayment from a defined benefit plan is corrected in accordance with the rules of Section 2.04(1) [of Appendix B].” Thus, by application of Section 2.05 of Appendix B of the EPCRS, Section 2.04(1)(a)(ii)(B) of Appendix B is made applicable to any safe-harbor correction of Overpayments under Appendix B of the EPCRS.

Additionally, the third paragraph of page 2 of the Mayerson Letter, referencing Section 6.06(3) of the EPCRS, states that “EPCRS explicitly provides that, in the case of overpayments other than 415 failures, a plan may use the actuarial offset method . . . to correct overpayments.” (note that the Mayerson Letter refers to the correction method provided in Section 2.04(1)(a)(ii) of Appendix B of the EPCRS as the “actuarial offset

method” when Section 2.04(1)(a)(ii) actually calls the method therein the “Adjustment of Future Payments Correction Method”). Thus, the Mayerson Letter, by its own reference, indicates that the “actuarial offset method” (or more accurately, the “Adjustment of Future Payments Correction Method”) described in Section 2.04(1)(a)(ii)(B) of Appendix B of the EPCRS may be applied to non-415(b) Overpayment corrections.

Therefore, in applying the IRC Section 415(b) Overpayment safe-harbor correction language under Section 2.04(1)(a)(ii) of Appendix B of the EPCRS to the non-415(b) Overpayments such as the purported overpayments to Mr. XXXXXX and Mrs. XXXXXX, the surviving spouse’s annuity would be reduced to the corrected payment amount; however, it would not be permissible for the amount of overpayments made to the participant/employee (and interest thereon) to be offset against the surviving spouse’s annuity. In application to the Overpayment Claim against Mr. and Mrs. XXXXXX, while it would be permissible to reduce Mrs. XXXXXX’s surviving spouse annuity to the correct initial annuity amount, it would not be permissible to offset the overpayments made to Mr. XXXXXX (and interest thereon) against Mrs. XXXXXX’s surviving spouse annuity.

5. Non-Safe Harbor Corrections

As we noted above, Section 2.04(1)(a)(ii) of Appendix B of the EPCRS regarding the “Adjustment of Future Payments Correction Method” is a safe-harbor correction under the EPCRS (i.e., the I.R.S. will accept a correction made under that method as being a proper method to correct Overpayments). The Mayerson Letter asserts, among other things, that (i) the “EPCRS does not provide guidance as to the method to be adopted by plan fiduciaries to correct overpayments to participants and beneficiaries”, (ii) referencing Section 6.06(3) of the EPCRS, states that “EPCRS explicitly provides that, in the case of overpayments other than 415 failures, a plan may use the actuarial offset method or ‘any other appropriate correction method’ to correct overpayments”, and (iii) that the language of Section 2.04(1)(a)(ii)(B) of Appendix B of the EPCRS does not prohibit the Plan’s offset against Mrs. XXXXXX’s survivor spouse annuity since the Plan is using the “dollar-for-dollar” offset method and not the “actuarial offset method” to correct Overpayments. These issues will be addressed together below, and it will be demonstrated that Section 2.04(1)(a)(ii)(B) of Appendix B of the EPCRS is not only a safe-harbor correction method but the required method to correct Overpayments by offset against a surviving spouse’s annuity payments.

Regarding the statement in the Mayerson Letter that EPCRS does not provide guidance as to the method to be adopted by plan fiduciaries to correct overpayments to participants and beneficiaries, as demonstrated above, the EPCRS certainly provides safe-harbor methods of correcting overpayments in Appendix B. Moreover, Section 6.06(3) of the EPCRS, in the section entitled “Correction of Overpayment (defined benefit plans)” contains directions regarding making any correction of an Overpayment from a defined benefit plan under the EPCRS.

As the Mayerson Letter correctly indicated, Section 6.06(3) of the EPCRS, “Correction of Overpayment (defined benefit plans)”, provides that “[a]n Overpayment

from a defined benefit plan is corrected in accordance with rules similar to the Return of Overpayment and Adjustment of Future Payments correction methods described in Section 2.04(1) of Appendix B or any other appropriate correction method.” However, what the Mayerson Letter failed to state is that Section 6.06(3) of the EPCRS also requires that “[a]ny other correction method used must satisfy the correction principles of section 6.02 [of the EPCRS] and any other applicable rules in this revenue procedure” (emphasis added). Thus, Section 6.06(3) requires that an Overpayment correction by a defined benefit plan either conform to the Overpayment safe-harbor correction method set forth in Section 2.04(1) of Appendix B of the EPCRS or conform to the “non-safe harbor” correction provisions of Section 6.02 of the EPCRS. This is confirmed by Section .01(3) of Appendix A of the EPCRS that states “[a]s provided in section 6.02(2), there may be more than one reasonable and appropriate correction of a failure. *Any correction method used that is not described in Appendix A or Appendix B [i.e., a non-safe harbor correction] would need to satisfy the correction principles of section 6.02*” (emphasis added).

Section 6.02(2)(a) of the EPCRS in turn provides, in determining whether a correction method is reasonable and appropriate, that “[t]he correction method should, to the extent possible, resemble one already provided for in the Code, regulations, or other guidance of general applicability.” Since there is not any other dispositive guidance in the Internal Revenue Code, regulations, or other guidance on the treatment of recoupment of an Overpayment from a surviving spouse’s portion of a joint and survivor annuity other than Section 2.04(1)(a)(ii)(B) of Appendix B, there are no alternative Overpayment correction methods (including the Plan’s “dollar-for-dollar” correction) that would conform to Section 6.02 of EPCRS other than Section 2.04(1)(a)(ii)(B) of Appendix B itself. Thus, Section 2.04(1)(a)(ii)(B) of Appendix B is the *de facto* correction method under the EPCRS for recoupment of an Overpayment with respect to a surviving spouse’s portion of a joint and survivor annuity.

6. Summary of Spousal Offset Claim

In summary, based on the relevant language in the EPCRS described in I.R.S. Revenue Ruling 2018-52, the Plan offset of Mr. XXXXXX’s portion of the Overpayment Claim against Mrs. XXXXXX’s survivor annuity benefit is not a permissible correction method. **Therefore, Mrs. XXXXXX requests/makes a claim that the Plan (i) cease offsetting of the amounts of the overpayments made to Mr. XXXXXX (including all interest thereon) from Mrs. XXXXXX’s spousal survival annuity, and (ii) all such amounts related to the overpayments to Mr. XXXXXX that have been offset from Mrs. XXXXXX’s surviving spouse annuity be returned to her as soon as administratively feasible.**

C. Interest Charge

1. No Interest Under 2007 Plan/IRC Section 411(d)(6) Anti-Cutback Rule

The December 19th Letter from the Plan, in response #4, in reply to my office’s request that the Plan specify the Plan provision authorizing the Plan to charge interest when

attempting to recoup a Plan overpayment, indicated that Section 8.2(b) of the *current* Plan permits charging of interest, pursuant to the following language:

“If the Fund pays benefits to which a Participant, Spouse, alternate payee or Beneficiary (‘Payee’) is not entitled, including benefits in an amount greater than the benefits to which the Payee is entitled (‘Overpayment’), regardless of the reason for the Overpayment, the Fund has the right to recover such overpayment plus *interest*, cost and attorneys’ fee.” (emphasis added).

While the language in Section 8.2(b) of the current Plan, as indicated above, may provide for the charging of interest on overpayments, Section 8.2(b) of the Plan *as in effect in 2007* when Mr. XXXXXX began the receiving the distribution of his Plan annuity benefit provided as follow:

“The Trustees shall have the right to recover by all legal and equitable means any amounts paid to anyone in error and the right to recover by all legal and equitable means any amounts paid to which the recipient was not rightfully entitled under the terms of this Plan. This right to recovery shall include, but shall not be limited to, the right to recoup such amounts from any future benefits to be paid to or on behalf of the Participant, Pensioner, or Beneficiary and the right to recoup such amounts from any benefits to be paid to or behalf of any survivors of the Participant, Pensioner, or Beneficiary.”

Therefore, Section 8.2(b) of the Plan *as in effect in 2007* when Mr. XXXXXX began the receiving the distribution of his Plan annuity benefit **did not provide for the charging of interest** for any overpayments made to participants, surviving spouses, or any beneficiary(ies), and the Plan was apparently amended at some point after the Mr. XXXXXX’s commencement of benefits in 2007. Because Section 8.2(b) of the Plan as in effect in 2007 when Mr. XXXXXX began receiving the distribution of his Plan annuity benefit did not provide for the charging of interest, at a minimum, the Plan, by its own terms, was not and is not entitled to charge interest on the Overpayment Claim for the period of time from 2007 and onward that Section 8.2(b) of the Plan did not provide for charging interest.

Moreover, it is our position that, because Section 8.2(b) of the Plan as in effect in 2007 when Mr. XXXXXX began the receiving the distribution of his Plan annuity benefit did not provide for the charging on interest on overpayments, no interest may be charged on the Overpayment Claim for any of the purported overpayments to Mr. or Mrs. XXXXXX based on the provisions of Section 411(d)(6) of the Code. Section 411(d)(6) of the Code provides that a plan shall not satisfy the requirements of Section 411 of the Code (and thus a plan would not be tax-qualified under Section 401(a) of the Code) if the accrued benefit of a participant is decreased by an amendment of the plan. Further, the regulations related to Section 411(d) provide that benefits protected under Code Section 411(d)(6) may

not be eliminated merely because they are payable with respect to a spouse or other beneficiary. 26 CFR 1.411(d)-4, Q-A 2(a)(4).

In this case, the Plan was apparently amended/restated at some point after Mr. XXXXXX began the distribution of his accrued, vested pension benefit in 2007. Therefore, the post-2007 amendment to Section 8.2(b) of the Plan to charge interest on any overpayments, as applied to Mr. XXXXXX's benefit, is a post-accrual amendment that decreased Mr. and Mrs. XXXXXX's pension benefit and, therefore, an impermissible cutback to Mr. and Mrs. XXXXXX's pension benefit under Section 411(d)(6) of the Code. By example, based on the August 1st Letter from the Plan, Mrs. XXXXXX's corrected monthly annuity was/should have been \$324 per month under the 2007 version of the Plan and there were no provisions in the Plan in 2007 for charging of interest. Subsequent to the Plan amendment to Section 8.2(b) of the Plan to provide for a reduction due to interest, assume that the such reduction for interest as applied to the Overpayment Claim was even \$1 per month, Mrs. XXXXXX's monthly benefit would \$323 (\$324-\$1=\$323), clearly a post accrual reduction/cutback to an accrued benefit due to a Plan amendment. Thus, the post-2007 Plan amendment to collect interest on overpayments is, as applied to Mr. and Mrs. XXXXXX's pension benefit, a violation of the "anti-cutback" provisions of Code Section 411(d)(6).

Finally, the Plan may contend that the EPCRS (assuming the Plan is correcting the overpayment operational failure under the EPCRS) requires the Plan to charge interest on payments. While this may be correct, the EPCRS does not require that the Plan obtain the interest (or any portion of an overpayment) from participants and beneficiaries. As previously discussed, Section 6.06(3) of the EPCRS provides, with respect to the correction of an Overpayment from a defined benefit plan, that ". . . *an appropriate correction method may include . . . having the employer or other person contribute the amount of the Overpayment . . . to the plan in lieu of seeking recoupment from plan participants and beneficiaries.*" Rev. Proc. 2015-27 at 10 (emphasis added). Thus, in this case, the Plan may obtain any interest to be charged from persons other than the Mr. and Mrs. XXXXXX, in particular the persons and/or third-party administrators responsible for the error(s) that resulted in the purported Overpayment Claim; in fact, in this matter, since the Plan is prohibited from charging interest related to either Mr. or Mrs. XXXXXX's portion of the Overpayment Claim due to the provisions of IRC Section 411(d)(6) as discussed immediately above, if the Plan is to recover interest on the Overpayment Claim, it will have to be from parties other than Mr. or Mrs. XXXXXX.

Therefore, Mrs. XXXXXX asserts as a claim that (i) the Plan, by its own terms, was not and is not entitled to charge interest on the Overpayment Claim for the period of time from 2007 and onward that Section 8.2(b) of the Plan did not provide for charging interest, and (ii) moreover, because the post-2007 Plan amendment to collect interest on overpayments is, as applied to Mr. and Mrs. XXXXXX's pension benefit, a violation of the "anti-cutback" provisions of Code Section 411(d)(6), any charge of interest on any amount of the Overpayment Claim is impermissible.

2. Waiver of Interest Due to Plan Delay

As discussed above, the initial requests for documents, records, and other information regarding the Overpayment Claim were sent to the Plan in the August 29th Letter from my office and receipt of which was acknowledged by the Plan on August 30, 2019. Despite repeated subsequent requests from my office, including the October 5th Letter, the November 7th Letter, and the December 17th Letter from my office, the requests as initially set forth in the August 29th Letter were not responded to in full until the December 19th Letter from the Plan. If this delay by the Plan of over 3 ½ months had not occurred, our office would have been able to submit a claim on Mrs. XXXXXX's behalf significantly sooner. **Therefore, in the event that the Plan denies the claim as set forth immediately above regarding the impermissibility of the Plan charging interest on the Overpayment Claim, Mrs. XXXXXX, in the alternative, asserts, claims, and requests that the Plan waive any interest that accrued on the Overpayment Claim from August 30, 2018 through December 19, 2018.**

V. Additional Equitable Claims/Considerations in Litigation

In the event that any portion of Mrs. XXXXXX's claims set forth herein (including, without limitation, her claim for full restoration of the full value of her surviving spouse annuity as initially calculated by the Plan, and her claim for a full waiver of the Overpayment Claim (including interest)) are denied by the Plan and Mrs. XXXXXX has to seek relief in federal court under the applicable provisions of ERISA, Mrs. XXXXXX would assert all equitable claims and equitable defenses available including, without limitation: (i) the claim discussed above that the Plan fiduciaries, due to breaches of their fiduciary duty(ies) are responsible for the payment of the Overpayment Claim (including interest thereon); and (ii) those additional equitable claims discussed at length in the following sections below, all of which would have a substantial likelihood of success. Given the likelihood that Mrs. XXXXXX would prevail on those equitable claims and defenses, the likelihood that the Plan fiduciaries would be found liable for breaches of their fiduciary duties that led directly to the purported miscalculation of the original monthly annuity valuation and subsequent Overpayment Claim, and the amount of additional funds that would be expended by the Plan in litigation regarding this matter, **Mrs. XXXXXX requests that the Plan Administrator use its discretions and grant each of her claims as set forth above in this letter.**

A. Detrimental Reliance

As an initial matter with respect to addressing the equities of the situation between the Plan, the Plan fiduciaries, and Mr. and Mrs. XXXXXX, Mr. and Mrs. XXXXXX detrimentally relied on the representations made by the Plan Administrator and Plan with respect to the amount of benefits to which Mr. XXXXXX was entitled under the Plan when Mr. XXXXXX began the distribution of his Plan annuity benefit in 2007. Because Mr. and Mrs. XXXXXX were not made aware of any purported discrepancies in the amount of Mr. XXXXXX's 50% Spouse Pension benefit under the Plan as provided to him in 2007 and the amount that the Plan now claims is the correct amount, Mr. and Mrs. XXXXXX were

deprived of the ability to make different decisions regarding their financial matters (other than those he actually made) if the Plan had correctly advised Mr. and Mrs. XXXXXX of Mr. XXXXXX's Plan benefit value, including, without limitation: (i) when and in what form Mr. XXXXXX took his benefit under the Plan; and (ii) had Mr. and Mrs. XXXXXX been aware of the purported "true" value of Mr. XXXXXX's Plan benefit, Mr. and Mrs. XXXXXX would have been able to alter their other financial decisions that were made and based, in whole or part, on the representations made by the Plan in 2007. Thus, Mr. and Mrs. XXXXXX detrimentally relied on the representations made by the Plan with respect to the amount of Mr. XXXXXX's Plan benefit. Also, the reduction in the value of Mrs. XXXXXX's surviving spousal annuity portion of the 50% Spouse Pension and the further reduction of Mrs. XXXXXX's surviving spousal annuity to offset the purported Overpayment Claim affect Mrs. XXXXXX further to her detriment both financially and otherwise as a result of the Plan's actions and errors.

B. Plan Fiduciaries Liable

In addition to the claim/assertion discussed previously that the Plan fiduciaries, due to breaches of their fiduciary duty(ies) are responsible for the payment of the Overpayment Claim, Mrs. XXXXXX would also assert that, due to the breaches due to breaches of their fiduciary duty(ies) and the subsequent errors by the Plan in miscalculating the initial value of Mr. XXXXXX's 50% Spouse Pension under the Plan, she is entitled to full restoration of the full value of her surviving spouse annuity as initially calculated by the Plan (i.e., \$688 per month for the remainder of her life) and that, among others, the Plan fiduciaries should be liable to pay the Plan for any expensed related to such restoration. Mrs. XXXXXX would assert, and incorporates here by reference, the same factors and rational described in this letter in the section entitled "Plan Fiduciaries Liable for Overpayment" in demonstrating the Plan fiduciaries are liable for any costs to restore Mrs. XXXXXX's monthly surviving annuity amount to the amount originally provided by the Plan in 2007.

C. Reformation

In the event that Mrs. XXXXXX has to seek relief in federal court under the applicable provisions of ERISA, Mrs. XXXXXX would petition the applicable court to apply the equitable remedy of "reformation" to bring the Plan and/or Mr. XXXXXX's Plan records into conformity with the Plan and Mr. XXXXXX's Plan records *as applied* in 2007 (whether by mistake or otherwise) and, thus, render moot any claim the Plan may have for the purported Overpayment Claim, since Mr. and Mrs. XXXXXX's 50% Spouse Pension would then be reformed to the valuation of the 50% Spouse Annuity as initially reported and paid to Mr. and Mrs. XXXXXX upon commencement of payment in 2007.

The United States Supreme Court in *Cigna V. Amara*, 131 S. Ct. 1866, recognized that reformation could be employed as an equitable remedy, particularly when the result of fraud or mistake. While the Court noted that reformation was a traditional equitable remedy that may be applied when occasioned by fraud or mistake, the Court did not limit the remedy of reformation to cases involving fraud or mistake. However, even if fraud or mistake were a required element for Mrs. XXXXXX to seek reformation, at a minimum,

assuming that there was an overpayment to Mr. XXXXXX, there was a mistake on the part of the Plan in calculating the amount of Mr. XXXXXX's Plan annuity benefit in 2007.

While the Court in *Amara* discussed reformation as an equitable remedy available to reform a plan document, the court did not limit reformation to plan documents. A plan's operational documents are much broader than merely the plan document and trust agreement (see e.g., ERISA Sec. 104(b)(4) providing that summary plan description, trust agreement, annual report, bargaining agreement, contract, actuarial report may be requested by participants and beneficiaries). Many documents ranging from service and wage records to a plan's internal guidelines are relevant to the adjudication of a plan claim. The United States Court of Appeals for the Ninth Circuit, in *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004), ruled that such plan records may be reformed when appropriate to do equity and to cure a breach of fiduciary duty which would certainly be the case in this matter.

D. Estoppel

In the event that Mrs. XXXXXX has to seek relief in federal court under the applicable provisions of ERISA, Mrs. XXXXXX would assert that the Plan is estopped from (i) changing the valuation of the 50% Spouse Annuity as initially reported and paid to Mr. and Mrs. XXXXXX upon commencement of payment in 2007, and (ii) recovering the purported Overpayment Claim from Mrs. XXXXXX. The United States District Court, District of Columbia, in *Perry v. International Brotherhood of Teamsters*, 118 F.Supp.3d 1, 7 (2015), while recognizing that estoppel is a valid claim under ERISA, also recognized that, while at least 7 other Federal Courts of appeals have enunciated the complete elements for estoppel under ERISA, the D.C. Circuit has not.

As pointed out in *Perry* by the D.C. District Court, at least 7 United States Courts of Appeals have enunciated elements for estoppel under ERISA. The United States Court of Appeals for the Fifth Circuit, in *Mello v. Sara Lee Corporation*, 431 F.3d 440, 444-45, (5th Cir. 2005), found that a claim for estoppel against a plan will be established if a party establishes: (1) a material misrepresentation; (2) reasonable and detrimental reliance upon the representation; and (3) extraordinary circumstances. The United States Court of Appeals for the Third Circuit, in *Pell v. E.I. DuPont de Nemours & Co.*, 539 F.3d 292, 300 (3rd Cir. 2008) enunciated the same factors as the 5th Circuit in *Mello*. Based on the facts of this matter, Mrs. XXXXXX would be able in court to establish an estoppel claim against the Plan and the Plan fiduciaries and thereby prevent the Plan from (i) changing the valuation of the 50% Spouse Annuity as initially reported and paid to Mr. and Mrs. XXXXXX upon commencement of payment in 2007, and (ii) recovering the purported Overpayment Claim from Mrs. XXXXXX.

1. Material Misrepresentation

With respect to the first element of an estoppel claim, that there be a material misrepresentation, the court in *Mello* stated that “. . . a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an

adequately informed decision.” (*Mello*, 431 F.3d at 445, quoting *Curcio V. John Hancock Mu. Life Ins. Co.*, 33 F. 3rd 226, 237). Here, there can be no dispute that, if the purported value of Mr. XXXXXX’s 50% Spouse Pension was so grossly miscalculated in 2007 to result in the Overpayment Claim of \$126,264.46, the amount of Mr. XXXXXX’s benefit under the Plan at the time of distribution was misrepresented in writing, such misrepresentation would have been pertinent to the decision, and the misrepresentation would have misled a reasonable employee in making an adequately informed decision. Thus, a material misrepresentation was clearly made to Mr. and Mrs. XXXXXX regarding the amount of Mr. XXXXXX’s Plan annuity benefits.

2. Reasonable and Detrimental Reliance

With respect to the second element of an estoppel claim, that there be reasonable and detrimental reliance upon the representation, as previously discussed in this letter, Mr. and Mrs. XXXXXX detrimentally relied on the representations made by the Plan Administrator and Plan with respect to the amount of benefits to which Mr. XXXXXX was entitled under the Plan when Mr. XXXXXX initiated and began his Pension annuity distribution from the Plan in 2007. Additionally, reliance by Mr. and Mrs. XXXXXX on the representations made by the Plan was reasonable because: (i) the distribution documents were formal, written unambiguous documents distributed by the Plan as a dispositive assertion (not an informal estimate) of Mr. XXXXXX’s benefit amount pursuant to the terms of the Plan and which the Plan intended for Mr. and Mrs. XXXXXX to rely upon in accepting the distribution; and (ii) given the complexity of the calculations and actuarial knowledge required, neither Mr. or Mrs. XXXXXX had any way of determining that there was any purported overpayments and were dependent on the Plan Administrator to correctly apply the provisions of the Plan to determine Mr. XXXXXX’s correct pension benefit given the complexity of the actuarial calculations and Mr. and Mrs. XXXXXX’s lack of knowledge about the relevant actuarial assumptions.

3. Extraordinary Circumstances

With respect to the third element of an estoppel claim, that there be extraordinary circumstances, while the court in *Mello* did not address what constitutes “extraordinary circumstances”, other United States Courts of Appeals have done so. The court in *Pell* noted that extraordinary circumstances occur in a variety of factual circumstances. (*Pell*, 539 F.3d at 303).

The United States Court of Appeals for the Sixth Circuit in both *Bloemker v. Laborer’s Local 265 Pension Fund*, 605 F.3d 436, 443 (6th Cir. 2010) found that extraordinary circumstances exist when the balance of equities strongly favors the application of estoppel.” (*Bloemker*, 605 F.3d at 444). In this matter, the balancing of the equities strongly (if not wholly) favor Mr. and Mrs. XXXXXX. Mr. and Mrs. XXXXXX were not responsible for the purported calculation error (the Plan, Plan fiduciaries, and third party vendor(s) were responsible). Given the complexity of the calculations and actuarial knowledge required, neither Mr. or Mrs. XXXXXX had any way of determining that there were any purported overpayments. Mr. and Mrs. XXXXXX relied on the

accuracy of the amounts communicated in 2007 than and subsequently for approximately the next 11 years in making their financial decisions. Mr. and Mrs. XXXXXX were deprived of the ability to making alternate financial decisions had they been properly informed of Mr. XXXXXX's benefit. Additionally, a significant amount of time, approximately 11 years, has passed since the initial Plan error(s) were made and the Plan annuity distribution began. Further, as discussed elsewhere in this letter, the Plan fiduciaries have breached a number of their fiduciary duties in this matter with respect to the operation of the Plan and the duties owed to Plan participants and beneficiaries. In fact, given that other Plan participants have been affected by the same Plans error(s) that led to the purported overpayments and the significant amounts involved in the purported overpayments, the Plan fiduciaries' breaches of the duties owed to the Plan participants and beneficiaries reach the level of, at a minimum, recklessness that is tantamount to constructive fraud in the misrepresentations made to Plan participants and beneficiaries.

Additionally, the reduction in Mrs. XXXXXX's monthly surviving spouse annuity amount and recoupment of the purported Overpayment by offset of Mrs. XXXXXX's monthly surviving spouse annuity has, and will continue to cause Mrs. XXXXXX financial distress (as well as emotional distress). Mrs. XXXXXX financially relies on the amount of her original (unadjusted) monthly surviving spouse annuity from the Plan. Given the already significant reduction (over 50%) in Mrs. XXXXXX's monthly surviving spouse annuity from the Plan in order to correct the Plan's original annuity valuation error, Mrs. XXXXXX has already had a significant burden placed on her monthly income. Then compounding this over 50% initial reduction to Mrs. XXXXXX's monthly surviving spouse annuity from the Plan by reducing her annuity by a further 25% per month until the Plan recoups the \$126,264.46 of purported overpayments that were caused by Plan error will only exacerbate the financial hardship (and emotional hardship) that the Plan has, and is, causing Mrs. XXXXXX and, quite frankly, is egregious conduct by the Plan, the Plan Administrator, and the Plan's fiduciaries (note that the court in *Bloemker* found that the equities strongly favored the plan participant and ruled in favor of the participant's equity claims in that case when the amount of repayment that would have been imposed was \$11,215.16 significantly less than the \$126,264.46 that is being sought in this matter). Thus, Mrs. XXXXXX can clearly establish that the "extraordinary circumstances" necessary for estoppel would apply to any recoupment efforts by the Plan and Plan fiduciaries.

E. Surcharge

In the event that Mrs. XXXXXX has to seek relief in federal court under the applicable provisions of ERISA, Mrs. XXXXXX would petition the applicable court to apply the equitable remedy of "surcharge" or "make-whole" to the Plan's fiduciaries in order to make Mrs. XXXXXX whole for any losses each may incur as a result the Plan and/or Plan fiduciaries reducing the value of her surviving spouse annuity from the original 2007 valuation and the further reduction to recoupment of the purported Overpayment Claim and which losses result from the breaches of fiduciary duties that were (and are) owed to Mr. and Mrs. XXXXXX.

The United States Supreme Court in *Cigna V. Amara*, 131 S. Ct. 1866 (2011), recognized that surcharge could be employed as an equitable remedy to provide relief in the form of monetary compensation for a loss incurred as a result of a breach of fiduciary duty. *Amara*, 131 S. Ct. at 1880. As discussed above, in this matter, the Plan fiduciaries have breached their fiduciary duty(ies) owed to Mr. and Mrs. XXXXXX, and Mr. and Mrs. XXXXXX have detrimentally relied upon, and suffered other harm, as a result of the misrepresentations made to them regarding the amount of Mr. XXXXXX's Plan benefit when commenced in 2007. Further, the efforts of the Plan and the Plan's fiduciaries to in reducing Mrs. XXXXXX's monthly surviving spouse annuity and seeking recoupment of the purported Overpayment Claim that was caused by the breaches of fiduciary duty continue to harm Mrs. XXXXXX. Additionally, should Mrs. XXXXXX have to file a federal lawsuit in regards to her claims in this matter, Mrs. XXXXXX would suffer yet more harm and financial distress. In any litigation, Mrs. XXXXXX would, by use of the surcharge equitable remedy seek compensation to be made whole for any losses she has or will incur related to this matter.

VI. Improper Claims Procedure

As noted in the August 29th Letter from the SCPRP to the Plan, we dispute the language in the August 1st Letter from the Plan stating that Mrs. XXXXXX has only one administrative appeal, that being to the Board of Trustees, before she is required to bring an action in Federal Court under Section 502(a) of ERISA. Section 503 of ERISA requires that a Plan have claims procedures in place that meet the requirements set forth under 29 CFR 2560.503-1 of the Department of Labor Regulations. The claims procedures regulations require a plan to afford a plan participant or beneficiary two levels of administrative claim submission/appeal. Thus, providing Mrs. XXXXXX with only one administrative level of claim submission/appeal (to the Board of Trustees) is a violation of Section 503 of ERISA. Therefore, Mrs. XXXXXX assert, claims, and requests that she be afforded, if any of the claims set forth herein are denied, in whole or part, a second or "appeal" level of administrative review by the Plan before Mrs. XXXXXX is required to bring an action in Federal Court under Section 502(a) of ERISA.

VII. Conclusion

Mrs. XXXXXX requests that the Plan grant all claims and relief requested herein above. In summary, Mrs. XXXXXX first claims and requests that (i) the entire 50% Spouse Pension provided to Mr. and Mrs. XXXXXX in 2007 (i.e., both the portion that was paid to Mr. XXXXXX as the participant/annuitant and the portion paid to Mrs. XXXXXX per the surviving spouse annuity portion) be retroactively restored to the full amount of the 50% Spouse Pension benefit as originally calculated in 2007 and, in the alternative if the 50% Spouse Pension is not restored to full in its entirety, that (ii) Mrs. XXXXXX's surviving spouse annuity portion of the 50% Spouse Pension awarded in 2007 be retroactively restored to the full amount of the surviving spouse annuity as originally calculated in 2007. Second, if the Plan does not grant the claim/relief requested to retroactively restored Mr. and/or Mrs. XXXXXX's 50% Spouse Pension benefits to the full value as originally calculated in 2007, Mrs. XXXXXX claims and requests that the

Plan's Overpayment Claim be waived and/or terminated. Third, in the event that the Plan denies any part of the previous claims, Mrs. XXXXXX's claims and requests that the Plan follow the proper method of recovery of the Overpayment Claim, including determining the proper amount of interest, if any, to be applied to the Overpayment Claim.

In addition, Mrs. XXXXXX claim and asserts that she is entitled to two levels of administrative review of her claims regarding this matter (and not just one level as the Plan is currently providing to Mrs. XXXXXX) before Mrs. XXXXXX is required to bring an action in Federal Court under Section 502(a) of ERISA. Finally, if any of Mrs. XXXXXX's claims for relief contained in this letter are denied in whole or part and Mrs. XXXXXX has to seek relief in federal court under the applicable provisions of ERISA, Mrs. XXXXXX would assert all equitable claims and equitable defenses available to her including, without limitation, those set forth in Section V of this letter.

My office appreciates your attention to this matter, and we look forward to your response.

Sincerely,

Martin Bolt
Attorney

Enclosure(s): As stated

cc: Mrs. Shannon XXXXXX Via Electronic Mail and U.S. Mail

Roger Curme, Attorney, SCPRP

BREDHOFF & KAISER, P.L.L.C.

Attorneys & Counselors

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Elliot Bredhoff
(1921 - 2004)
Henry Kaiser
(1911 - 1989)

January 8, 2019

Julia Penny Clark
Bruce R. Lerner
Andrew D. Roth
Douglas L. Greenfield
Roger Pollak
Anne Ronnel Mayerson
Leon Dayan
Devki K. Virk
Robert Alexander
Matthew Clash-Drexler
Abigail V. Carter
Joshua B. Shiffrin
Jenifer A. Cromwell
Jacob Karabell

Caitlin Kekacs
James Graham Lake
Adam M. Bellotti
Joshua A. Segal
Dana M. Krohn
Elisabeth Oppenheimer
Georgina C. Yeomans
April H. Pullum

Richard F. Griffin, Jr.
Kathleen Keller
Philip C. Andonian
Of Counsel

Robert M. Weinberg
Jeffrey R. Freund
Jeremiah A. Collins
Mady Gilson
John M. West
Senior Counsel

By email

Chris McAllister
Western States Pension Assistance Project
505 12th Street
Sacramento, CA

Dear Mr. McAllister:

We represent the IAM National Pension Fund (the "Fund"), which has asked us to respond to your September 28, 2018 letter concerning [REDACTED]. As you know, in accordance with the overpayment policy adopted by the Fund's Board of Trustees, the Fund is reducing the monthly surviving spouse benefit to Ms. [REDACTED] payable on account of the death of her husband, [REDACTED], to recoup overpayments to Mr. and Ms. [REDACTED].

In your letter, you state that the Employee Plans Compliance Resolution System (EPCRS) "prohibits qualified plans from recouping benefits paid to [REDACTED] from [REDACTED]." In support of this proposition, you cite Appendix B, Section 2.04(1) of the Employee Plans Compliance Resolution System (EPCRS), most recently set forth in IRS Revenue Procedure 2018-52. For the reasons discussed below, your reliance on EPCRS is misplaced.

First, EPCRS merely sets forth the method by which a tax-qualified plan may correct operational errors that, if not corrected, could result in the plan being in violation of the tax qualification rules. EPCRS does not provide guidance as to the method to be adopted by plan fiduciaries to correct overpayments to participants and beneficiaries.

Second, even if EPCRS did provide guidance as to the appropriate method of recouping overpayments, the provision of EPCRS that you cite does not address the method used by the Fund. That provision applies only where a plan recoups overpayments to a participant who has received benefit payments in excess of the limits permitted under section 415 of the Internal Revenue Code ("415 failure"), which is not the type of overpayment being recouped here. Further, as explained below, that provision applies only to a particular method of recoupment, the "actuarial offset method," which is not the recoupment method being used here.

Specifically, in the event of a 415 failure, Appendix B, Section 2.04(1) of Revenue Procedure 2018-52 provides that a plan may require the recipient to return the overpayments or, alternatively, it may recoup the overpayments over the participant's life expectancy using the actuarial offset method. Under the actuarial offset method, the plan determines the amount by which future benefits to the participant will be reduced by calculating the amount of monthly benefit, over the participant's expected lifetime, that is the actuarial equivalent value of the overpayment (plus interest as of the date the plan begins to recoup the benefit). Thus, the reduction to recoup the overpayment is made "(over a period not longer than the remaining payment period) so that the actuarial present value of the [] reduction is equal to the Overpayment plus interest at the interest rate used by the plan to determine actuarial equivalence." Because the "payment period" described in Section 2.04(1) is the employee's life, payments may be recouped only over the employee's life. Once the employee dies, the benefit is considered to be fully recouped and the plan may not continue to reduce the benefits of the surviving spouse. Accordingly, the sentence that you cited in your letter, which states that "[i]f the employee is receiving payments in the form of a joint and survivor annuity . . . any reduction to recoup Overpayments made to the employee does not reduce the amount of the spouse's survivor benefit," applies only where a plan has elected to recoup an overpayment to a participant over the participant's lifetime under the actuarial offset method.

Here, the Fund does not recoup overpayments using the actuarial offset method. Instead, it recoups overpayments by directly offsetting monthly benefits by the amount of the overpayment, up to a maximum of 25% of each monthly benefit, until the overpayment is fully recovered. EPCRS explicitly provides that, in the case of overpayments other than 415 failures, a plan may use the actuarial offset method "or any other appropriate correction method" to correct overpayments. Rev. Proc. 2018-52, section 6.06(3). Nowhere does EPCRS provide that the "dollar-for-dollar method" used by the Fund is an inappropriate correction method.

We are unaware of any statutory or regulatory authority that would prohibit the Fund from reducing the monthly surviving spouse benefit to Ms. [REDACTED]. Governing Treasury regulations permit plans to recoup overpayments without distinction between the participant's benefit payments and the surviving spouse's benefit payments as the permissible target of a plan's recoupment efforts. Treasury Regulation § 1.401(a)-13(c)(2)(iii) provides that "[t]he terms 'assignment' and 'alienation' do not include . . . any arrangement for the recovery by the plan of overpayments of benefits previously made to a participant."

For its part, the Department of Labor ("Department") takes the position that plan fiduciaries have a duty to "attempt to . . . recover erroneous payments made from a plan." U.S.

Mr. Chris McAllister
January 8, 2018
Page 3

Dep't of Labor, Advisory Opinion 77-08 (April 4, 1977). The Department has issued no guidance that distinguishes between the participant's benefit payments or the surviving spouse's benefit payments as the permissible target of a plan's recoupment efforts. To the contrary, the Department has confirmed that, where a plan makes payments to a participant who is working in service for which the plan is permitted to suspend benefit payments (known as "suspendible service"), the plan may "recoup from survivor benefits to be paid by the plan to a surviving spouse amounts which the plan was entitled to withhold as a result of the participant's [suspendible] service." Rules and Regulations for Minimum Standards for Employee Benefit Plans, 46 Fed. Reg. 8,894, 8,903 (Jan. 27, 1981).

A number of federal courts have likewise held that plans may recover participant overpayments from a survivor spouse annuity. *See, e.g., Hearn v. Western Conference of Teamsters Pension Fund*, 68 F.3d 301 (9th Cir. 1995) (pension plan may recover participant overpayment resulting from misrepresentation of marital status from surviving spouse annuity); *Teater v. DSM Engineering Plastics*, 38 EBC 2498 (E.D. PA 2006) (pension plan may recover participant overpayment resulting from employer's clerical error from surviving spouse annuity).

If you have any questions or would like to discuss this matter further, please call me.

Sincerely yours,


Anne Mayerson

cc: Raymond Goad
David Cohn


SOUTH CENTRAL PENSION RIGHTS PROJECT
SCPRP

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Toll free: 1-800-443-2528
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HELPING INDIVIDUALS UNDERSTAND AND EXERCISE THEIR PENSION RIGHTS

May 22, 2019

Via U.S. Certified Mail (RRR) #70170660000039302200
And Electronic Mail (DCohn@IAMNPF.org)

David P. Cohn, Assistant General Counsel
IAM National Pension Fund
1300 Connecticut Avenue NW, Ste. 300
Washington, DC 20036-1711

RE: Our Client: [REDACTED] (individually and as representative of the estate of [REDACTED])
Plan: IAM Pension Fund National Pension Plan
Matter: Plan Overpayment Claim
Pension Award No.: [REDACTED]

Dear Mr. Cohn:

As you are aware, [REDACTED] ("Mrs. [REDACTED]"), individually and as the representative of the estate of [REDACTED] ("Mr. [REDACTED]"), has engaged South Central Pension Rights Project ("SCPRP") to provide counsel regarding her benefit under the IAM Pension Fund/National Pension Plan (the "Pension Plan") and the purported overpayment (including interest) of: (i) \$119,043.46 from the Pension Plan to Mr. [REDACTED] and (ii) \$7,231.00 from the Pension Plan to Mrs. [REDACTED] (referred to herein, individually and collectively, as the "Overpayment Claim").

By letter from my office dated January 25, 2019 (referred to herein as the "January 25th Claim Letter"), the SCPRP submitted a claim letter to the Pension Plan regarding the Overpayment Claim. Based on a telephone conversation between you and I, it was my understanding that the January 25th Claim Letter was submitted too close to the February 2019 meeting of the Board of Trustees to be reviewed at that meeting; however, it was my understanding that the January 25th Claim Letter would be reviewed at the subsequent meeting of the Board of Trustees held in April 2019. As of today, my office has not been informed of any decision by the Board of Trustees regarding the January 25th Claim Letter. Therefore, at this time, I would like to inquire if a decision on the January 25th Claim Letter has been rendered by the Board of Trustees and, if so, when my client can expect to be informed of such decision? If the Board of Trustees has not rendered a decision on the January 25th Claim Letter, when is it expected that such a decision will be rendered by the Board of Trustees?

Our office appreciates your attention to this matter, and we look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Martin Bolt', with a stylized flourish at the end.

Martin Bolt
Attorney

cc:

[REDACTED]

Via Electronic Mail and U.S. Mail

Roger Curme, Attorney, SCPRP



June 5, 2019

*Via Electronic Mail (mbolt@tlsc.org) and
Certified Mail*

Martin Bolt
South Central Pension Rights Project
P.O. Box 41256
Austin, TX 78704

RE: [REDACTED] Overpayment

Dear Mr. Bolt:

This letter relates to your representation of Ms. [REDACTED] concerning the overpaid benefits she and her husband received from the IAM National Pension Fund (the "Fund").

At their February 6, 2019 meeting, the Fund's Board of the Trustees ("Trustees") approved revisions to the Fund's Policy for Collection of Overpayments (the "Policy"). The changes include the addition of circumstances in which the Fund will not seek to recover an overpayment. Such circumstances include if the Trustees determine in their discretion that:


- a. The overpayment results from an error made by the Fund Office that cannot reasonably be ascertained by the payee; and
- b. At the time the Fund Office discovers the error, either:
 - i. the overpayment has continued for ten or more years, or
 - ii. the participant, alternate payee or beneficiary is age 80 or older and the overpayment was made or commenced more than a year before the error was discovered.

As the overpayment to Mr. and Mrs. [REDACTED] continued for ten or more years, this change to the Policy applies to Ms. [REDACTED]. As a result, the Fund will not be seeking to recover the overpayment, subject to Ms. [REDACTED] executing the enclosed release agreement.

June 5, 2019

Also, the Fund will be paying Ms. [REDACTED] the benefit amount earned under the Fund, rather than any miscalculated amount that the Fund may have paid earlier.

Sincerely,

A handwritten signature in black ink that reads "David P. Cohn". The signature is written in a cursive style with a large, stylized "D" and "C".

David P. Cohn
Assistant General Counsel

cc: [REDACTED]
Angela Curseen, Interim Director Operations (via email)
Raymond Goad, General Counsel (via email)

AGREEMENT

THIS RELEASE AGREEMENT (the "Agreement") is made as of this ____ day of _____, 2019, by the IAM National Pension Fund (the "Fund"), and [REDACTED] (the "Payee").

WHEREAS, the Fund is a multiemployer defined benefit pension plan as defined in sections 3(3) and 3(37) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"); and

WHEREAS, the Fund's Board of Trustees (the "Trustees") is the "plan sponsor" and "administrator" of the Fund as those terms are defined in section 3(16) of ERISA; and

WHEREAS, the Payee is the former spouse of a deceased Participant in the Fund ("Participant"); and

WHEREAS, the Fund paid pension benefits to the Participant and the Payee; and

WHEREAS, the Fund determined that it had overpaid benefits to the Participant and the Payee in the amount of \$126,364.46 ("Overpayment"); and

WHEREAS, in 2018 the Fund notified the Payee that it was seeking recoupment of the Overpayment from the Payee; and

WHEREAS, the Payee appealed the Fund's demand for recoupment of the Overpayment; and

WHEREAS, as a result, a dispute exists among the parties as to whether the Fund has a right to pursue the Payee for recoupment of the Overpayment; and

WHEREAS, the parties have now resolved this dispute, and wish to memorialize the resolution thereof;

NOW, THEREFORE, the parties agree:

1. **Recoupment of Overpayment by the Fund.** The Trustees, in their discretion as granted by the Fund's governing documents including the Fund's Policy for the Collection of Overpayments, will not continue to pursue the Payee for the Overpayment.

2. **Release from the Payee.** In consideration for the Fund agreeing not to pursue the recoupment of the Overpayment, the Payee, on behalf of herself and all of her current, former and future representatives, agents, successors, and assigns ("Releasers"), do hereby release, hold harmless from any liability, and forever discharge the Fund, and any of its current, former and future trustees, directors, officers, shareholders, partners, agents, employees, representatives, heirs, subsidiaries, successors, and assigns ("Released Parties") from and against any and all claims, liens, causes of action, losses, liabilities, damages (incidental, consequential or otherwise), costs or expenses (including but not limited to attorneys' fees and costs) relating to the Participant's and the Payee's participation in the Fund.

3. **No Admission.** Nothing contained in this Agreement will constitute or be treated as an admission by the Released Parties of liability or any wrongdoing.

4. **Entire Agreement.** This Agreement constitutes the entire agreement and contract among the parties relating to the subject matter hereof and supersedes any and all previous agreements and understandings, oral or written, relating to the subject matter hereof. Each party has adequate information concerning the matters that are the subject of this Agreement and has independently and without reliance on the other parties (or any of their affiliates or any officer, employee, agent or representative thereof) made its own analysis and decision to enter into this Agreement.

5. **Construction.** The parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties, and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

6. **Notices.** All notices, requests, demands, or other communications hereunder shall be in writing and shall be deemed to have been duly given if delivered or mailed, postage prepaid, certified mail, return receipt requested or by overnight express mail:

(a) If to the Payee, to:

with a copy to:

(b) If to the Fund, to:

Ryk Tierney, Executive Director
1300 Connecticut Avenue NW, Suite 300
Washington, D.C. 20036

with a copy to:

Raymond Goad, Jr., General Counsel
1300 Connecticut Avenue NW, Suite 300
Washington, D.C. 20036

The addresses contained herein may be changed by any party in a notice given as provided herein.

7. **Modification.** Neither this Agreement nor any of its provisions shall be modified, changed, discharged, or terminated except by an instrument in writing signed by the party against whom the enforcement of any modification, change, discharge or termination is sought.

8. **Successors and Assigns.** This Agreement is binding upon, and will inure to the benefit of, the parties to this Agreement, and their respective successors and/or assigns.

9. **Disputes.** The parties hereby consent to the jurisdiction of the United States District Court for the District of Columbia for the enforcement of this Agreement and any disputes arising out of or related to this Agreement; provided, however, that the parties agree that prior to instituting any proceeding to enforce this Agreement, they will meet and confer in good faith to attempt to resolve any such dispute.

10. **Governing Law.** This Agreement shall be governed by, construed and interpreted according to the laws of the District of Columbia, except insofar as preempted by federal law.

11. **Counterparts.** This Agreement may be executed in one or more counterparts each of which shall be deemed to be an original, but all of which together shall constitute the same Agreement. Any signature page of any such counterpart, or any electronic facsimile thereof, may be attached or appended to any other counterpart to complete a fully executed counterpart of this Agreement, and any telecopy or other facsimile transmission of any signatures shall be deemed an original and shall bind each party.

IN WITNESS WHEREOF, the parties have executed this Agreement.



For the IAM National Pension Fund

By: _____

By: _____

Date: _____

Date: _____