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Friday, May 27, 2016

**VIA U.S. CERTIFIED MAIL**

Opposing Union  
123 Fake St.  
Unreal, OH 43537

**Re: Claim for Interest on Benefits Payable to:**  
Buffy Summers  
Date of Birth:  
Social Security Number: XXX-XX-XXXX

Dear Plan Administrator:

The Western States Pension Assistance Project is part of Legal Services of Northern California, a nonprofit law firm in Sacramento, CA. We assist individuals in accessing and understanding pension benefits. This letter is meant to be a formal claim for interest on benefits paid under the Opposing Union (hereinafter, “the Plan” or “OU”). This appeal is made pursuant to Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and applicable Department of Labor and Department of Treasury regulations.

I have included a release of information signed by Ms. Summers for your convenience. [Attachment A].

### **Claim Summary**

Ms. Summers requests interest payable on retroactive pension payments made in a lump sum for the period between April 2011 and April 2016.

#### **I. Factual background**

On April 15, 2016, Ms. Summers was awarded \$31,018.50 lump sum in retroactive disability pension payments for the period between April 2011 and April 2016. Ms. Summers initially applied for disability pension in October 2012 based on a diagnosis of Disability. He was denied due to a miscalculation in her service credit. The denial letter advised him to reapply when he reached age 55, which would be October 2015. Due to that wording and that Ms. Summers was physically and mentally weakened due to her disability, he submitted an appeal of her denial in October 2015. He was approved in April 2016.

Her retroactive payment represented 61 months at \$508.50 per month after a tax withholding of \$100. The amount does not include interest, but a raw total of 61 payments of \$508.50.

## II. Governing Law and Regulations

### A. ERISA and Employee Plans Compliance Resolution System (EPCRS)

The Employee Retirement Income Security Act (ERISA) allows individuals to “recover benefits due to him under the terms of Her plan.” 29 U.S.C. § 1132(a)(1)(B).

IRS Revenue Procedure 2013-12 (hereinafter “EPCRS”) Section 6.02(a) provides that when retroactive benefits are being restored, “[t]he correction method should restore the plan to the position it would have been in had the failure not occurred, including restoration of current and former participants and beneficiaries to the benefits and rights they would have had if the failure had not occurred.”

## IV. Discussion

Courts have found that interest is owed where benefits are paid on a date after the date where a participant becomes entitled. The Second Circuit has held that

“[w]hen benefits are paid only after the date on which the beneficiary was entitled to receive them under the terms of the plan, the beneficiary has not received the full value of what was promised and, to the same degree, the plan has realized an unjust enrichment (assuming the lateness was unjustified). An award of interest in such circumstances serves as an equitable make-whole remedy.”

*Dunnigan v. Metro. Life Ins. Co.*, 277 F.3d 223, 229 (2d Cir. 2002).

The Second Circuit, citing the Third and Seventh Circuits, further held that bad faith is not a requirement for awarding interest. *Id.* at 229-30 (citing *Clair v. Harris Trust & Savings Bank*, 190 F.3d 495, 498-499 (7th Cir. 1999); *Fotta v. Trustees of the United Mine Workers*, 165 F.3d 209, 213 (3d Cir. 1998)).

In *Dunnigan*, a participant in an ERISA disability insurance plan submitted a timely claim and was denied without right of appeal. *Dunnigan*, 277 F. 3d 223 at 226. After several attempts at appeal, her claim was approved five years later without interest to offset the lost value caused by delay. *Id.* The Second Circuit held that interest is an “equitable make-whole remedy.” *Id.* at 229.

In *Contilli v. Local 705 Int'l Broth. of Teamsters Pension Fund*, 559 F.3d 720 (7th Cir. 2009), a participant applied for benefits three months after Her normal retirement date. The plan commenced Her payments upon application, but did not pay a retroactive lump sum plus interest or actuarially adjust Her payments to reflect late retirement. The Seventh Circuit held that an application for benefits may be “a condition on the receipt of payment . . . . But the payments skipped as a result of the deferral must be made up, either by payment (with interest) once the deferral ends, or by a suitable actuarial adjustment to the ongoing benefits. . . .” *Id.* at 722.

Here, Ms. Summers applied in October 2012 and was ultimately approved in April 2016. First, EPCRS requires that a correction be made to put a participant in a positions they would have been had the error not occurred. Interest is typically included in such corrective payments.

Even if the plan did not make a failure that would require EPCRS correction, interest is still owed. As noted above, courts hold that interest is an equitable remedy for retroactive payments. Interest is provided even when there is no bad faith on the part of the pension plan. Interest is simply “the full value of what was promised.” *Dunnigan*, 277 F.3d 223 at 229.

Ms. Summers earned benefits pursuant to the terms of the Plan. Interest payable on retroactive benefits owed is a part of the value of those benefits. Interest is required when there is a plan failure per EPCRS rules, when there is an improper denial (see *Dunnigan* above), and where there is a delay in applying for benefits (see *Contilli* above). Because interest is payable when benefits are owed but delayed, Ms. Summers is owed interest on her lump sum distribution.

## **V. Conclusion**

I respectfully request that the Plan provide interest on benefits payable to Ms. Summers for the period between April 2011 and April 2016. You may direct your response to me at:

Western States Pension Assistance Project  
505 12th St.  
Sacramento, CA 95814  
Attn: Attorney

Please copy Ms. Summers on these materials. You may direct mail to Ms. Summers at the following address:

Buffy Summers  
456 Slayer Blvd.  
Sunnyvale, CA 91234

Should you have any questions or concerns regarding this claim for benefits, please direct them to me at PHONE.

Sincerely,

Attorney  
Staff Attorney, Western States Pension Assistance Project

Exhibits: Attachment A – Release of Information

CC: Ms. Buffy Summers