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February 7, 2023

Board of Trustees
Building Service 32BJ Benefit Funds
25 West 18th Street
New York, New York 10011-4676

Re: Nikola and Milica U [REDACTED]

Dear Members of the Board:

Thank you for your consideration of Milica U [REDACTED]'s claim for survivor benefits from the Building Service 32BJ Pension Fund. For the reasons that follow, Mrs. U [REDACTED] is entitled to benefits under the 50% Joint and Survivor Pension as the lawful surviving spouse of Nikola U [REDACTED]

I. Statement of Facts

Nikola and Milica U [REDACTED] were married on October 1, 1960, in the former Yugoslavia. (Milica U [REDACTED] Aff. ¶ 2, Exh. A.) In 1969, the family moved to the United States. (Milica U [REDACTED] Aff. ¶ 3.) By 1987, Nikola and Milica were no longer living together, (Milica U [REDACTED] Aff. ¶ 4), but they never divorced, legally separated, or had the marriage annulled. (Milica U [REDACTED] Aff. ¶4, Exhs. C & D¹; Exhs. A – M attached hereto.) In 2008, Nikola applied for a pension, which he was receiving when he died on February 2, 2022. (Milica U [REDACTED] Aff. ¶ 7, Exh. F.) Milica's subsequent claim for survivor benefits was denied because Nikola was allegedly married to someone else when his benefits commenced. (Milica U [REDACTED] Aff. ¶¶ 6, 8, Exhs. E & I.)

¹ Certifications from the New York State Department of Health that searches for records for the periods January 1, 2011, to December 31, 2020, and January 1, 2020, to December 31, 2022, also failed to disclose any record of divorce were received after Milica U [REDACTED] signed her Affidavit, but are made part of Exhibit D to her Affidavit for ease of reference.

II. Argument

A. Milica and Nikola U [REDACTED] were legally married at the time Nikola's pension benefits commenced.

On his May 21, 2008, application for pension benefits, Nikola designated another individual (elsewhere identified as Nina S [REDACTED]) (see Bronx County Clerk Case File Summary, attached hereto as Exh. A, at 4)), as his spouse and beneficiary under the joint and survivor payment option. (Milica U [REDACTED] Aff. ¶ 6, Exh. E.) An accompanying Certificate of Marriage Registration issued by the Marriage License Bureau of the City of New York stated that Nikola U [REDACTED] and Nina S [REDACTED] were married in Manhattan on November 27, 1996. (Milica U [REDACTED] Aff. Exh. E, at 3.) This alleged marriage, however, was void as bigamous.

"A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless . . . [s]uch former marriage has been annulled or has been dissolved" N.Y. Dom. Rel. L. §6(1). See also, Alan D. Scheinkman, *Practice Commentaries*, McKinney's Cons. Laws of N.Y., Dom. Rel. L. C6:1: Bigamy--One Spouse at a Time) (hereinafter "*Practice Commentaries*") [Note: online version]. Bigamy is a felony in the State of New York. N.Y. Penal § 255.15 ("A person is guilty of bigamy when he contracts or purports to contract a marriage with another person at a time when he has a living spouse, or the other person has a living spouse.")

Where two competing putative spouses come forward, it is presumed that the second marriage is valid and that the first marriage was dissolved by death, divorce or annulment. See, e.g., *Gomez v. Windows on the World*, 804 N.Y.S.2d 849, 851, 23 A.D.3d 967, 969 (3d Dep't 2005) (citing *Matter of Brown*, 40 N.Y.2d 938, 390 N.Y.S.2d 59, 358 N.E.2d 883 (1976); *Matter of Seidel v. Crown Indus.*, 517 N.Y.S.2d 310, 132 A.D.2d 729 (3d Dep't 1987); 45 N.Y. Jur.2d Domestic Relations § 73).

The presumption is rebutted when it is proved that the second marriage was void due to the continued existence of the first marriage. *Gomez*, 804 N.Y.S.2d at 851, 23 A.D.3d at 969 (citing *In re Meehan's Estate*, 135 N.Y.S. 723, 150 A.D. 681, (1st Dep't 1912); *Matter of Dugro*, 25 N.Y.S.2d 88, 261 A.D. 236 (1st Dep't 1941), *aff'd*, 287 N.Y. 595, 38 N.E.2d 706 (1941)). When the presumption is successfully rebutted, the second marriage is void *ab initio*, and it is not ratified or validated by a subsequent dissolution of the first marriage. *Mack v. Brown*, 919 N.Y.S.2d 166, 171, 82 A.D.3d 133, 140-141 (2d Dep't 2011) (citations omitted).

To overcome the presumption of the validity of the second marriage, it is necessary to produce clear and convincing evidence disproving every reasonable possibility that would validate the second marriage. *Practice Commentaries* (citing *Seidel v. Crown Industries*, 517 N.Y.S.2d 310, 132 A.D.2d 729 (3rd Dept. 1987)). In other words, the proponent of the first marriage's continued validity must prove a negative: that the first marriage was not previously terminated. *Practice Commentaries*. The absence of a legal

separation, judgment of divorce, or an annulment may be established through declarations by the proponent and others, and by certification from the appropriate custodian of records that a diligent search found no record that the first marriage was ever dissolved by divorce, legal separation, or annulment. *Practice Commentaries*.

Although the search needs to encompass the jurisdictions in which a party might have obtained an order of dissolution, the courts have adopted a realistic and practical approach. *Practice Commentaries*. The decision in *Gomez v. Windows on World*, 804 N.Y.S.2d 849, 23 A.D.3d 967 (3d Dept. 2005), is an example that presented competing claims to benefits payable to the surviving spouse of a victim of the 9/11 attacks. There, the proponent of the first marriage rebutted the presumption through her testimony and proof that searches of court records in all relevant jurisdictions discovered no record of a divorce or annulment. *Gomez*, 804 N.Y.S.2d at 851-852, 23 A.D.3d at 970. *See also Matter of Brown*, 40 N.Y.2d 938, 390 N.Y.S.2d 59, 358 N.E.2d 883 (1976).

And in *Metropolitan Life Insurance Company v. Jackson*, 896 F. Supp. 318 (S.D.N.Y.1995), the district court was presented with a dispute between competing widows over life insurance proceeds on the life of the deceased husband. There, the district court held that the presumption of the validity of the second marriage was rebutted, and the continued validity of the first marriage established, after a search of the two counties where the parties to the first marriage had resided disclosed no judicial dissolution of the first marriage. *Metropolitan Life Ins. Co.*, 896 F. Supp. at 322-323.

When a marriage is dissolved in the State of New York, a certificate of dissolution is filed with the State Department of Health. N.Y. Pub. Health L. §4139. An index of these certificates is maintained and may be searched to see if a particular marriage was terminated. *Id.* A search of the records of each county in New York where either party resided, in tandem with a state-wide search of Health Department records, should therefore suffice to rebut the presumption of the second marriage's validity. *Practice Commentaries*. Similarly, if either party resided outside the State, searches should be conducted in each foreign jurisdiction where either party resided. *Id.* However, searches in states or countries where neither party ever lived are not necessary. *Id.*

Nicola and Milica U [REDACTED]'s marriage was never dissolved by legal separation, divorce, or annulment. (M. U [REDACTED] Aff. ¶ 4, Exhs. C & D; Danny U [REDACTED] Aff. ¶ 3; Exhs. A – M attached hereto.) Mrs. U [REDACTED] never commenced any action for the legal dissolution of their marriage. (Milica U [REDACTED] Aff. ¶ 4, Exhs. C & D; Exhs. A – M attached hereto.) Nor was she ever served with papers for any such action. (Milica U [REDACTED] Aff. ¶ 4.) Nothing to the contrary is in the Pension Fund's file.

The sworn statements by Milica U [REDACTED] and their son are corroborated by the results of an extensive search of official records. Milica U [REDACTED] has searched diligently for any records that her marriage to Nikola was ever dissolved in venues where such an action could have been brought: the State of New York, and Monroe County, Pennsylvania, where Nikola owned a house. The custodians of these records unanimously

responded that no evidence of the dissolution of the marriage between Milica and Nikola U [REDACTED] is on file. (Milica U [REDACTED] Aff. ¶ 5, Exhs. C & D.²)

The undersigned has also searched county clerk's records in the five boroughs, and the New York State Courts Electronic Filing system, for any legal action involving a party with the surname "U [REDACTED]." (See Exhibits A through G, attached hereto). The searches disclosed no record that the marriage between Nikola and Milica U [REDACTED] was ever dissolved in the City or State of New York. Nikola and Milica U [REDACTED] each appear as a party only once. In 2000, Milica sued Long Island College Hospital (Exh. B), and, in 2009 (not long after Nikola's retirement), Nina S [REDACTED] filed for divorce in the Bronx.³ (Exh. A.)

The Monroe County, Pennsylvania, Prothonotary's Office suggested that the search for records of divorce be expanded to neighboring counties because actions for divorce in Pennsylvania do not need to be filed in the county in which a party resides. (Milica U [REDACTED] Aff., Exh. C.) On November 21, 2022, I telephoned the Prothonotaries of four of the six Pennsylvania counties that abut Monroe County: Pike, Wayne, Luzerne and Carbon Counties. All of them searched for divorce records filed in their respective counties since 1971, and verbally informed me that no divorce by anyone named "U [REDACTED]" had been filed. The Prothonotaries of Carbon, Wayne, and Pike Counties confirmed the results of the searches in writing. (See Exhs. H, I, and J attached hereto.)

Lackawanna, Northampton, and Luzerne are the three remaining Pennsylvania counties adjacent to Monroe County. The Prothonotaries for these counties provide on-line searches for court filings. Searches in all three counties for filings disclosed no filings under the name "U [REDACTED]." (See Exhs. K, L, and M attached hereto.)

It is respectfully submitted that the evidence submitted constitutes clear and convincing evidence that Milica and Nikola U [REDACTED] were still lawfully married when Nikola purportedly married Nina S [REDACTED] in 1996, when his pension commenced in 2009, and when he died in February 2022.

B. As the surviving spouse of Nikola U [REDACTED], Milica U [REDACTED] is entitled to benefits under a 50% Qualified Joint and Survivor Annuity.

Subject only to a few exceptions not applicable here, the Retirement Equity Act of 1984 (REA), Pub.L. 98-397, 98 Stat. 1426 (98th Cong., 2nd Sess., Aug. 23, 1984), amended ERISA to require that benefits from a qualified defined benefit plan payable to a married retiree be paid in the form of a 50% Qualified Joint and Survivor Annuity ("50% QJSA") for the benefit of the spouse, unless the spouse signs a written waiver of those

² See note 1.

³ Because the putative marriage between Nina S [REDACTED] and Nikola U [REDACTED] was void, the Judgment of Divorce was moot. An action for a judgment declaring the nullity of a void marriage under Section 140 of the Domestic Relations Law is the proper cause of action.

benefits before a notary public or a plan representative.⁴ ERISA §205, 29 U.S.C. §1055. Accordingly, the Plan provides that the “50% Joint and Survivor Pension” is the default form of pension for married retirees, and that a participant’s election of a form of pension that would provide the spouse with a smaller benefit (or no benefit at all) must be accompanied by the spouse’s written consent. (See Building Service 32BJ Pension Fund “Program A” Summary Plan Description, at 24-27, 34, 42, 60,62 (eff. Jan. 1, 2018)). As discussed in subparagraph A, *supra*, Milica and Nikola U [REDACTED] were legally married at the time of his retirement. Milica, moreover, never waived her right to benefits under the 50% QJSA. (Milica U [REDACTED] Aff. ¶ 8.) She is, therefore, entitled to a survivor annuity under the REA and the terms of the Plan.

III. Conclusion.

Milica U [REDACTED] is the surviving spouse of retired participant Nikola U [REDACTED]. She has not waived her right to benefits under the Plan’s Husband-and-Wife Pension. She is, therefore, entitled to a survivor annuity effective March 2022.

Should additional information be required, please do not hesitate to contact me.

Thank you for your consideration.

Sincerely,


Christopher Wm. Dagg

Encls.
cc: M.U [REDACTED] (w/encls.)

⁴ Exceptions to the requirement for a spouse’s consent are limited. Consent is not required only if the parties are married less than one year at the time of the participant’s annuity starting date, if the non-participant spouse cannot be located, or if “such other circumstances” as may be prescribed by regulation exist. ERISA 205(b)(4) & (c)(2)(B), 29 U.S.C. § 1055(b)(4) & (c)(2)(B). (Building Service 32BJ Pension Fund “Program A” Summary Plan Description, at 27 (eff. Jan. 1, 2018)).